CHAPTER 1
CHILDREN IN NEED OF SERVICES (CHINS) DEFINED

Table of Contents

CHAPTER 1
CHILDREN IN NEED OF SERVICES (CHINS) DEFINED

I. CHILDREN IN NEED OF SERVICES (CHINS)

I. A. Overview of CHINS Categories

Indiana law refers to abused and neglected children as Children In Need of Services (CHINS) and divides civil abuse and neglect into various different categories. The CHINS categories are listed below, but each category is discussed in detail within this chapter. Other elements of these categories, such as the need for the coercive intervention of the courts and the age requirements, are also discussed below at I.C.1. and 2.

Neglect, IC 31-34-1-1

The child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision.

Abuse, IC 31-34-1-2

The child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian. There is a rebuttable presumption of CHINS when there is evidence that the illegal manufacture of a drug or controlled substance is occurring on property where a child resides. See this Chapter at III.A. for additional information.

Victim of Sex Offense, IC 31-34-1-3(a)

The child is the victim of an offense under IC 35-42-4-1 (rape), IC 35-42-4-2 (before its repeal, criminal deviate conduct), IC 35-42-4-3 (child molestation), IC 35-42-4-4 (exploitation), IC 35-42-4-5 (vicarious sexual gratification/sexual conduct in minor's presence), IC 35-42-4-6 (child solicitation), IC 35-42-4-7 (seduction), IC 35-42-4-8 sexual battery), IC 34-42-4-9 (sexual misconduct with a minor), IC 35-45-4-1 (indecency), IC 35-45-4-2 (prostitution), IC 35-45-4-3 (patronizing a prostitute), IC 35-45-4-4 (promoting prostitution), IC 35-46-1-3 (incest), or similar laws of another jurisdiction.

Child Living with Adult Who Committed Sex Offense, IC 31-34-1-3(b)

The child lives in the same household as an adult who committed an offense described above (IC 31-34-1-3(a)) against a child and the offense resulted in a conviction or a judgment, or lives with an adult who has been so charged and is awaiting trial.

Child Living with Another Child Who a Victim of a Sex Offense (listed at IC 31-34-1-3(a)), IC 31-34-1-3(c)

The child lives in the same household as a child who is the victim of an offense described in IC 31-34-1-3(a)(1), and a case worker assigned to provide services to the child places the child in a program of informal adjustment or other family or rehabilitative services, and the caseworker subsequently determines further intervention is necessary; the case worker determines that a program of informal adjustment or other family or rehabilitative services is inappropriate.

Child Living with Adult Who Committed Human or Sexual Trafficking, IC 31-34-1-3(d)

The child lives in the same household as an adult who committed a human or sexual trafficking offense under IC 35-42-3.5-1 or the law of another jurisdiction that resulted in a conviction or a judgment, or lives with an adult who has been so charged and is awaiting trial.

Victim of Human or Sexual Trafficking, IC 31-34-1-3.5
The child is a victim of human or sexual trafficking (as defined in IC 31-9-2-133.1), or a human or sexual trafficking offense under the law of another jurisdiction. A child is considered a victim of human or sexual trafficking regardless of whether the child consented to the conduct described.

Parental Allowance of Child's Participation In Obscene Performance, IC 31-34-1-4
The child's parent, guardian, or custodian allows the child to participate in an obscene performance (as defined by IC 35-49-2-2 or IC 35-49-3-2).

Parental Allowance of Child's Participation In Sex Offenses, IC 31-34-1-5
The child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by IC 35-45-4.

Child Endangerment of Self or Others, IC 31-34-1-6
The child substantially endangers the child's own health or the health of another.

Parental Failure to Participate In School Disciplinary Proceedings, IC 31-34-1-7
The child's parent, guardian, or custodian fails to participate in a school disciplinary proceeding in connection with the student's improper behavior, as provided for by IC 20-33-8-26, where the behavior of the student has been repeatedly disruptive in the school.

Missing Child, IC 31-34-1-8
The child is a missing child (as defined in IC 10-13-5-4).

Child Born with Fetal Alcohol Syndrome or Trace Amounts of Controlled Substances In System, IC 31- 34-1-10
The child is born with fetal alcohol syndrome, neonatal abstinence syndrome, or any amount (including a trace amount) of a controlled substance, a legend drug, or a metabolite of a controlled substance or legend drug in the child's body.

Child Has Injuries or Risks Caused by Mother's Use of Alcohol or Other Controlled Substance During Pregnancy, IC 31-34-1-11
The child has an injury, abnormal physical or psychological development, has symptoms of neonatal intoxication or withdrawal, or is at a substantial risk of a life-threatening condition, any of which arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy.

The definition of "custodian", found at IC 31-9-2-31, includes the following persons within the definition of custodian: (1) a member of the household of the child's noncustodial parent; (2) an individual who has or intends to have direct contact, on a regular and continuing basis, with a child for whom the individual provides care and supervision; (3) a license applicant or licensed foster home, residential child care facility, child care center that is licensed or required to be licensed under IC 12-17.2-4, or child care home that is licensed or required to be licensed under IC 12-17.2-5; (4) a person who is responsible for care, supervision, or welfare of children at a child care ministry, home, center or facility of a child care provider, or a school; (5) a child caregiver as defined by IC 31-9-2-16.4. This definition of "custodian" allows DCS to assess reports of alleged child abuse and neglect perpetrated by the above named persons, and if necessary, to provide an informal adjustment program or file a CHINS petition.

I. B. Mental Endangerment or Impairment

Indiana's juvenile code does not use the terms "mental injury", "mental abuse", or "mental neglect." Instead, it uses the concept of impairment or serious endangerment to the child's mental health in the CHINS Neglect category at IC 31-34-1-1, and serious endangerment of the child's mental health due to injury in the CHINS Abuse category at IC 31-34-1-2. Conceivably, the parent, guardian, or custodian can endanger the child's mental health by physical or mental acts (sex crimes, beatings, burns, verbal abuse, confinement) or by omissions that may harm the child's mental condition (failure to protect the child from physical or sexual abuse by another; failure to nurture the child, failure to facilitate age appropriate development of mental, motor, and verbal skills; failure to insure school attendance; failure to provide stable housing and living environment).

I. B. 1. CHINS Cases on Mental Endangerment or Impairment

In Re A.H., 58 N.E.3d 951, 956 (Ind. Ct. App. 2016), where the Court reversed the CHINS adjudication for a seventeen-year-old child who had been diagnosed with anxiety disorder, separation anxiety, and depression, exhibited violent behavior toward her sister and Mother, and had been the victim of bullying and rape. The Court found there was insufficient evidence that medical care was unlikely to be provided or accepted without the coercive intervention of the court because there was no evidence Mother failed to supply the child with the help she needed. The Court noted there was no evidence Mother had missed therapy appointments for the child, there were no services Mother had refused, and there were no medications Mother was unable to provide.

In Re S.K., 57 N.E.3d 878, 883 (Ind. Ct. App. 2016), where the Court reversed the juvenile court's order finding Parents' four children to be CHINS. The Curt opined the juvenile court's findings did not support its conclusion that the children's emotional health was seriously endangered. The Court held the following findings were not sufficient to support the conclusion that the children were *seriously* endangered (emphasis in opinion): (1) the children did not get along with Father's girlfriend; (2) the children sometimes quarreled and said hateful things to each other; (3) the children were upset and withdrawn after visits with Mother; (4) the children were anxious about having to move or change schools.

In Re D.B., 43 N.E.3d 599, 606-07 (Ind. Ct. App. 2015), *trans. denied*, where the Court reversed the CHINS adjudication for a two-year-old child, who was present when Mother's boyfriend shot and killed Mother and himself at the child's home. The child's paternity affiant Father had not seen the child for over a year and lived in Minnesota, but appealed the CHINS adjudication because he was willing to care for the child, who had been placed with her godmother. The Court said it was undeniable that the child had undergone significant trauma, and that removing her from a caregiver she knew to place her with an unknown caregiver would be an additional trauma, but DCS had not proven that her mental and emotional condition was the result of Father's "inability, refusal, or neglect…to supply the child with necessary food, clothing, shelter, medical care, education, or supervision[.]"

In Re Ju.L., 952 N.E.2d 771, 782 (Ind. Ct. App. 2011), where the Court affirmed the CHINS adjudication on evidence of emotional abuse of children by Mother. Mother repeatedly subjected children to invasive physical examinations based on her unwavering belief that Father was physically and sexually abusing the children, despite the children admitting they had lied and wished to be truthful.

In Re R.P., 949 N.E.2d 395, 402 (Ind. Ct. App. 2011), where the Court affirmed the CHINS adjudication on evidence of mental endangerment to children by Mother who made multiple

allegations of sexual molestation, subjected children to multiple examinations, and failed to enroll children in therapy.

In Re V.C., 867 N.E.2d 167, 182 (Ind. Ct. App. 2007), where the Court affirmed the CHINS adjudication on evidence that Mother had engaged in a pattern of false accusations of sexual abuse against Father, had enrolled child with three different sexual abuse therapists, and had subjected child to repeated invasive medical examinations.

Matter of E.M., 581 N.E.2d 948, 954-5 (Ind. Ct. App. 1991), where the Court reversed the juvenile court CHINS judgment which was based on emotional abuse and neglect. On the issue of emotional abuse, the Court indicated that a child could be adjudicated a CHINS under IC 31-34-1-2 if the child was emotionally abused by Mother's boyfriend, and Mother failed to take action to stop the abuse. The Court then noted that the alleged emotional abuse in this case was the boyfriend telling the child that she did "stupid things" and using profanity in describing her behavior. The Court could not find that these statements were emotionally abusive, and therefore Mother did not abuse the child by failing to protect her from the boyfriend. The Court found that the testimony of the counselor was "equivocal" and was not sufficient to support the trial court's finding that the child was emotionally abused by her Mother. The Court acknowledged that punishment by confinement or "grounding" could be excessive and deprive a child of a healthy emotional development, but the type of confinement and grounding used in this case by Mother was not excessive and there was no showing the child was seriously impaired or endangered. The Court opined that "inappropriateness" is not enough to support intervention.

Roark v. Roark, 551 N.E.2d 865, 871 (Ind. Ct. App. 1990), where the Court affirmed the CHINS judgment because of many incidents of physical and emotional abuse and neglect. The Court particularly noted the following act of emotional abuse: "Holding a child's hand over a burning flame, regardless of whether the child is injured, is emotional abuse of the highest order and speaks for itself in terms of causing psychological damage to a child."

I. B. 2. Termination Cases Dealing with Harm to Child's Mental Health

The following termination of parental rights cases dealt with the emotional and mental health of the children:

Matter of A.F., 69 N.E.3d 932, 949 (Ind. Ct. App. 2017) (children had been CHINS on three separate occasions and the cycle of removal from parents, living with parents, and subsequent removal from parents caused trauma to the children), *trans*. *denied*;

C.A. v. Indiana Dept. of Child Services, 15 N.E.3d 85, 96 (Ind. Ct. App. 2014) (children suffered from PTSD as result of living with Father; therapist opined children would be re-traumatized if they were reunited with parents);

In Re E.M., 4 N.E.3d 636, 645 (Ind. 2013) (based on older half-siblings' PTSD diagnoses and the younger children's greater vulnerability to psychological harm, trial court was within its discretion to find Father's violence against Mother had also abused the young children);

K.T.K. v. Indiana Dept. of Child Services, 989 N.E.2d 1225, 1235 (Ind. 2013) (children had been in five different living environments over period of sixteen months; therapist testified the uncertainty of their future had been troublesome to children);

A.J. v. Marion County Office of Family and Children, 881 N.E.2d 706, 718 (Ind. Court App. 2008) (children's behavioral problems would be rectified if they had permanency, and they needed to be somewhere they were going to stay and feel comfortable), *trans. denied*;

In Re L.S., 717 N.E. 2d 204, 207 (Ind. Ct. App. 1999) (significant and severe marital discord in children's presence endangered their emotional well-being);

Stone v. Daviess Co. Div. Child. Serv., 656 N.E.2d 824, 827 (Ind. Ct. App. 1995) (children were emotionally and psychologically harmed while in parents' care and exhibited academic and social delays, aggression, lack of response to discipline, and wild behavior);
Wardship of J.C. v. Allen Cty. Office, 646 N.E.2d 693, 696 (Ind. Ct. App. 1995) (child developed emotional problems requiring medical attention and counseling which Father could not provide);
In Re Children: T.C. and Parents: P.C., 630 N.E.2d 1368, 1374 (Ind. Ct. App. 1994) (child's slight delay in verbal skills and inability of Mother to provide enrichment opportunities were insufficient to support conclusion that termination was in best interests of child);
J.L.L. v. Madison County DPW, 628 N.E.2d 1223, 1227 (Ind. Ct. App. 1994) (children suffered serious speech, growth, and other developmental delays that improved "almost immediately" upon removal from parents);
R.M. v. Tippecanoe County DPW, 582 N.E.2d 417, 421 (Ind. Ct. App. 1991) (mentally ill Mother was unable to provide stability and uninterrupted support child needed);
Matter of Y.D.R., 567 N.E.2d 872, 874 (Ind. Ct. App. 1991) (children had suffered "extreme emotional pain" and were the "product of an emotional environment exceptionally deprived of appropriate modeling" and "devoid of most basic emotional responses");
Matter of J.H., 468 N.E.2d 542 (Ind. Ct. App. 1984) (the Court related the child's mental condition of insecurity, aggression and other emotional problems to Mother's unfitness as a parent and Mother's myriad of odd, excessive, and inappropriate behaviors in dealing with the child).

I. B. 3. Criminal Neglect of Dependent Cases Based on Mental Endangerment or Harm

In **Williams v. State**, 829 N.E.2d 198 (Ind. Ct. App. 2005), the Court affirmed custodial Grandmother's neglect of a dependent conviction based on her disciplining the eleven-year-old grandson by requiring him to kneel on a broom handle with his arms extended holding heavy objects and by requiring him to stand away from a wall with his hands behind his back while holding a cloth against a wall with his head. These punishments lasted for up to two hours. The Court held that Grandmother's "extreme conduct proved at trial amounted to exposing [the child] to unreasonable and prolonged pain capable of causing 'actual and appreciable' psychological harm." Id. at 201.

In **Gross v. State**, 817 N.E.2d 306 N.E.2d (Ind. Ct. App. 2004), the Court found there was insufficient evidence to convict Mother and her roommate for playing a "hostage game" with Mother's children that involved taping the children's wrists and ankles with construction tape. The tape would be removed on the children's request, so the Court found no evidence that playing the game exposed the children to substantial, actual, and appreciable risk of mental or physical harm.

In **Riffel v. State**, 549 N.E.2d 1084 (Ind. Ct. App. 1990), the Court found that Father's abnormal sexual practices with his five-year-old son were harmful to the child's mental health.

In **White v. State**, 547 N.E.2d 831 (Ind. 1989), the Court accepted the State's position that a parent's exposure of a child to an illegal drug environment posed an actual and appreciable danger to the child and constituted criminal neglect.

I. B. 4. Voluntary Placement of Children with Emotional, Behavioral, or Mental Disorders

Children with emotional, behavioral, or mental disabilities can be voluntarily placed outside the home by their parent, guardian, or custodian in order to obtain special treatment or care

that the parent, guardian, or custodian is unable to provide. IC 31-34-1-16. DCS may not initiate a termination proceeding or a transfer of legal custody, "solely because the parent, guardian, or custodian is unable to provide the treatment or care." IC 31-34-1-16(a). Conditioning the receipt of services or care funded by DCS upon relinquishing custody of a child is not permissible. IC 31-34-1-16(a).

When a child with emotional, behavioral, or mental disabilities is voluntarily placed outside the home, DCS and the parent, guardian, or custodian "may execute a voluntary placement agreement" which clarifies that legal custody of the child is not being transferred to DCS and specifies the legal status of the child and the rights and obligations of the child's parent, guardian, or custodian. IC 31-34-1-16(b). The statute does not address payment for the child's placement. But see **Collins v. Hamilton**, 349 F.3d 371 (7th Cir. 2003) (State of Indiana was required to provide Medicaid coverage for placement of a child in a psychiatric residential treatment facility where child was properly qualified; child was a former CHINS).

In **In Re A.B.**, 887 N.E.2d 158, 162-64 & n.2 (Ind. Ct. App. 2008), the Court affirmed the termination of Mother's parental rights to her child. Mother hospitalized the child because of the child's out-of-control and aggressive behavior. On appeal of the termination, the Court found, as a matter of first impression, that IC 31-34-1-16 does not preclude the initiation of termination proceedings where, although prior to initiation of CHINS proceedings Mother had voluntarily placed the child in residential treatment, termination proceedings were not initiated *solely* because Mother was unable to provide the care the child required (emphasis in opinion). DCS's involvement with Mother and the child stemmed from a referral DCS received while the child was residing at the residential treatment facility that the child had participated in inappropriate sexual conduct with her brother. DCS attempted reunification by offering numerous services to the family, including individual and family counseling, residential treatment, home based services, psychological evaluations, and visitation, but Mother was unable to provide the child with the care and treatment the child required. The Court stated that it left unanswered, perhaps for the Legislature or DCS, the question of how the State would provide long-term care for a CHINS where, under the statute, parental rights could not be terminated, but where the parents, through no fault of their own, were unable and permanently incapable of becoming able to care for their special needs child.

In **Involuntary Termination of the Parent-Child Relationship of B.R.**, 875 N.E.2d 369, 373-75 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's termination of Mother's parent-child relationship with her adopted child. The Court found that IC 31-34-1-16 did not apply to this case inasmuch as Mother did not place the child out of the house solely because she could not provide treatment for the child; therefore, IC 31-34-1-16 did not limit the State's power to request the termination of the parent-child relationship. DCS placed the child in residential treatment, then filed a CHINS petition. Mother's infrequent visits seemed to trigger "uncontrollable" behavior by the child, so the child was placed in a therapeutic foster home with foster parents who sought to adopt the child. The child showed much improvement while living with the foster parents. DCS filed a petition to terminate Mother's parental rights, which the trial court ultimately granted. Mother argued that the child "was removed because of [Mother's] financial limitations" and that, under IC 31-34-1-16, "moving to termination is completely inappropriate under those circumstances." The Court found that it was not necessary to address the precise interpretation of IC 31-34-1-16 inasmuch as "even under Mother's interpretation of the statute, the record reveals that Mother was motivated to place [the child] out of the house in part because of her inability to control the child and her fear that the child might harm her other children." The Court held that, taken together, Mother's various admissions to the effect that she could not care for the child and

that she feared for the safety of her children showed that Mother did not voluntarily place the child out of the house solely because she could not provide the child's treatment.

I. C. Statutory Elements of the CHINS Case

The elements of proof vary for each CHINS category. CHINS cases do not appear to require proof of an "intentional" state of mind; however, proof of a "knowing" or "reckless" state of mind may be required in some CHINS categories. Every CHINS category requires proof that the child was less than eighteen years of age when the petition was filed and proof that the child "needs care, treatment, or rehabilitation" that the child is not receiving and is unlikely to be given or accepted without the coercive intervention of the court.

I. C. 1. Age of Child

Proving the age of the child is an element of each CHINS case, and DCS must prove that the child is under the age of eighteen. The juvenile court loses the ability to adjudicate a child a CHINS once the child reaches the age of eighteen, even though the CHINS proceeding was initiated before the child's eighteenth birthday.

If the child is adjudicated a CHINS prior to the child's eighteenth birthday the court can retain jurisdiction until the child reaches the age of twenty-one. IC 31-30-2-1-(a)(1).

See **In Re K.D.**, 962 N.E.2d 1249, 1253 (Ind. 2012) (the Court stated that DCS must prove all three basic elements of each CHINS statute, one of which is that the child is under the age of eighteen); see also **In Re T.G.**, 726 N.E.2d 857 (Ind. Ct. App. 2000); **Mafnas v. Owen County Office of Family**, 699 N.E.2d 1210 (Ind. Ct. App. 1998); **Roark v. Roark**, 551 N.E. 2d 865, 871 (Ind. Ct. App. 1990) (Father alleged error on the trial court finding that the child was eighteen months old, because the factfinding hearing contained no evidence establishing the child's exact age. The Court rejected the argument and stated that the record established that the child was young enough to require a babysitter. "We can presume from this that she was among the group intended to be protected under the CHINS statutes; i.e., those under the age of 18 . . . That the trial court entered a precise age unsupported by the evidence does not render its findings clearly erroneous.").

I. C. 2. "Needs Care, Treatment, and Coercive Intervention" Element

Proving that the child needs care, treatment, or rehabilitation that the child is not receiving and is unlikely to be given or accepted without the coercive intervention of the court is an essential element of a CHINS case which DCS must prove.

In **In Re D.F.**, 83 N.E.3d 789, 797 (Ind. Ct. App. 2017), the Court affirmed the trial court's order adjudicating Mother's four children to be CHINS. Mother had physically abused the two oldest children and neglected the personal hygiene of one of the other children, who had to bathe and wash her clothes at school. The Court held the trial court could reasonably conclude that the care, treatment, or rehabilitation needed to address the children's circumstances was unlikely to be provided without the coercive intervention of the court. The Court noted: (1) Mother admitted to DCS that she had been diagnosed with bipolar disorder, schizophrenia, and post-traumatic stress disorder; (2) instead of receiving treatment, Mother self-medicated with alcohol and marijuana; (3) instead of acknowledging her parenting problems, Mother blamed the children, her sister, and DCS, and insisted that all of the witnesses except for herself were lying. The Court opined that Mother's behavior supported the trial court's conclusion that the children would not receive care or treatment without the coercive intervention of the court.

In **In Re L.S.**, 82 N.E.3d 333, 341 (Ind. Ct. App. 2017), the Court affirmed the trial court's denial of the CHINS petition, which was filed because of Father's alleged domestic violence against Mother and one of the children. Father admitted the allegations of the CHINS petition, but Mother denied the allegations. Mother filed for dissolution of her marriage to Father, the children continued to reside with Mother throughout the pending CHINS case, and Mother demonstrated a willingness to protect the children from Father, including reporting violations of the order for protection. The trial court found that coercive intervention was not necessary due to the dissolution case, the existing order for protection, and the retention of firearms by the sheriff. Father contended that the domestic violence in the home and Mother's decision not to give medication to the oldest child did not support the trial court's decision that the coercive evidence of the juvenile court was unnecessary. The Court disagreed, noting that: (1) since Father had left the home and Mother obtained the protection order, there was no more domestic violence; (2) Mother testified she had "discussions with the oldest child's doctor" before discontinuing the child's medication; (3) Mother had taken several measures to prevent domestic violence between herself and Father and to protect the children from domestic violence in the future.

In **Matter of D.P.**, 72 N.E.3d 976, 984-85 (Ind. Ct. App. 2017), the Court reversed the trial court's finding that the eleven-year-old child was a CHINS because there were pending domestic violence charges against Father, with a no-contact order identifying Mother as the victim. Mother admitted the CHINS allegations, but the Court concluded DCS failed to meet its burden of proof in light of Father's refusal to concede to Mother's admission and the lack of admissible evidence to support all the elements of a CHINS action. The Court noted that there was no evidence that the domestic violence occurred in the child's presence, no evidence as to the impact of the incident upon the child, and no evidence on whether the coercive intervention of the court was necessary to protect him. The court found the mere fact of Father's domestic violence arrest was not enough by itself to establish that the coercive intervention of the court was necessary to protect the child.

In **Matter of N.C.**, 72 N.E.3d 519, 526-27 (Ind. Ct. App. 2017), the Court reversed the CHINS adjudication for the six-year-old child and remanded to the juvenile court to vacate the CHINS finding. The child and his half-siblings were removed from Mother's custody by DCS because Mother was using methamphetamine while caring for her children. Father and Mother had a prior domestic relations case in another court in the same county. Father filed a petition to modify custody in the domestic relations court prior to the filing of the CHINS petition. Before the CHINS factfinding was held, the domestic relations court held a hearing, attended by Father, Mother, and DCS, and found the evidence supported granting temporary custody of the child to Father. The domestic relations court did not make a permanent change of custody to Father, and stated it would hold a hearing on either parent's request if the CHINS case was dismissed or the parties were discharged from the CHINS case at a later date. By the time of the CHINS factfinding hearing, the child had resided with Father for about two months and DCS had no current concerns. The Court found the juvenile court erred in adjudicating the child to be a CHINS because DCS did not prove by a preponderance of the evidence that the coercive intervention of the court was necessary to ensure the child's well-being. The Court observed that whatever neglect the child experienced due to Mother's issues at the outset of the case was rectified by being placed in Father's home before the factfinding hearing. DCS argued that Matter of M.R., 452 N.E.2d 1085 (Ind. Ct. App. 1983), provides that once the juvenile court concludes that a parent's actions or omissions have created a CHINS condition, the court may infer that such actions and condition would continue in the absence of court intervention. The Court was not persuaded by DCS's argument, noting that DCS's position failed to acknowledge the Indiana Supreme Court

precedent In Re S.D., 2 N.E.3d 1283, 1287 (Ind. 2014). The Court explained that the S.D. opinion clearly treats endangerment and the need for coercive intervention as two separate elements, both of which must be proven in a CHINS proceeding. N.C. at 525-26.

In **D.J. v. Department of Child Services**, 68 N.E.3d 574, 580-81 (Ind. Ct. App. 2017), the Court reversed the trial court's CHINS adjudication for Parents' two children, who were four years old and fourteen months old when the CHINS case began. The children were removed from Parents because: (1) Mother left the children alone in the bathtub for about two minutes and found the younger child lying face down in the tub when she returned; (2) the younger child resumed breathing; but (3) the police detective and the DCS case worker noted the house was cluttered, in complete disarray, there were no beds for the children, and there was an extremely bad odor in the house. DCS began services with Parents, including psychological evaluations, drug screens, home-based individual and family therapy, homemaker services, and visitation. Parents cooperated with and satisfactorily completed DCS services, so the Court found Parents did not need the trial court's ongoing coercive intervention by the time of the factfinding hearing, which was held much later.

In **In Re A.H.,** 58 N.E.3d 951, 955-56 (Ind. Ct. App. 2016), the Court reversed the juvenile court's CHINS adjudication of a seventeen-year-old girl who had mental health issues and behavior problems. The Court remanded with instructions to vacate the CHINS adjudication. DCS became involved with the child and her family when the child struck her brother. Mother stated she had been taking the child to mental health providers, but the child refused to participate in services. The Court found there was no evidence to support a finding that Mother would not provide care to the child without the coercive intervention of the court. The Court found no evidence in the record that Mother failed to supply the child with the help she needed, noting that there were no missed appointments with a therapist, there were no services Mother refused, and there were no medications Mother was unable to provide. The Court observed that the coercive power of the State into family life was not appropriately applied to a parent who sought reasonable care for her traumatized child, merely because that care was unsuccessful through no fault of the parent.

In **In Re S.K.,** 57 N.E.3d 878, 883 (Ind. Ct. App. 2016), the Court reversed the juvenile court's order adjudicating Parents' four children to be CHINS. The children had been living with Father, who took them to live with Mother when they were about to become homeless. Mother tested positive for methamphetamine and amphetamine, and admitted taking Adderall. The case manager removed the children, and placed them with Mother's Aunt and Uncle. Mother's second drug test was positive for amphetamine, but the levels had dropped. Mother's subsequent drug screens were negative. Ten days after the filing of the CHINS petition, Father moved into a home with his girlfriend, their five-month-old son, and the girlfriend's son. Two weeks after moving into the new home, Father told the case manager that he would take the children if Mother could not take them. The Court found the juvenile court's conclusion that coercive intervention was required to obtain counseling for the children was unsupported by the evidence in the record with respect to Parents' willingness to accept counseling.

In **K.B. v. Indiana Dept. of Child Services**, 24 N.E.3d 997, 999, 1006-07 (Ind. Ct. App. 2015), the Court affirmed the trial court's order adjudicating Father's two children to be CHINS. The children were exposed to domestic violence and substance abuse on the part of Father and his girlfriend. Father and his girlfriend were also noncompliant with an Informal Adjustment. The Court found the trial court's conclusion that the coercive intervention of the court was necessary was not clearly erroneous. In support of the trial court's determination

that the coercive intervention of the court was necessary, the Court noted evidence of Father's unstable housing for the children, Father's failure to cooperate with DCS or the children's court appointed special advocate, and the children's excellent school attendance and grades when they were living with their maternal grandmother.

In **In Re S.D.**, 2 N.E.3d 1283, 1287-90 (Ind. 2014), the Indiana Supreme Court reversed the CHINS adjudication of Mother's two-year-old child, who had special medical needs. The Court opined that not every endangered child is a CHINS, permitting the State's *parens patriae* intrusion into the ordinarily private sphere of the family. At the time of the factfinding, Mother and a second caregiver approved by DCS needed to complete a 24-hour training on home care of the two-year-old child's tracheostomy at Riley Hospital, which was the only unfulfilled requirement before Riley would allow the child to be returned home. The Court opined that the element of necessary coercive intervention of the court guards against State interference in family life, reserving that intrusion for families "where parents lack the *ability* to provide for their children" not merely where they "encounter *difficulty* in meeting a child's needs." The Court opined that the evidence could not reasonably support an inference that Mother was likely to need the court's coercive intervention to finish the home-care training. The Court said that although the evidence showed Mother had difficulty completing the last step of medical training, she was not unwilling or unable to do so without the court's compulsion, so the State's coercive intervention into the family could not stand.

In **In Re Des. B.**, 2 N.E.2d 828, 838-9 (Ind. Ct. App. 2014), the Court affirmed the trial court's CHINS adjudication of Mother's two children, who were under the age of three years. The Court could not say that the trial court's conclusion that the coercive intervention of the court was necessary was clearly erroneous. The Court observed that a trial court is not required to "wait until a tragedy occurs to intervene." The Court noted: (1) Mother had not completed the intensive outpatient treatment recommended by the clinical addiction counselor; (2) Mother failed a drug screen and pleaded guilty to possession of marijuana during DCS's involvement; and (3) the case manager's testimony that Mother needed to address the problems of Mother's violent relationships with her children's fathers.

In **J.C. v. Indiana Dept. of Child Services**, 3 N.E.2d 980, 984 (Ind. Ct. App. 2013), the Court found that there was sufficient evidence to support the trial court's adjudication that Mother's son was a CHINS. Although Mother claimed that court intervention was not needed to ensure that her son's problems were addressed, the Court noted "the prevailing theme throughout the testimony by the probation officer, counselors, and family case manager illustrated Mother's pattern of poor communication and failure to respond to messages concerning [her son's] treatments, school attendance, and legal circumstances." The CHINS petition included allegations that the son: (1) missed large amounts of school; (2) used illegal substances and was on probation; (3) engaged in self-harming behaviors and expressed suicidal thoughts; (4) frequently left home without permission; and (5) was overwhelmed at the prospect of his pending parental responsibilities upon the birth of his expected child by his girlfriend. The CHINS petition also alleged that Mother had not engaged with treatment providers, son's probation officer, DCS, or son's school counselors to address his issues.

In **In Re V.H.**, 967 N.E.2d 1066, 1072-4 (Ind. Ct. App. 2012), the Court reversed the CHINS adjudication and remanded the case with instructions to vacate the parental participation order. The Court felt that under the present facts and circumstances, it was clear that Mother was addressing the child's behavioral issues, and the Court could not agree that the child needed care, treatment, or rehabilitation that the child was not receiving and was unlikely to be provided with without the coercive intervention of the court. The Court noted the

following: (1) Mother was involved in developing the child's IEP; (2) Mother was involved in developing the child's school Behavioral Intervention Plan; (3) Mother took the child to Gallahue for an initial assessment after the child's behavioral problems escalated; (4) Mother took the child to three group sessions before DCS became involved because of the child's escalating bad behavior; (5) Mother had the child taken to Lutherwood after another incident; (6) when DCS became involved, Mother contacted her own primary care physician and scheduled the child for a psychological evaluation after Mother learned that DCS could not schedule an evaluation for three to six months.

See also **Halberg v. Hendricks Cty. Office**, 662 N.E.2d 639 (Ind. Ct. App. 1996) and **Parker v. Dept. Of Public Welfare**, 533 N.E.2d 177 (Ind. Ct. App. 1989).

I. D. Purpose and Goals in CHINS Case

IC 31-10-2-1 of the Indiana Juvenile Code states that it is the purpose and policy of our family law to:

(1) recognize the importance of family and children in our society;
(2) recognize the responsibility of the state to enhance the viability of children and family in our society;
(3) acknowledge the responsibility each person owes to the other;
(4) strengthen family life by assisting parents to fulfill their parental obligations;
(5) ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation;
(6) remove children from families only when it is in the child's best interest or in the best interest of public safety;
(7) provide for adoption as a viable permanency plan for children who are adjudicated children in need of services;
(8) provide a juvenile justice system that protects the public by enforcing the legal obligations that children have to society and society has to children;
(9) use diversionary programs when appropriate;
(10) provide a judicial procedure that: (A) ensures fair hearings; (B) recognizes and enforces the legal rights of children and their parents; and (C) recognizes and enforces the accountability of children and parents;
(11) promote public safety and individual accountability by the imposition of appropriate sanctions; and
(12) provide a continuum of services developed in a cooperative effort by local governments and the state.

Federal law has had a significant impact on the goals and purpose of CHINS proceedings. The Adoption and Safe Families Act, as adopted in Indiana legislation, provides that (1) the child's health and safety are paramount; (2) the state must exert reasonable efforts to avoid removal of a child from the home, or if the child is removed, to secure parent-child reunification; and (3) provides for criminal background checks to determine the safety of a child who is returning home. See 42 U.S.C. 671(a)(15), IC 31-34-21-5.5. See also Chapter 4 at VI.

In **In Re J.B.**, 61 N.E.3d 308, 313 (Ind. Ct. App. 2016), *on rehearing*, the Court reached the same result as its original opinion, **In Re J.B.**, 55 N.E.3d 903 (Ind. Ct. App. 2016), but for different reasons. In In Re J.B., 61 at 313-14, the Court reversed that part of the CHINS court's order which discharged the parties and terminated the CHINS case. The Court remanded for further proceedings consistent with the CHINS statutes, including any appropriate services for Mother. The CHINS petition was filed because Mother was under the influence of drugs and the children were not properly restrained when Mother and the children were involved in a car accident.

Mother and Father shared joint custody of the children pursuant to a paternity case. After Parents admitted that the children were CHINS, the CHINS court awarded sole custody of the children to Father, ordered that Mother would have supervised parenting time, and closed the CHINS case without entering a dispositional decree that would have ordered services for Mother. The Court looked to IC 31-10-2-1 and In Re N.E., 919 N.E.2d 102, 108 (Ind. 2010), noting that the policy of the state and the purpose of Title 31 is to "strengthen family life by assisting parents to fulfill their parental obligations" and to "provide a continuum of services developed in a cooperative effort by local governments and the state." J.B., 61 N.E.3d at 312. The Court observed that DCS had used the coercive power of the State to insert itself into a family relationship by obtaining a CHINS finding and then had the CHINS court modify sole custody to Father and close the CHINS case thirty days later, without entering a dispositional decree and giving Mother a meaningful opportunity to participate in services as DCS itself had recommended in both the parental participation petition and the predispositional report. The Court found that the goal of the CHINS statutory scheme was not furthered in this case.

In **In Re S.D.**, 2 N.E.3d 1283, 1285, 1290-91 (Ind. 2014), the Indiana Supreme Court reversed the trial court's determination that Mother's two-year-old child, who had cardiomyopathy and had received a tracheostomy, a gastrostomy, and had been placed on a ventilator, was a CHINS. Mother had difficulty meeting the demands of a situation, but evidence did not indicate that she would be unable to correct her one lingering issue without the "coercive intervention of the court." CHINS cases aim to help families in crisis—to protect children, not punish parents. The Court opined that the focus is on the best interests of the child and whether the *child* needs help that the parent will not be willing or able to provide—not whether the *parent* is somehow "guilty" or "deserves" a CHINS adjudication (emphasis in opinion). The Court said that a CHINS finding should consider the family's condition not just when the case was filed, but also when it is heard.

In **In Re N.E.**, 919 N.E.2d 102, 105-6 (Ind. 2010), the Indiana Supreme Court affirmed the CHINS judgment and remanded for the juvenile court to address its deficient dispositional findings regarding the child and Father. CHINS adjudications focus on the condition of the child, and the acts or omissions of one parent can cause a condition that creates the need for court intervention. The Court observed that a CHINS adjudication can also come about through no wrongdoing on the part of either parent, such as where a child substantially endangers his own heath or the health of another, or the parents lack the financial ability to meet the child's extraordinary medical needs. The Court opined that, "[s]tanding alone, a CHINS adjudication does not establish culpability on the part of a particular parent." A CHINS intervention in no way challenges the general competency of a parent to continue a relationship with the child. A CHINS determination establishes the status of a child alone.

In **In Re K.D.**, 962 N.E.2d 1249, 1256 (Ind. 2012), the Indiana Supreme Court clarified that the In Re N.E., 919 N.E.2d 102, opinion does not stand for the proposition that any time a parent makes an admission that the child is a CHINS, a CHINS adjudication automatically follows. Each circumstance when a parent admits the allegations set forth in the CHINS petition is case specific and situations can exist where an admission by one parent would be incapable of providing a factual basis for the CHINS adjudication.

See also **Jackson v. Madison County Dept. of Family**, 690 N.E.2d 792 (Ind. Ct. App. 1998); **Matter of Robinson**, 538 N.E.2d 1385 (Ind. 1989).

II. NEGLECT

II. A. Statute

IC 31-34-1-1 provides that a child is a CHINS if before the child turns eighteen years old:

(1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

II. B. Abandonment

Indiana does not mention "abandonment" in its CHINS neglect statute; however, abandonment of a child is certainly a form of neglect. Various statutes exist to expedite the litigation and facilitate permanency for abandoned infants. See Chapter 4 at VI.C.3 and VI.D for discussion on abandoned infants.

Child abandonment may be charged as criminal neglect of a dependent under IC 35-46-1-4(a)(2). The criminal neglect of dependent statute, IC 35-46-1-4(c)(1), includes a defense that the caretaker left the child with an emergency medical provider and the abandonment did not result in bodily injury to the child. See **Chinda v. State**, 754 N.E.2d 981, 984 (Ind. Ct. App. 2001) (Court affirmed Mother's conviction of neglect of a dependent; Mother's actions of placing the baby in the trash dumpster subjected the baby to a dangerous life-threatening situation in accordance with the neglect of a dependent statute. It was reasonable for the trial court to infer that she had abandoned the baby and deprived him of required support) *trans. denied*; **Jones v. State**, 701 N.E.2d 863, 869 (Ind. Ct. App. 1998) (Mother's confession that she left her four-year-old child alone in apartment for several days was sufficient evidence of knowing abandonment of the child to sustain Mother's criminal conviction for neglect of dependent).

See also **T.Y.T. v. Allen County Div. of Family**, 714 N.E.2d 752, 756 (Ind. Ct. App. 1999) (Mother gave child to putative Father, Father left child with a childcare provider, and Mother did not know where child was living and made no attempt to determine child's location); **Young v. Elkhart County Office of Family**, 704 N.E.2d 1065, 1067 (Ind. Ct. App. 1999) (Mother left children with putative Father's mother and did not reclaim them).

II. C. Neglect by Failure to Provide Necessities

The CHINS neglect category requires proof that the parent, guardian, or custodian has not provided the child with necessary food, clothing, shelter, medical care, education, or supervision.

CHINS neglect is generally alleged when there is repeated failure to provide for a child as to more than one basic necessity, rather than an isolated incident of neglect, unless the isolated neglect incident is very serious. See **In Re S.K.**, 57 N.E.3d 878 (Ind. Ct. App. 2016) (evidence was insufficient to establish children were CHINS; when Father's previously stable housing became unstable, he took them to Mother, ensuring stable housing for children; although children changed schools multiple times, no evidence they missed school or were not enrolled); **In Re D.B.**, 43 N.E.3d 599 (Ind. Ct. App. 2015) (although DCS showed that Father was originally absent from child's life, DCS did not show he was unfit or unable to provide care), *trans. denied*; **In Re S.D.**, 2 N.E.3d 1283 (Ind. 2014) (not every endangered child is a CHINS, permitting state intervention); **J.C. v. Indiana Dept. Child Services**, 3 N.E.3d 980 (Ind. Ct. App. 2013)

(evidence was insufficient to adjudicate child a CHINS; other than allegation that child had a seven-day period of truancy, CHINS petition focused on child's sibling's behavior, and no evidence showed it impacted child); **Perrine v. Marion Cty. OFC**, 866 N.E.2d 269 (Ind. Ct. App. 2007) (mere presence of drug paraphernalia and admitted single methamphetamine use outside the child's presence was insufficient to support CHINS adjudication).

For older case law on inability to provide necessities due to financial situations, see **Lake County FCS v. Charlton**, 631 N.E.2d 526 (Ind. Ct. App. 1994); **In Re B.D.J.**, 728 N.E.2d 195 (Ind. Ct. App. 2000).

II. C. 1. Termination of the Parent-Child Relationship Cases Based on Failure to Provide Necessities and Support

The following termination cases from 2001 onwards originated from CHINS cases based on failure to provide necessities and support:

Termination of W.M.L., 82 N.E.3d 361, 368 (Ind. Ct. App. 2017) (children removed from Parents after younger child's birth because Mother had used marijuana during pregnancy and the family was homeless);

Matter of A.F., 69 N.E.3d 932, 949 (Ind. Ct. App. 2017) (children were removed and adjudicated CHINS on three separate occasions due to Father's criminal activity and incarcerations);

In Re O.G., 65 N.E.3d 1080, 1083 (Ind. Ct. App. 2016) (child removed from Parents' care because he was left with a friend who could not contact Mother, Father told DCS that he and Mother would both test positive for marijuana, and Parents had significant history of domestic violence), *trans. denied*;

In Re J.E., 45 N.E.3d 1243, 1245 (Ind. Ct. App. 2015) (child removed due to Mother's housing issues and past DCS involvement and Father's pending felony charge), *trans. denied*;

In Re A.G., 45 N.E.3d 471, 474-75 (Ind. Ct. App. 2015) (newborn infant was removed from Mother's care because he tested positive for cocaine and marijuana at birth; Father was incarcerated and unable to provide support for child), *trans*. *denied*;

In Re K.E., 39 N.E.3d 641, 643 (Ind. Ct. App. 2015) (four-month-old child removed from Mother's care because she left him unattended and Father was incarcerated for multiple drug-related offenses);

In Re D.P., 27 N.E.3d 1162, 1163 (Ind. Ct. App. 2015) (children removed because Mother was homeless);

D.B.M. v. Indiana Dept. of Child Services, 20 N.E.3d 174, 177 (Ind. Ct. App. 2014) (eight-year-old child removed from Mother's care due to Mother's hospitalization for mental illness, child's frequent hospitalizations based on Mother's unsubstantiated claims that someone was poisoning him, and drug trafficking at Mother's home), *trans*. *denied*;

C.A. v. Indiana Dept. of Child Services, 15 N.E.3d 85, 88 (Ind. Ct. App. 2014) (three children removed from Parents' care due to Parents' arrests for dealing methamphetamine in children's presence);

S.E. v. Indiana Dept. of Child Services, 15 N.E.3d 37, 48 (Ind. Ct. App. 2014) (five-month-old child removed from Mother's care due to Mother's history of more than twenty suicide attempts and more than fifty other hospitalizations);

T.B. v. Indiana Dept. of Child Services, 971 N.E.2d 104, 105 (Ind. Ct. App. 2012) (children were dirty and had not eaten since early morning and one child had a broken foot wrapped in dirty bandages; Mother had not obtained follow-up medical care for child's foot), *trans. denied*;

In Re D.B., 942 N.E.2d 867, 870 (Ind. Ct. App. 2011) (utilities in Father's apartment, where he and the child were living, had been cut off in winter and Father could not reinstate service due to unpaid utility bill), *trans. denied*;
In Re A.K., 924 N.E.2d 212, 215 (Ind. Ct. App. 2010) (child was living with homeless parents in a van and was extremely dirty when removed by DCS);
In Re H.L., 915 N.E.2d 145, 147 (Ind. Ct. App. 2009) (child had experienced multiple hospitalizations for "failure to thrive" and had been diagnosed with cystic fibrosis; Mother did not respond to child's cries or interact with child "unless prompted");
Rowlett v. Office of Family and Children, 841 N.E.2d 615, 617 (Ind. Ct. App. 2006) (two young children were running around outside of Mother's home unsupervised, the house was dirty and in disrepair, with trash all over and dirty dishes piled up, and the children were "very dirty" and wearing only pull up diapers), *trans. denied*;
Lawson v. Marion County OFC, 835 N.E.2d 577, 578 (Ind. Ct. App. 2005) (children were hungry, dirty, and had head lice, and the house was dirty, including dried human feces on the floor, and a "filthy" bathroom and kitchen);
In Re Involuntary Term. Paren. of S.P.H., 806 N.E.2d 874, 877 (Ind. Ct. App. 2004) (sheriff's department found drugs in the home with the three minor children, and the home was filthy and in total disarray);
McBride v. County Off. Of Family & Children, 798 N.E.2d 185, 189 (Ind. Ct. App. 2003) (children were living in a rundown mobile home without heat, refrigeration, stove or power, and the home was very cluttered and dirty);
In Re R.S., 774 N.E.2d 927, 929 (Ind. Ct. App. 2002) (residence was without electricity, running water or food, and Mother was historically unable to provide adequate supervision or housing for the children), *trans. denied*;
In Re E.S., 762 N.E.2d 1287, 1288 (Ind. Ct. App. 2002) (child had recurrent head lice, poor personal hygiene and appearance, and poor school performance; the child had special needs, and biological parents were unable to provide her with adequate care and supervision);
Carrera v. Allen County OFC, 758 N.E.2d 592, 593 (Ind. Ct. App. 2001) (OFC recommended that the child be removed from Mother's custody because Mother was unable to provide the child with necessary and appropriate housing or to maintain steady employment, had no plan to obtain housing or employment, and showed no interest in accepting any of the services provided by OFC to assist her in these endeavors);
In Re D.J., 755 N.E.2d 679, 681 (Ind. Ct. App. 2001) (case manager found the home to be dirty, messy, and cluttered, with several animals and roaches in the home, as well as dog feces on the floor);
In Re K.S., 750 N.E.2d 832, 835 (Ind. Ct. App. 2001) (children were removed from Mother because the children were unclean, Mother's residence was dirty and infested with animal feces, and the home did not have heat other than from kerosene heaters);
In Re D.Q., 745 N.E.2d 904, 907 (Ind. Ct. App. 2001) (children were playing outside unsupervised, smelled of urine, and there were no diapers or clean clothes in the home for the children; Mother was being evicted for non-payment of rent and poor condition of her apartment).

II. C. 2. Criminal Cases for Failure to Provide Necessities

II. C. 2. a. Neglect of Dependent Cases
See this Chapter at II.E.3.

II. C. 2. b. Non-Support Cases

Sanjari v. State, 981 N.E.2d 578, 585 (Ind. Ct. App. 2013), *trans. denied*, where the Court affirmed ten year sentence for voluntarily underemployed Father who owed over $57,00 in unpaid child support for his two daughters.

Porter v. State, 935 N.E.2d 1228, 1234-35 (Ind. Ct. App. 2010), where the Court affirmed conviction for nonsupport as class C felony, reduced second charge to class D felony due to double jeopardy concerns, and found sufficient evidence to enhance class C felony conviction. The Court noted that the statute criminalizes *present act* of failing to provide child support and enhances offense if amount due *at the time of the underlying act* is $15,000 or more (emphasis in opinion).

Culbertson v. State, 929 N.E.2d 900, 905 (Ind. Ct. App. 2010), *trans. denied*, where the Court affirmed Father's conviction for class C felony nonsupport, finding that Father did not establish defense to nonsupport due to incarceration. The Court noted that Father never sought modification of child support obligation due to inability to pay.

Stephens v. State, 874 N.E.2d 1027, 1034-35 (Ind. Ct. App. 2007), *trans. denied*, where the Court affirmed Father's conviction for felony nonsupport (IC 35-46-1-5) as a Class C felony despite his contentions that the jury and trial court erred when they decided he did not prove an inability to pay defense and that there was insufficient evidence to support the felony nonsupport conviction and its enhancement to a Class C felony. The Court observed that, after hearing the testimony of Father's witnesses with regard to the inability to pay defense, the jury and the trial court concluded that Father did not adequately prove the defense, and assessment of credibility is within the discretion of the trial court. In finding the evidence sufficient, the Court noted that IC 35-46-1-5 provides that a person who knowingly or intentionally fails to provide support to the person's dependent child commits Class D felony nonsupport, if the total of unpaid support is at least $15,000, as here, it becomes a Class C felony. The Court found that the evidence was sufficient to support (1) the intent element, which requires only evidence that a child support order is in place and the defendant is in arrears; and (2) the arrearage is in excess of $15,000.

Dishman v. State, 770 N.E.2d 855, 858 (Ind. Ct. App. 2002) *trans. denied*, where Father's conviction for class C felony non-support was affirmed, despite Father's argument that support obligation should be abated or excused during his incarceration.

Cooper v. State, 760 N.E. 2d 660, 664, 667 (Ind. Ct. App. 2002), *trans. denied*, where the Court found the criminal non-support statute was not unconstitutionally vague. A parent may escape criminal conviction by providing child with food, clothing, shelter, or medical care, but must provide more than a token amount of support.

II. C. 3. CHINS Cases on Failure to Provide Necessities

In **Matter of K.S.**, 78 N.E.3d 740, 745 (Ind. Ct. App. 2017), the Court reversed the juvenile court's finding that the four-month-old child was a CHINS because Mother used marijuana and did not have stable housing. The Court opined there was insufficient evidence to support the CHINS adjudication. The Court noted that, although Mother admitted she used marijuana two months before the child's birth, there was no evidence showing how, specifically, Mother's marijuana use seriously impaired or endangered the child. The Court also noted DCS presented no evidence that the child tested positive for marijuana. The Court also found DCS presented no evidence that Mother lacked stable housing. Mother's statement that she

felt she "wasn't really welcome" at her cousin's house where she was living at the time of the factfinding did not support the juvenile court's finding that she lacked stable housing. Although the juvenile court might have been concerned that Mother and the child would be asked to move out of cousin's house, the Court observed that this had not happened at the time of the factfinding.

In **In Re D.B.**, 43 N.E.3d 599, 607 (Ind. Ct. App. 2015), *trans. denied*, the Court reversed the trial court's CHINS adjudication for a two-year-old child whose Mother had been killed by her boyfriend. Father had signed a paternity affidavit, lived in Minnesota, and had not seen the child for over a year when Mother died. Father contacted DCS the week after the CHINS petition was filed and contested the CHINS adjudication. Father had not been a significant presence in the child's life and the Interstate Compact on Placement of Children was not completed at the time of the factfinding hearing. The Court held that the Interstate Compact did not apply to placement of a child with an out-of-state parent. Id. at 604. The Court opined that, as Father is the child's parent, there must be a presumption that he is a fit and capable parent, unless DCS proves that the child would be seriously impaired or endangered in Father's care.

In **In Re S.A.**, 15 N.E.3d 602, 612 (Ind. Ct. App. 2014), the Court concluded the trial court erred in adjudicating the two-year-old child to be a CHINS. Mother admitted that the child was a CHINS because of Mother's heroin use, domestic violence, and the presence of scars from cigarette burns on the child's hands. DCS located the alleged Father, who was in the U.S. Navy, and he requested paternity testing. Father's paternity was established, and he requested custody of the child. By the time of the CHINS factfinding hearing, Father had been discharged from the Navy, was living in his parent's home in Indianapolis, had prepared a bedroom for the child at his parents' house, was employed, and was visiting the child daily. The Court found there was insufficient evidence to support the CHINS adjudication. The Court was not persuaded that Father's voluntary admission of his Post Traumatic Stress Disorder (PTSD) history and successful completion of treatment in a military ward of a behavioral health hospital supported the need for a CHINS finding. The Court found no basis to support the trial court's conclusion that Father was unlikely to obtain additional PTSD treatment, if needed, without the coercive intervention of the court.

In **M.K. v. Indiana Dept. of Child Services**, 964 N.E.2d 240, 245-6 (Ind. Ct. App. 2010), the Court reversed the CHINS adjudication, finding that the record did not support a conclusion that the children were endangered by any neglect on the part of either parent or that the parents were unable or unwilling to supply the children with stable housing, food, clothing, care, or supervision. The Court opined that the evidence did not support the trial court's finding that Mother relocated to Fort Wayne without a plan for housing and was unable or unwilling to provide the children with stable housing. The Court also noted that Mother and Father had a stable housing arrangement for the children in Baltimore; that, while in Fort Wayne, Mother stayed in contact with her Baltimore landlord regarding the progress of repairs to the apartment; Mother left her two teenage daughters in Baltimore; the rent was paid on her Baltimore apartment through at least the end of February; Mother and Father still had a valid lease on that apartment; Mother packed ample supplies for the children during their stay in Fort Wayne; and the DCS case manager testified that the children appeared to be fed and properly clothed in winter attire.

In **In Re A.C.,** 905 N.E.2d 456, 458, 462-63 (Ind. Ct. App. 2009), the Court held that there was sufficient evidence to support the CHINS adjudication. The evidence showed that the child's physical or mental condition was seriously impaired as the result of Mother's

inability, refusal, or neglect to provide the necessary clothing, food, shelter, medical care, or supervision; Mother was responsible for the condition in which the child was found by DCS; and the coercive intervention of the court was necessary to force Mother to provide the child with necessary care and treatment. DCS does not need to show abandonment before a juvenile court may conclude that the coercive intervention of the court is necessary or before a child may be adjudicated a CHINS. The Court noted the following evidence: (1) the public health nurse testified that the child was significantly delayed and needed to see a physician; (2) the child was underweight, behind on vaccinations, and had difficulties walking due to her undiagnosed hip problem; (3) Mother moved repeatedly during the CHINS proceeding, and if the child was returned to her, Mother planned that they would live in a two bedroom trailer with three adults and two children; (4) Mother did not cooperate with DCS; (5) Mother missed visits with the child; (6) Mother showed ongoing lack of concern about the child's health problems; (7) Mother had a consistent pattern of not providing needed care and necessities for the child.

II. D. Neglect of Education

The Compulsory Attendance law, which sets the basic requirements for school attendance, is codified at IC 20-33-2. IC 20-33-2-1 through -3.2 provide for legislative intent and definitions. The Compulsory Attendance law requires each child to attend school for the number of days public schools are in session in the school corporation in which the student is enrolled in Indiana, or where the student is enrolled if the student is enrolled outside of Indiana. IC 20-33-2-5. "Attend" means to be physically present: (1) in a school; or (2) at another location where the school's educational program in which a person is enrolled is being conducted; during regular school hours on a day in which the educational program in which the person is enrolled is being offered. IC 20-33-2-3.2.

Each governing body may establish and include in its written discipline rules a definition of "habitual truant" which must, at minimum, define the term as "a student who is chronically absent by having unexcused absences from school for more than ten days of school in one school year." IC 20-33-2-11(b). The department of education shall develop guidelines concerning criteria for defining habitual truant that may be considered by the governing body. IC 20-33-2-11(g).

A student is required to attend school from the earlier of the date the student enrolls in school or the beginning of the fall school term for the school year in which the student becomes seven years of age. IC 20-33-2-6. The student must attend school until the student: (1) graduates; (2) becomes eighteen years of age; or (3) becomes sixteen or seventeen years of age and meets the requirements under IC 20-33-2-9 concerning an exit interview enabling the student to withdraw.

An exit interview is required under certain circumstances pursuant to IC 20-33-2-9. It is only required for students who are described at IC 20-33-2-6(3) (is sixteen years old but less than eighteen years old and the requirements of IC 20-33-2-9 are met enabling the student to withdraw from school before graduation). IC 20-33-2-9(a). A student who is sixteen years old but less than eighteen years old must attend school and cannot withdraw from school before graduation unless (IC 20-33-2-9(b)):

(1) the student, the student's parent, and the principal agree to the withdrawal;
(2) the student provides written acknowledgment of the withdrawal that meets the requirements of subsection (c) and the: (A) student's parent; and (B) school principal; each provide written consent for the student to withdraw from school; and

(3) the withdrawal is due to: (A) financial hardship and the individual must be employed to support the individual's family or a dependent; (B) illness; or (C) an order by a court that has jurisdiction over the student.

The written acknowledgement of withdrawal at the exit interview to include a statement that the student and student's parent understand that withdrawing from school is likely to: (1) reduce the student's future earnings; and (2) increase the likelihood of the student's being unemployed in the future. IC 20-33-2-9(c). A student who fails to attend the exit interview or return to school if the student does not meet the requirements for withdrawal will have his driver's license or learner's permit and employment certificate revoked or denied. IC 9-24-2-1.

Enforcement of the Compulsory Attendance law is found at IC 20-33-2-26. It is the duty of each superintendent, attendance officer, state attendance officer, security police officer appointed under IC 36-8-3-7, and school corporation police officer appointed under IC 20-26-16 to enforce the law and to execute affidavits against a parent for violation of the law. IC 20-33-2-26(a). An affidavit against a parent for violation shall be prepared and filed in the same manner and under the procedure prescribed for filing affidavits for the prosecution of public offenses. IC 20-33-2-26(b). Such an affidavit under this section shall be filed in a court with jurisdiction in the county where the child resides, and the prosecuting attorney shall file and prosecute actions under this section as in other criminal cases, and the court shall promptly hear these cases. IC 20-33-2-26(c).

The governing body of the school corporation may submit information regarding habitually truant students to the bureau of motor vehicles regarding their ineligibility to obtain an operator's license or a learner's permit. IC 20-33-2-11(f). IC 20-33-2-11(a) states that a habitual truant who is thirteen or fourteen years of age may not be issued a motor vehicle learner's permit or operator's license by the department of motor vehicles until the student is eighteen years old. If a student's attendance record improves, the school corporation may determine that the student is eligible to be issued a learner's permit or operator's license. IC 20-33-2-11(e).

If a student does not receive consent to withdraw from school at an exit interview and fails to return to school, the school principal shall deliver by certified mail or personal delivery to the bureau of motor vehicles a record of the student's failure to return to school so the bureau of motor vehicles can revoke or not issue a learner's permit or driver's license to the student until he is eighteen years old. IC 20-33-2-28.5(g). Additionally, the student's employment certificate shall be revoked or not issued by the bureau of child labor after notification to the bureau of the student's status by the principal. IC 20-33-2-28.5(f).

The misdemeanor failure to ensure attendance law at IC 20-33-2-28 states that it is unlawful for a parent to fail, neglect, or refuse to send the child to a public school for the full term "unless the child is being provided with instruction equivalent to that given in public schools." See also IC 20-33-2-44.

Before proceedings are instituted against a parent for failure to ensure the child's attendance, personal notice of the violation shall be served on the parent by the superintendent or the superintendent's designee. IC 20-33-2-27(b). For a list of the means by which a parent must be notified of the violation, see IC 20-33-2-27(c). If the violation is not terminated not more than one school day after the notice is given, or if another violation is committed during the notice period, no further notice is necessary. IC 20-33-2-27(c). Each day of violation constitutes a separate offense. IC 20-33-2-27(c).

The superintendent or any attendance officer shall report a child who is habitually absent from school to an intake officer of the juvenile court or DCS, and that the intake officer or DCS shall proceed in accordance with IC 31-30 through IC 31-40. IC 20-33-2-25. There is no clear definition of educational neglect; all of these laws, as well as school created definitions, should be consulted in determining what constitutes neglect of education within a particular school system.

CHINS, delinquency, and/or criminal proceedings can be initiated when a child does not attend school regularly. All of these actions can be tried in the juvenile court which has concurrent jurisdiction with the criminal court for violation of the compulsory school attendance law and criminal neglect of a dependent charges. See IC 31-30-1-3 (jurisdiction of the juvenile court).

Exceptions to the Compulsory Attendance law are stated below at II.D.3.

II. D. 1. CHINS, Delinquency, and Termination of Parental Rights Proceedings for Educational Neglect

CHINS neglect of education (IC 31-34-1-1), CHINS parental failure to participate in disciplinary proceeding (IC 31-34-1-7), and delinquency truancy (IC 31-37-2-3) can be initiated in the juvenile court to address attendance problems at school. Only the prosecuting attorney may file a petition alleging that a child is a delinquent child under IC 31-37-2. IC 31-37-10-1. DCS and the prosecutor have the ability to initiate a CHINS action.

Under IC 31-37-19-4, the juvenile court shall order the Bureau of Motor Vehicles to invalidate driver's permits and licenses of children who have repeated delinquency adjudications for truancy.

Delinquency cases based on truancy include:

C.S. v. State, 953 N.E.2d 1144, 1147 (Ind. Ct. App. 2011), where the Court reversed the juvenile's delinquency adjudication; there was insufficient evidence that the juvenile needed care, treatment, or rehabilitation, a required element in order to be adjudicated as a delinquent in violation of the attendance law. After learning of the juvenile's attendance issues, the juvenile's mother cooperated with the school, imposed disciplinary actions at home, and the juvenile was no longer absent or tardy.

B.L. v. State, 688 N.E.2d 1311 (Ind. Ct. App. 1997), holding the court could not use inherent contempt power to incarcerate repeat truant for violating order in delinquency case to attend school, but could use statutory modification procedure.

CHINS cases referencing neglect of education, truancy, or other school problems are included below. Arguably, a child may be a CHINS if the parents do not cooperate with the school in obtaining needed evaluations, medications, or special placements for the child, if the situation rises to the level of seriously impairing the child's mental condition. Cases include:

In Re S.K., 57 N.E.3d 878, 883 (Ind. Ct. App. 2016), the Court reversed the juvenile court's order which adjudicated Parents' four children to be CHINS. Father and the children experienced a period of instability, during which the children changed schools twice, but attended school at all times and maintained above average grades. On the issue of Parents' neglect by failing to supply the children with education, the Court opined there was no evidence that the children had been deprived of an education, despite the fact that they changed schools multiple times.

K.B. v. Indiana Dept. of Child Services, 24 N. E.3d 997, 999 (Ind. Ct. App. 2015), a CHINS case, where the Court affirmed the CHINS adjudication of Father's two children.

The evidence revealed that, while in Father's care, the children missed more than 10% of their school days.

Termination of the parent-child relationship cases referencing a parent's failure to ensure the child's school attendance or engaged in other types of educational neglect as a factor include:

H.G. v. Indiana Dept. of Child Services, 959 N.E.2d 272, 257 (Ind. Ct. App. 2011), where CHINS petitions were filed for the three children because, among other reasons, they had been frequently late or absent from school.

In Re W.B., 772 N.E.2d 522, 527 (Ind. Ct. App. 2002), where the counselors documented the older siblings' severe developmental, social, emotional, and intellectual delay. The oldest child, almost six years of age, had minimal language (at the eighteen to twenty-four month level), poor hand-eye coordination, poor fine motor skills, knew no colors, shapes, alphabet letters or numbers, and could not count.

S.J.J. v. Madison Cty. Dept. of Welfare, 629 N.E.2d 866, 867, 869 (Ind. Ct. App. 1994), where the dispositional order required, among other things, that Mother "see that the children attend school daily." In affirming the termination judgment, the Court concluded that evidence of failure to maintain visitation and counseling schedules supported the inference that Mother's problems with her children's school attendance had not been remedied.

For older termination cases on this topic, see **Matter of C.M.**, 675 N.E.2d 1134, 1139, 1140 (Ind. Ct. App. 1997); **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E.2d 824 (Ind. Ct. App. 1995); **Matter of D.B.**, 561 N.E.2d 844 (Ind. Ct. App. 1990); **Matter of V.M.S.**, 446 N.E.2d 632, 633 (Ind. Ct. App. 1983).

II. D. 2. Criminal Proceedings for Educational Neglect

The misdemeanor failure to ensure attendance law at IC 20-33-2-28 states that it is unlawful for a parent to fail, neglect, or refuse to send the child to a public school for the full term "unless the child is being provided with instruction equivalent to that given in public schools." See also IC 20-33-2-44(b), providing that a person who knowingly violates the requirements of IC 20-33-2 commits a Class B misdemeanor.

Parents could also be charged with felony neglect of a dependent under IC 35-46-1-4(a) which provides that a person who has care of a dependent commits neglect of a dependent (Level 6 felony), if the person knowingly or intentionally deprives the dependent of education as required by law.

In **Houston v. State**, 957 N.E.2d 654 (Ind. Ct. App. 2011), *trans. denied*, the Court affirmed the convictions of two mothers for class B misdemeanor failure to ensure school attendance charges (IC 20-33-2-27(a), IC 20-33-2-44(b)). Defendant Houston enrolled her child in kindergarten, but the child had twenty-seven unexcused absences. Defendant Gruzinsky enrolled her child in kindergarten, but the child had twenty-six unexcused absences and forty-five tardies. See Chapter 7 at VIII.D.6.d. for discussion of school records.

In **Hampton v. State**, 754 N.E.2d 1037 (Ind. Ct. App. 2001), *trans. denied*, Father failed to return the children to Mother after extended summer visitation and failed to send the children to school when school resumed in the fall. Despite Father's claim that he was home schooling one of his children, his criminal conviction for class D felony educational neglect was affirmed. The Court distinguished Hamilton v. State, 694 N.E.2d 1171 (Ind. Ct. App. 1998) and opined that the education required by law, as provided in IC 35-46-1-4(a), was the public school education selected for the child by Mother, the child's custodial parent.

In **Eukers v. State**, 728 N.E.2d 219, 222-3 (Ind. Ct. App. 2000), the Court affirmed custodial Mother's class B misdemeanor conviction for violation of the Compulsory Attendance Act because the child had accumulated twenty-three absences during five months of the school year. The Court opined that the school's attendance policy did not unconstitutionally impinge on the legislature's exclusive power to establish and define criminal offenses. The Court held that the delegation of authority to school districts to establish attendance policies is not unconstitutional because the prosecutor is vested with sole discretion to prosecute parents for failure to ensure children's school attendance and the prosecutor's discretion operates independently of a school's attendance policy. The Court found the following: (1) the Powers Act vested the school board with authority to implement an attendance policy; (2) the school board mailed the policy handbook to parents of all students in the district; (3) the handbook informed parents that, after ten absences, a doctor's statement must be provided and continued unexcused absences may result in a formal referral for educational neglect; (4) the Powers Act provided schools with authority to enforce their attendance policies requiring children with unexcused absences to attend Saturday school or after-school detention, but school officials have no recourse against the parent. The General Assembly enacted the Compulsory Attendance Act which prevents parents from denying their children certain minimal education. The prosecutor has sole discretion to bring a criminal prosecution against a parent for failure to ensure his child's school attendance, even though a school attendance officer has provided information to the prosecutor that a child has an unexcused absence.

In **Hamilton v. State**, 694 N.E.2d 1171 (Ind. Ct. App. 1998), Mother's felony neglect of a dependent and misdemeanor failure to ensure school attendance convictions were reversed on appeal due to insufficient evidence. Mother's convictions for violation of the compulsory attendance law were reversed because the school did not give her personal notice of failed attendance by (1) personal delivery, (2) certified mail, or (3) leaving notice at the last or usual place of residence. Mother's felony neglect of dependent convictions for her children's absences were also reversed. To prove felony neglect of education, the State is required to prove not only a violation of the compulsory attendance law, but that as a result of the child's failure to attend school, the child failed to acquire the knowledge and training taught at school.

II. D. 3. Home Schooling and Alternatives to Public Education

The statute which allows parents to avoid the Compulsory Attendance requirement if they provide their children with "instruction equivalent to that given in the public schools" is codified at IC 20-33-2-28. A student is not bound by the requirements of the compulsory education laws found at IC 20-33-2 if the parent of the student certifies to the superintendent that the parent intends to begin providing the student with instruction equivalent to that given in the public schools as permitted under IC 20-33-2-28. IC 20-33-2-8.

Furthermore, a student is not bound by the requirements of the compulsory education laws found at IC 20-33-2 if the parent of the student certifies to the superintendent that the parent intends to enroll the student in a nonaccredited, nonpublic school. IC 20-33-2-8.

While reporting enrollment in home school is not required by statute, parents must keep attendance records, and would be advised to keep other records of the home schooling. IC 20-33-2-20 allows the state superintendent or the superintendent of the school corporation in which the nonpublic school is located to request records to verify the enrollment and attendance of a student in "a nonpublic school."

The Court in **Hampton v. State**, 754 N.E.2d 1037, 1044 (Ind. Ct. App. 2001), *trans. denied*, discussed in this Chapter at II.D.2. immediately above, was not persuaded by Father's claim that he was home schooling the children. The Court noted that Mother had custody of the children and had chosen a public school education for the child.

II. E. Neglect of Supervision

The juvenile code does not define the term "supervision". Leaving a child unattended may constitute failure to supervise. Failure to watch, care for, protect, or limit the activities of the child in a manner necessary to avoid serious injury or endangerment may constitute neglect of supervision.

E. 1. CHINS Cases

In **In Re L.S.**, 82 N.E.3d 333, 342 (Ind. Ct. App. 2017), the Court affirmed the trial court's denial of the CHINS petition for Parents' three children. DCS filed a CHINS petition for the children after law enforcement responded to a domestic violence incident in the children's presence. Mother filed a petition for dissolution of marriage, the children continued to reside in Mother's care, a protective order was put in place, and Mother demonstrated a willingness to protect the children from Father, including reporting violations of the protective order. The trial court found that coercive intervention was not necessary due to the dissolution case, the existing order for protection, and the retention of firearms by the sheriff. Father contended the children should have been found to be CHINS. The Court disagreed with Father's contention, noting that since Father had left the home and Mother obtained the protection order, there was no more domestic violence, and Mother had presented evidence that she had taken several measures to prevent domestic violence between herself and Father and to protect the children from future domestic violence.

In **Matter of D.P.**, 72 N.E.3d 976, 985 (Ind. Ct. App. 2017), the Court reversed the trial court's CHINS adjudication of an eleven-year-old child. Despite Mother's admission to the CHINS petition because there pending domestic violence charges against Father, the Court concluded DCS failed to meet its burden in light of: (1) Father's refusal to concede to Mother's admission; and (2) the lack of admissible evidence to support all of the elements of a CHINS action. Quoting K.B. v. Indiana Dept. of Child Services, 24 N.E.3d 997, 1003-04 (Ind. Ct. App. 2015), the Court: (1) acknowledged that "a child's exposure to domestic violence can support a CHINS finding"; (2) a single incident of domestic violence in the child's presence may support a CHINS finding; and (3) domestic violence need not necessarily be repetitive. D.P. at 984. The Court said that domestic violence is a very serious matter, but the Court could not conclude that one arrest for that crime automatically makes the child a CHINS without any evidence of the alleged incident. The Court noted that there was no evidence that the domestic violence ever occurred in the child's presence, no evidence on the impact of the incident on the child, and no evidence on whether the coercive intervention of the court was necessary to protect the child.

In **In Re D.J. v. Department of Child Services**, 68 N.E.3d 574, 581 (Ind. 2017), the Indiana Supreme Court reversed the trial court's CHINS determination. Mother left the child alone in the bathtub, resulting in an eventual CHINS cases where other problems with her residence were uncovered. Concluding DCS failed to prove by a preponderance of the evidence that Parents required the court's ongoing coercive intervention to insure the children received proper care, the Court reversed the trial court's determination that the children were CHINS. The Court looked to its opinion in In Re S.D., 2 N.E.3d 1283, 1287 (Ind. 2014), in which the Court held that "[n]ot every endangered child is a child in need of services," and not every endangered child needs "the State's parens patriae intrusion into the ordinarily private sphere

of the family." The Court found that the third element, namely, that Parents were unlikely to attend to the children's care or treatment without the court's coercive intervention, was not sufficiently supported by the record. The Court noted the following evidence, which showed that Parents eventually cooperated with and satisfactorily completed DCS services: (1) a social worker testified that Parents completed the parenting curriculum; (2) the visitation supervisor and family coach could tell that Parents began implementing the parenting curriculum during visits; (3) the therapist testified that Parents were extremely compliant with services, no more therapy was needed, and all goals had been met; and (4) Parents had voluntarily secured individual and family services for the older child's autism.

In **In Re S.K.**, 57 N.E.3d 878, 883 (Ind. Ct. App. 2016), a CHINS case, the Court reversed the juvenile court's order adjudicating Parents' four children to be CHINS. The Court determined that the evidence was insufficient to establish that children were CHINS based on Father's failure to provide shelter and evidence that Mother and her boyfriend tested positive for methamphetamine and amphetamine on a day when they were the sole caregivers for the children. The Court opined that the evidence was insufficient to establish endangerment and the record and findings did not support a conclusion that the children lacked shelter, education, or supervision.

In **In Re S.M.**, 45 N.E.3d 1252, 1255-56 (Ind. Ct. App. 2015), *trans. denied*, the Court reversed the juvenile court's CHINS adjudication of Mother's four children. The Court opined the evidence was "woefully insufficient to support" the CHINS adjudication under the neglect statute, IC 31-34-1-1. The Court found there was no evidence that the children were endangered or lacked food, shelter, love, and care. The Court noted the record was wholly devoid of a single example of the children's needs going unmet. The Court opined that a CHINS finding may not be based on the mere facts of an unemployed parent, a family on food stamps, or a family living in a shelter while seeking stable housing.

In **K.B. v. Indiana Dept. of Child Services**, 24 N.E.3d 997, 999 (Ind. Ct. App. 2015), the Court affirmed the trial court's CHINS order adjudicating Father's two children to be CHINS. DCS had responded to a report that Father and his girlfriend had a fight in the children's presence. The case manager noted that Father and his girlfriend were "pacing back and forth", had enlarged pupils, and their eyes were bloodshot. Father and his girlfriend signed an Informal Adjustment, but they failed to participate in home-based counseling, keep in contact with DCS, take drug screens, or allow DCS to visit the children. The Court noted the following evidence which supported the CHINS adjudication: (1) the children were old enough to comprehend the violence, were present during the violence, and were crying; (2) there was evidence from girlfriend's daughter that the violence was repetitive; (3) the children had missed more than 10% of their school days; (4) Father and his girlfriend were evasive about their address with the DCS case manager and the court appointed special advocate, and refused to take drug screens.

In **In Re L.P.**, 6 N.E.3d 1019, 1021 (Ind. Ct. App. 2014), the Court reversed the juvenile court's CHINS adjudication of Mother's six-year-old child. The juvenile court found that the child was a CHINS based on Mother's admitted use of methamphetamine and her positive drug test. The Court noted the juvenile court's observation that methamphetamine had caused "tragic" effects in Sullivan County. The Court opined that, although methamphetamine use may indeed be epidemic, the relevant inquiry was whether the child was seriously impaired or endangered and in need of care and supervision unlikely to be provided without coercive intervention of the court. The Court, citing Perrine v. Marion County Office of Child Services, 866 N.E.2d 269 (Ind. Ct. App. 2007), held that the factual finding of an isolated use

of methamphetamine, without more, did not support the juvenile court's conclusion of law that the child was a CHINS.

In **In Re A.G.**, 6 N.E.3d 952, 958 (Ind. Ct. App. 2014), the Court affirmed the trial court's CHINS adjudication of Mother's two children. Mother suffered from Factitious Disorder by Proxy. Caretakers affected with this disorder "cause harm to their children for attention, and many times the affected children are subject to medical conditions which the caretaker will use as a vehicle for their attention seeking behavior." Among the trial court's conclusions were: (1) the older child's physical and mental condition is seriously impaired due to injury caused by Mother's acts or omissions pursuant to IC 31-34-1-2; (2) the children's physical or mental health is seriously endangered by the inability of the parents to provide them with necessary supervision pursuant to IC 31-34-1-1; (3) the weight of the evidence proves by preponderance that Mother is afflicted with Factitious Disorder by Proxy and is responsible for the older child's life threatening cyanotic episodes. The Court affirmed the trial court's judgment finding the children to be CHINS.

In **J.C. v. Indiana Dept. of Child Services**, 3 N.E.3d 980, 983-5 (Ind. Ct. App. 2013), the Court affirmed the trial court's CHINS adjudication of Mother's fifteen-year-old son (Older Son), but concluded that the trial court clearly erred in its CHINS adjudication of Mother's twelve-year-old son (Younger Son). The Court cited the following evidence in support of Older Son's CHINS adjudication: (1) he was placed on informal probation due to a charge of possession of drug paraphernalia; (2) Mother failed to bring him to two appointments with his probation officer and did not return the probation officer's telephone calls; (3) he tested positive for marijuana and amphetamines and admitted to experimenting with LSD, peyote, and marijuana during probation; (4) his informal probation was unsuccessful, and he was referred to the prosecutor's office for formal probation; (5) the school counselor and the DCS case manager had difficulty in getting Mother to return their telephone calls; (6) he told his counselor and probation officer that he had been suicidal and had engaged in cutting. In reversing the trial court's CHINS adjudication of Younger Son due to insufficient evidence, the Court noted that the only allegation in Younger Son's CHINS petition which pertained directly to him was his seven-day truancy. The Court found that the record was devoid of evidence indicating that Younger Son's school absences for a relatively brief period endangered him, that truancy was a continuing problem, or that Older Son's problems had a dangerous or negative impact on Younger Son. The Court reiterated that each CHINS determination is very specific to the condition of that particular child.

In **In Re Des.B.**, 2 N.E.3d 828, 838-9 (Ind. Ct. App. 2014), the Court affirmed the trial court's adjudication that Mother's two children, who were under three years old, were CHINS. The Court opined that the evidence supported the trial court's findings that, as of the factfinding hearing, Mother continued to have extensive problems with drugs and violent relationships with her children's fathers, and that these problems were harmful to the children. The Court said that, although there was no evidence to suggest that Mother used drugs in the presence of her children, the Court did not find that fact dispositive. The Court opined that the trial court is not required to "wait until a tragedy occurs to intervene", quoting In Re A.H., 913 N.E.2d 303, 306 (Ind. Ct. App. 2009). The Court could not say that the trial court erred when it concluded that Mother's behavior represented "a substantial risk of endangering the children."

In **In Re R.S.**, 987 N.E.2d 155, 159 (Ind. Ct. App. 2013), the Court reversed the trial court's determination that Parents' two-month-old infant was a CHINS. The Court opined that the evidence did not support the trial court's conclusion that the infant was a CHINS. The Court

observed that Parents' parental relationships with the three older siblings were terminated in part because Parents lacked financial resources and adequate housing to properly care for the siblings' special needs. The Court noted that the infant was healthy and tested negative for drugs, and Parents had income and clean, appropriate housing. The Court said that a CHINS adjudication may not be based on conditions that no longer exist, and the trial court should also consider the parents' situation at the time the case is heard by the court. DCS had removed the infant from Parents' home two days after her birth based solely on the family's history and the evidence given during the termination trial on the siblings.

In **In Re S.W.**, 920 N.E.2d 783, 789-90 (Ind. Ct. App. 2010), the Court concluded that DCS presented sufficient evidence to prove by a preponderance of the evidence that the seventeen-year-old child's physical or mental condition was seriously endangered by Parents' refusal or neglect to provide necessary supervision. The Court noted that: (1) the deputy sheriff found the child walking along a country road at 10:45 p.m. approximately twelve miles from her home; (2) Parents refused to pick the child up; (3) Parents did not inquire about the child's whereabouts when she did not return home; (4) Parents chose to ignore repeated phone calls to their home; and (5) the child told the DCS family case manager that domestic violence, drug use, and abuse were occurring in her home.

In **In Re J.L.**, 919 N.E.2d 561, 564 (Ind. Ct. App. 2009), the Court affirmed the trial court's determination that the thirteen-month-old child was a CHINS on evidence that: (1) Maternal Grandmother and Mother smoked marijuana in the bathroom of their home two or three times a week after the child and Maternal Grandmother's child were in bed; (2) although the child has a heart murmur, she was well taken care of, and was receiving adequate medical attention; (3) the house was clean and orderly; (4) Mother admitted to using heroin three months prior to her assessment interview with the family case manager; (5) Mother admitted to using marijuana since she was fifteen years old; (6) Mother had also used marijuana and heroin after the filing of the CHINS petition. While Mother was under the influence of marijuana at the time the child was in residence, Mother abandoned the child without any responsible adult supervision; a parent's duties do not end merely because a child is asleep.

In **In Re T.S.**, 881 N.E.2d 1110, 1111-14 (Ind. Ct. App. 2008), the Court affirmed the trial court's CHINS adjudication of Mother's child. The Court noted that a probate court had committed Mother indefinitely to inpatient mental health treatment and, thus, Mother was unavailable to care for the child and no services the State might offer would decrease the need for someone besides Mother to care for the child. Accordingly, the trial court had little choice but to declare the child a CHINS and continue his placement in foster care.

In **Perrine v. Office of Child Services**, 866 N.E.2d 269, 271-73, 276-77 (Ind. Ct. App. 2007), the Court reversed the juvenile court's judgment determining the child to be a CHINS as to Mother. The Court held that (1) the juvenile court erred when it concluded that the unavailability of someone "legally responsible" to care for Mother's disabled fourteen-year-old child at the time of Mother's arrest and incarceration supported its CHINS determination, because Mother was prevented from arranging for trained child care for the child at the time of the arrest; and (2) a single admitted use of methamphetamine, outside the presence of the child, without more, is insufficient to support a CHINS determination. The Court held the evidence did not show that Mother used methamphetamine in the presence of the child. The Court stated that it found no Indiana CHINS cases in which a single occurrence of drug use, outside the child's presence, had been found sufficient to support a CHINS determination. The Court: (1) observed that Mother did not contest that she had sole custody of the child, but pointed out that she was only unavailable to take care of the child during the about six to nine

hours she was incarcerated; and (2) concluded that, while Mother was indeed unavailable during her incarceration; she was unreasonably prevented from providing a caretaker for her child. Mother's attempt to arrange for a caretaker for the child were thwarted when law enforcement refused to allow her to make a phone call to someone trained to care for the child such as Mother's parents or brother who lived three to ten minutes from her residence. The Court held that, on these facts, it could not say that coercive intervention of the court was necessary to assure that the child would receive the care, treatment, or rehabilitation that she needs.

In **In Re C.S.**, 863 N.E.2d 413, 418-19 (Ind. Ct. App. 2007), *trans. denied sub nom.* Montgomery v. Marion County OFC, 869 N.E.2d 461 (Ind. 2007), the Court reversed the juvenile court's CHINS determination as to Father after finding that there was insufficient evidence to support that determination. The Court held that Father's "failure" to establish paternity before the fact-finding hearing was not evidence of neglect on his part that would seriously impair or endanger the child; therefore, the only evidence before the juvenile court relating to Father was that he would be an acceptable parent to the child.

In **In Re D.H.**, 859 N.E.2d 737, 744 (Ind. Ct. App. 2007), DCS filed a CHINS petition alleging that the children were endangered due to Father's untreated sexual perpetration issues and Mother's failure to take appropriate protective measures. The trial court found the five children to be CHINS, but the Court reversed the CHINS adjudication because it was clearly erroneous. The Court noted that at no point did the trial court find that the allegations of the petition had been proven by a preponderance of the evidence. The trial court also did not find that the children were seriously endangered as required under IC 31-34-1-1; rather, the trial court found that, if the allegations were true, the children would be endangered. The Court opined that to permit the children to be declared CHINS based upon speculation that they would be endangered if their half-sister's allegations were true would contravene the CHINS statutes.

In **In the Matter of K.B.**, 793 N.E.2d 1191, 1198-1201 (Ind. Ct. App. 2003), the Court affirmed the juvenile court's denial of the motion to dismiss the CHINS petition. After placing her child in a residential treatment facility, Mother refused multiple times to accept discharge of him when Medicaid ran out and the facility deemed he was fit to be released. Mother felt she was unable to give him the supervision he needed. The ability of LCOFC to move for mandatory dismissal of the CHINS petition ended when Mother admitted to the allegations contained within the CHINS petition. The juvenile court properly based its finding that the child was a CHINS on Mother's admission to the allegations in the CHINS petition. Because Mother admitted to the allegations in the CHINS petition and the court based its findings on this admission, further supported by the documentary evidence and oral representations received by the juvenile court in the course of hearings, the evidence was sufficient to support the juvenile court's CHINS adjudication.

In **In Re A.H.**, 751 N.E.2d 690, 693-94 (Ind. Ct. App. 2001), a CHINS petition was filed alleging that the child had been sexually abused by Father and neglected by Mother who did not believe the child was truthful about the abuse. Mother told the child that the child was hallucinating from medications prescribed for a medical condition. The trial court's CHINS adjudication was affirmed on appeal.

Older cases on this topic include: **Matter of E.M.**, 581 N.E.2d 948, 954 (Ind. Ct. App. 1991) (allowing Mother's boyfriend to discipline the thirteen-year-old daughter did not constitute neglect of supervision; Indiana law "does not require parents to be the only supervisors of

their children" and the parent may allow others to supervise and discipline the child) and **Parker v. Dept. of Public Welfare**, 533 N.E.2d 177, 179 (Ind. Ct. App. 1989) (Court affirmed a CHINS judgment that the children were endangered as a result of Mother's inability, refusal, or neglect to supply the children with supervision).

II. E. 2. Termination Cases

Several termination of parental rights cases are based on parental inability to provide supervision, protection, care or emotional support. Termination cases may also deal with failure to protect the child from harm, which is arguably a form of failure to supervise.

The following termination cases originated from CHINS cases based on failure to provide supervision, protection, care, and emotional support:

In Re L.R., 79 N.E.3d 985, 992 (Ind. Ct. App. 2017) (eight-year-old child removed because Father's home methamphetamine lab blew up when child and Parents were present, and Mother had taken the child to purchase methamphetamine ingredients);
Matter of Bi.B., 69 N.E.3d 464, 469 (Ind. 2017) (children removed due to Parents' domestic violence, lack of supervision, and continued methamphetamine use);
A.B. v. Indiana Dept. of Child Services, 61 N.E.3d 1182, 1185 (Ind. Ct. App. 2016) (children removed from Father's care because three-year-old child had sustained second degree burns to his feet while being supervised by eleven-year-old half-sibling and Father failed to seek medical care for the burned child);
In Re A.S., 17 N.E.3d 994, 998 (Ind. Ct. App. 2014) (one-year-old child and eight-month-old child were removed from Parents' care due to Parents' drug use, uncertain housing, and sibling's death due to medical neglect), *trans*. *denied*;
In Re S.S., 990 N.E.2d 978, 985 (Ind. Ct. App. 2013) (children, ages four years, two years, and ten months, were removed due to Mother's neglect of their medical needs and failure to supervise them), *trans. denied*;
In Re C.G., 954 N.E.2d 910, 914-15 (Ind. 2011) (Mother left child with a male friend while Mother traveled to Utah where she was arrested on federal drug charge; male friend then left child with neighbor);
In Re I.A., 934 N.E.2d 1127, 1130 (Ind. 2010) (child removed due to Mother's lack of supervision of child and siblings, two of whom were discovered by police playing unsupervised in parking lot of motel);
In Re B.F., 976 N.E. 2d 65, 66 (Ind. Ct. App. 2012) (child was without necessary supervision based on drug use in home);
In Re Involuntary Termination of Parent-Child Relationship of Kay L., 867 N.E.2d 236, 238, 242 (Ind. Ct. App. 2007) (children were originally removed because of Mother's abandonment and lack of supervision, poor hygiene, and a life- and health-endangering environment, or as Mother put it, "I left them at home and went out partying and I didn't come home");
In Re Relationship of E.T., 808 N.E.2d 639, 640 (Ind. 2004) (children were removed when found wandering from their home for the second time in a month);
Hite v. Vanderburgh Cty Office Fam. & Chil., 845 N.E.2d 175, 177 (Ind. Ct. App. 2006) (due to an ongoing history of inadequate supervision, inadequate parenting, unsuitable living conditions, and suspected drug/alcohol abuse by the child's parents, the child's physical or mental condition was seriously endangered as a result of neglect);
Castro v. Office of Family and Children, 842 N.E.2d 367, 370-71 (Ind. Ct. App. 2006) (Mother left seven-year-old child playing outside unsupervised with her younger brothers and Father was incarcerated and incapable of caring for and providing support to the child), *trans. denied*;

In Re K.H., 838 N.E.2d 477, 478 (Ind. Ct. App. 2005) (MCOFC filed a CHINS petition for the child following Mother's arrest for the battery of her boyfriend);
In Re Invol. Termn. of Par. Child Rel. A.H., 832 N.E.2d 563, 565 (Ind. Ct. App. 2005) (children were removed because Mother failed to supervise the children and could not handle them, and Father was in prison);
In Re A.I., 825 N.E.2d 798, 801 (Ind. Ct. App. 2005) (OFC caseworker identified the problems in the household as substance abuse, domestic violence, and basic parenting and safety issues), *trans. denied*;
In Re D.L., 814 N.E.2d 1022, 1024 (Ind. Ct. App. 2004) (Mother failed to provide adequate supervision of children, and left them with caregivers for extended periods of time, without returning to pick them up as scheduled), *trans. denied*;
Stewart v. Randolph County OFC, 804 N.E.2d 1207, 1209 (Ind. Ct. App. 2004) (six-year-old child was found alone in front of a restaurant on State Road 32, having walked there by himself, and Mother and her boyfriend were not aware that the child was missing; Mother and her boyfriend were arrested for neglect of a dependent), *trans. denied*;
In Re W.B., 772 N.E.2d 522, 526 (Ind. Ct. App. 2002) (when the twins were born, the court found that the twins were CHINS and subject to high risk of abuse and neglect because of prior incidents regarding older siblings by Mother);
M.H.C. v. Hill, 750 N.E.2d 872 (Ind. Ct. App. 2001) (Mother left five-week-old infant with an acquaintance and had no further contact with the child).

Older cases include: **Matter of C.M.**, 675 N.E.2d 1134, 1136, 1140 (Ind. Ct. App. 1997); **In Re Termination of Parental Rights of V.A.**, 632 N.E.2d 752, 756 (Ind. Ct. App. 1994); **In Re Wardship of R.B.**, 615 N.E.2d 494, 495 (Ind. Ct. App. 1993); **Matter of Adoption of D.V.H.**, 604 N.E.2d 634, 636 (Ind. Ct. App. 1992); **Page v. Greene County Dept. of Welfare**, 564 N.E.2d 956, 960 (Ind. Ct. App. 1991); **Alexander v. La Porte Co. Welfare Dept.**, 465 N.E.2d 223 (Ind. Ct. App. 1984).

II. E. 3. Criminal Neglect of Dependent Cases

Criminal neglect of dependent cases may be based on dangerous supervision of children. The following cases discuss evidence in criminal neglect of dependent convictions:

Pierson v. State, 73 N.E.3d 737, 741 (Ind. Ct. App. 2017) (infant died of malnutrition in care of mildly mentally handicapped Father; Father found guilty but mentally ill on charges of recklessness and neglect of a dependent), *trans. denied*;
Patel v. State, 60 N.E.3d 1041, 1062 (Ind. Ct. App. 2016) (Court vacated Mother's Class A felony child neglect conviction for newborn baby's death and remanded for trial court to enter Class D felony neglect conviction and sentence Mother accordingly; Court found sufficient evidence that Mother was aware baby was born alive and knowingly endangered baby by failing to provide medical care);
Krueger v. State, 56 N.E.3d 1240, 1244 (Ind. Ct. App. 2016) (State presented evidence that Mother stopped giving prescribed medication to son, son had episodes of turning blue and losing consciousness while in her care, and Mother was diagnosed by a psychiatrist with Factitious Disorder by Proxy; Court affirmed Mother's Class B felony child neglect conviction);
Jones v. State, 54 N.E.3d 1033, 1039 (Ind. Ct. App. 2016) (Mother left her three children alone in the house in the middle of the night and was arrested for drug offenses and neglect of a dependent; Court concluded State established exigency and an objectively reasonable belief that Mother's unattended children were in need of aid, and police

officers' warrantless entry into Mother's home after her arrest did not violate the Fourth Amendment), *trans*. *denied*;
Embrey v. State, 989 N.E.2d 1260, 1268 (Ind. Ct. App. 2013) (Court affirmed defendant's criminal child neglect conviction for manufacturing methamphetamine in home where child was present despite defendant's argument that he was not the child's father and had no legal duty to care for child; defendant's parents identified defendant as father of child and officers who entered the home observed that defendant and child's mother were both holding the child);
Escobedo v. State 987 N.E. 2d 103, 117 (Ind. Ct. App. 2013), *summarily affirmed* at 989 N.E.2d 1248 (Ind. 2013) (Father's class A felony neglect conviction affirmed; rebuttal evidence from doctor and DCS caseworker on child's prior injuries and CHINS were adjudication admissible because Father opened the door by giving false impression that DCS had wrongfully removed child one year previously);
Villagrana v. State, 954 N.E.2d 466, 469 (Ind. Ct. App. 2011) (Court reversed Father's neglect conviction on evidence that two-year-old child had left home without Father's knowledge and was found by neighbor; State presented insufficient evidence to show that Father acted knowingly);
Dexter v. State, 945 N.E.2d 220, 224-25 (Ind. Ct. App. 2011), *summarily affirmed* on this issue at 959 N.E.2d 235 (Ind. 2012) (Court affirmed neglect conviction of Mother's boyfriend in death of Mother's three-year-old child on evidence from physician that child experienced "abusive head trauma" and boyfriend had been warned against throwing child into the air);
Scruggs v. State, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008) (Court reversed Mother's conviction for Class A misdemeanor neglect of dependent, for leaving her seven-year-old child at home alone and not returning for three hours; Court found that Mother may have exercised bad judgment, but State failed to prove beyond a reasonable doubt that she had a subjective awareness of a high probability that she had placed child in a dangerous situation), *trans. denied*;
Gauvin v. State, 878 N.E.2d 515, 524-525 (Ind. Ct. App. 2007) (Father's neglect conviction affirmed on evidence that: (1) he tied child up, smacked her across the face, and taped her mouth shut; (2) he knew that Stepmother was tying child up, hitting her, taping her mouth shut and knocking her head against a wall; (3) he permitted child to become malnourished and dehydrated; (4) he aided Stepmother in forcing child to sleep in a plastic pan in an unheated garage; (5) child died from her mistreatment by Father and Stepmother), *trans. denied*;
Richardson v. State, 856 N.E.2d 1222, 1226 (Ind. Ct. App. 2006) (Mother's neglect conviction affirmed for exposing six-year-old child to methamphetamine manufacture; child had trace amounts of cocaine, amphetamine, and opiates in his system), *trans. denied*;
Poling v. State, 853 N.E.2d 1270, 1278 (Ind. Ct. App. 2006) (Mother's boyfriend's convictions of six counts of neglect of dependent affirmed on evidence that he hog-tied the children, ages ten, six and five, with duct tape and locked them in a closet for an extended period of time);
Williams v. State, 829 N.E.2d 198, 200 (Ind. Ct. App. 2005) (neglect of dependent conviction affirmed on evidence that grandmother forced eleven-year-old child to kneel on a broom handle with his arms extended holding weighted objects and to stand a distance away from a wall and hold a cloth against the wall with his head for up to two hours as punishment), *trans. denied*;
Nybo v. State, 799 N.E.2d 1146, 1148 (Ind. Ct. App. 2003) (Mother pled guilty to neglect of dependent due to her failure to stop Father's physical abuse of thirteen-month-old adopted child which had resulted in child's death);

Reynolds v. State, 783 N.E.2d 357, 357 (Ind. Ct. App. 2003) (decision of post-conviction court denying claim of ineffective assistance on neglect of dependent charges affirmed on evidence that Mother and her boyfriend were at home with her nine-week-old son while smoking crack cocaine, and later discovered that the son had died with a toxic level of cocaine in his system);
Cleasant v. State, 779 N.E.2d 1260, 1264 (Ind. Ct. App. 2002) (neglect of a dependent conviction affirmed on evidence that a reasonable inference existed that Father knew he was accompanying an associate to a drug deal when he placed his infant son in the back seat of the associate's car);
Morales v. State, 749 N.E.2d 1260, 1269 (Ind. Ct. App. 2001) (Mother's neglect of dependent conviction affirmed due to scalding injury to her two-year-old child's buttocks).

For older cases on this topic, see **Kile v. State**, 729 N.E.2d 211, 213 (Ind. Ct. App. 2000); **Thames v. State**, 653 N.E.2d 517, 517 (Ind. Ct. App. 1995); **Kellogg v. State**, 636 N.E.2d 1262, 1265 (Ind. Ct. App. 1994); **Demontigney v. State**, 593 N.E.2d 1270, 1272 (Ind. Ct. App. 1992); **Shoup v. State**, 570 N.E.2d 1298, 1303 (Ind. Ct. App. 1991).

II. F. Neglect of Medical Care

Medical neglect can be the basis of a CHINS petition, and such neglect may eventually result in termination of the parent-child relationship.

In **In Re A.H.**, 58 N.E.3d 951, 956 (Ind. Ct. App. 2016), the Court reversed the juvenile court's CHINS adjudication of a seventeen-year-old child who had behavior problems and mental health issues, including diagnoses of anxiety disorder, separation disorder, and depression. Mother had been taking the child to receive mental health care since the child was in the fifth or sixth grade. DCS became involved when it received a report that the child had struck her brother. The child refused to participate in services. The Court found there was no evidence to support the juvenile court's finding that Mother would not provide care to the child without the coercive intervention of the court. The Court said there was no evidence that Mother failed "to supply" the child with the help she needed. The Court observed that the coercive power of the State into family life was not appropriately applied to a parent who sought reasonable care for her traumatized child, merely because that care was unsuccessful through no fault of the parent.

In **In Re S.D.**, 2 N.E.3d 1283, 1290-91 (Ind. 2014), the Indiana Supreme Court reversed the trial court's judgment that Mother's two-year-old child, who had gone into cardiac arrest at a hospital in South Bend due to previously undiagnosed caridomyopathy, was a CHINS. By the time of the factfinding, the only unfulfilled requirement before Riley Hospital would let the two-year-old child be returned to Mother's home was that Mother and the alternate caretaker had not completed a 24-hour home-care practice session at the hospital on caring for the child's tracheostomy. The Court opined that the evidence could not support an inference that Mother was likely to need the court's *coercive intervention* to complete the home-care session (emphasis in opinion).

In **In Re C.B.**, 865 N.E.2d 1068, 1073 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the CHINS adjudication, finding that DCS had presented not only sufficient evidence, but overwhelming evidence, that the child's physical well-being was seriously endangered and that he needed care and treatment he was not receiving from Mother. The Court found that, while it was not certain whether Mother inflicted the observed injuries upon the child, there was no question that the child suffered this harm while under Mother's care and custody and that, given

the multiplicity of the child's injuries, the record suggested that Mother was slow to seek medical treatment for the child.

See also **In Re A.H.**, 913 N.E.2d. 303, 311 (Ind. Ct. App. 2009) (Court affirmed trial court's determination that child was CHINS, where evidence and findings of fact were sufficient to demonstrate that child's physical condition was "seriously endangered"); **In Re Term. of Parent-Child Relat. of A.B.**, 888 N.E.2d 231, 239 (Ind. Ct. App. 2008) (child was originally removed from home because of suspected medical neglect, but Court reversed juvenile court's order terminating parental rights; Court opined juvenile court's determination that continuation of parent-child relationships between Mother, Father, and child posed a threat to the child's well-being was not supported by clear and convincing evidence), *trans. denied*.

Older case law on this topic includes: **Matter of C.M.**, 675 N.E.2d 1134, 1136 (Ind. Ct. App. 1997); **R.G. v. MCOFC**, 647 N.E.2d 326, 329 (Ind. Ct. App. 1995); **Matter of Jordan**, 616 N.E.2d 388, 389 (Ind. Ct. App. 1993); **Matter of Tucker**, 578 N.E.2d 774, 777 (Ind. Ct. App. 1991); **Matter of V.M.S.**, 446 N.E.2d 632, 638 (Ind. Ct. App. 1983).

II. F. 1. Religious Belief Rebuttable Presumption

In some limited situations, a child who is deprived of medical care may not be considered a CHINS if the parent's failure to provide medical care is based upon genuine religious beliefs. IC 31-34-1-14 provides that if "a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian, a rebuttable presumption arises that the child is not a child in need of services because of the failure. However, this presumption does not do any of the following:

(1) Prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana.
(2) Apply to situations in which the life or health of a child is in serious danger."

This presumption does not apply when the "life or health of a child is in serious danger". Regardless of this presumption, the juvenile court is empowered to order medical services for the child. Medical services can be ordered for a child before the filing of a CHINS petition under IC 31-32-12-1 through 4, in compliance with the protective order statutes at IC 31-32-13.

There are no reported CHINS cases dealing with the religious belief rebuttable presumption. However, other published opinions on the religion defense for denial of medical treatment include:

Schmidt v. Mutual Hosp. Services, Inc., 832 N.E.2d 977, 982-3 (Ind. Ct. App. 2005), a civil debt collection case, where the Court held that Parents' religious objections to medical treatment of their newborn child by the hospital and their attempts thereby to disclaim any obligation to pay for the child's treatment did not negate their parental obligation to provide necessary medical care for the child or their corresponding duty to pay for the hospital's services. Father explained to sheriff deputies who took Mother to the hospital, where she gave birth, that Parents trusted God rather than medicine for healing. The child was treated at the St. Francis Hospital's Neonatal Intensive Care Unit for seventy-five days after birth. The Court noted that the initial medical treatment provided to the newborn child was emergency in nature and because she was born in the hospital with potentially life-threatening ailments, the hospital had a continuing duty to treat her. The Court said that, after the initial emergency had passed, it would have been appropriate for the hospital to seek the State's intervention in

determining a further course of action for the child's care. The Court noted that the hospital continued to treat the child over Parents' objections, stopped asking Parents for consent, and simply provided treatment on its own initiative. The Court said that only the State has the authority to usurp the parents' rights in determining the child's best interest, and the Court did not condone this action by the hospital. The Court noted that a parent's decision to refuse lifesaving medical treatment for a minor child must yield to the State's interest in protecting the health and welfare of the child. The Court also noted that the State's authority to intervene is based on the CHINS neglect statute, IC 31-34-1-1, and that the rebuttable presumption that the child is not a CHINS due to the legitimate and genuine practice of the parents' religious belief did not apply "to situations in which the life or health of the child is in serious danger."

Hall v. State, 493 N.E.2d 433 (Ind. 1986), where Parents who prayed for son's recovery in lieu of obtaining medical care were convicted of reckless homicide and neglect of a dependent. The Court held that the trial court's finding that Parents acted recklessly in failing to seek medical care for sick child was sufficiently supported by evidence, but Parents were placed in double jeopardy in that pattern of neglect was means by which reckless homicide was committed.

II. F. 2. Criminal Neglect of Dependent Cases for Medical Endangerment

Criminal neglect of dependent cases which pertain to medical neglect or endangerment include the following:

Patel v. State, 60 N.E.3d 1041, 1062 (Ind. Ct. App. 2016) (Court vacated Mother's Class A felony neglect conviction for newborn's death and remanded for trial court to enter Class D felony conviction and sentence Mother accordingly; Court found there was sufficient evidence that Mother knew baby was born alive and knowingly endangered baby by failing to provide medical care);

McConniel v. State, 974 N.E.2d 543, 560-61 (Ind. Ct. App. 2012) (evidence that defendant Stepmother had been warned by family, neighbors, and healthcare workers of five-year-old stepdaughter's worsening condition, Stepmother's ongoing failure to obtain medical attention for stepdaughter, and physician's testimony that stepdaughter was severely emaciated and malnourished supported Stepmother's class A felony neglect conviction), *trans. denied*;

Lush v. State, 783 N.E.2d 1191, 1198 (Ind. Ct. App. 2003) (Father's conviction for neglect of a dependent affirmed because Father delayed for fifteen minutes in seeking medical attention for child after inflicting life-threatening injuries; child suffered subdural hematoma and permanent brain damage);

Brown v. State, 770 N.E.2d 275, 277 (Ind. 2002) (neglect of dependent conviction affirmed on evidence that Stepmother failed to get prompt medical attention for three-year-old stepdaughter who suffered a fractured skull when the child's father struck the child in the back of the head with a wooden paddle; child died due to medical neglect);

Trammell v. State, 751 N.E.2d 283, 285 (Ind. Ct. App. 2001) (neglect of dependent conviction affirmed on Mother's failure to seek recommended medical attention for five-month-old child who suffered from repeated vomiting and severe diarrhea when Mother had knowledge that the child's older sister required corrective surgery for a similar condition; child died due to medical neglect).

Older cases on this topic include: **Herron v. State**, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000); **Smith v. State**, 718 N.E.2d 794, 807 (Ind. Ct. App. 1999); **Taylor v. State**, 644 N.E. 2d 612, 614 (Ind. Ct. App. 1994); **Fout v. State**, 619 N.E.2d 311, 311 (Ind. Ct. App. 1993); **Sample v. State**, 601 N.E.2d 457, 460 (Ind. Ct. App. 1992).

II. G. Denying Treatment to Severely Disabled Newborns

Baby Doe was born in Monroe County, Indiana in 1982 with Down Syndrome and a life threatening physical condition which was correctable by surgery. The surgery was of a type generally provided to newborns without disabilities who suffer from the same correctable physical condition. The parents chose a medical treatment for the child of no nutrition and no surgical intervention. The child died six days after birth.

IC 31-34-1-9 was passed by the Indiana legislature in response to the Baby Doe case. This statute does not create a separate CHINS category, but provides that a child who fits into one of the other CHINS categories is not excluded from CHINS status and protection because of his disability. The purpose of the statute was to ensure that children are not denied life-sustaining treatment because they are born with disabilities. However, the statute does not protect all children with disabilities from denial of nutrition and life-sustaining medical treatment. The statute provides that a child who is denied treatment or nutrition is not a CHINS if such nutrition or treatment is not "generally provided" to similarly situated children. IC 31-34-1-9 states:

> A child in need of services under section 1, 2, 3, 4, 5, 6, 7, or 8 of this chapter includes a child with a disability who:
>
> (1) is deprived of nutrition that is necessary to sustain life; or
>
> (2) is deprived of medical or surgical intervention that is necessary to remedy or ameliorate a life threatening medical condition;
>
> if the nutrition or medical or surgical intervention is generally provided to similarly situated children with or without disabilities.

The phrase "child with a disability", for purposes of this statute, is defined as an individual who is less than eighteen years old and has a disability defined by IC 22-9-1-3(r). IC 31-9-2-20. IC 22-9-1-3(r) provides that disabled or disability means the physical or mental condition of a person that constitutes a substantial disability.

The focus of IC 31-34-1-9 is determining whether the treatment or nutrition is "generally provided to similarly situated children with or without disabilities." This language does not mean that there is no consideration to the child's disability, which may affect the child's life span, risk of surgical complication, and probability of surgical success to such an extent that the only "similarly situated" children are other children with the same disability. Therefore, medical treatment could theoretically be denied where it is the general practice to deny treatment to those suffering from the same extreme condition. See Kuzma, "Handicapped Infant Legislation: Response to Infant Doe," 14 Ind.L.J. 377 (1983-84) (Indiana statute allows denial of treatment to infants who suffer from hopeless conditions).

II. H. State of Mind

The CHINS neglect category requires proof that the child's endangerment was the result of the "inability," "refusal," or "neglect" of the parent, guardian, or custodian. If the CHINS petition alleges "refusal," then DCS must prove an intentional state of mind. If the petition alleges "neglect," then presumably DCS must prove a reckless state of mind, i.e. a conscious and unjustifiable disregard of harm that involves a substantial deviation from acceptable standards of conduct. However, if the petition alleges "inability," then DCS does not have to prove that the respondent had an intentional, knowing, or reckless state of mind. A child can be in need of services even if the neglect was the result of the parent's financial situation, mental illness, or other problem beyond his/her control.

See **In Re A.H.**, 58 N.E.3d 951, 956 (Ind. Ct. App. 2016) (Court found insufficient evidence to support CHINS neglect adjudication since evidence Mother was willing and able to engage with all needed services on behalf of her daughter); **K.B. v. Indiana Dept. of Child Services**, 24 N.E.3d 997, 1007 (Ind. Ct. App. 2015) (Father's lack of cooperation with DCS on an informal adjustment highlighted his inability or refusal to properly care for the children and supported CHINS neglect adjudication); **In Re A.H.**, 751 N.E.2d 690, 699 (Ind. Ct. App. 2001) (CHINS neglect adjudication affirmed on evidence that child informed Mother that Father was molesting her, but Mother did nothing to remove Father's opportunity to molest the child in the future).

II. I. Child's Condition Seriously Impaired or Endangered

The neglect category does not require proof that the child was injured. It is sufficient to prove that the child's mental or physical health is seriously endangered due to the neglect of the parent. There must be proof of a causal relationship between the parent's neglect and the endangerment or impairment of the child.

See **In Matter of D.P.**, 72 N.E.3d 976 (Ind. Ct. App. 2017) (evidence that a child is endangered is not by itself enough to warrant a CHINS determination, bringing state intrusion into the family life; on the other hand, a court need not wait until a tragedy occurs before entering a CHINS finding); **In Re T.H.**, 856 N.E.2d 1247 (Ind. Ct. App. 2006) (Father's refusal to do everything that was required of him under a voluntary service referral agreement did not establish that his children were neglected and could be found to be CHINS on that basis; the service referral agreement was not directed at substantial parental shortcomings endangering the children that needed to be addressed by services).

II. I. 1. Mental Condition

The following CHINS cases focus on the child's instability and insecurity, as well as the child's emotional, behavioral or academic problems attributable to the neglect of the parent.

In **In Re R.P.**, 949 N.E.2d 395, 401-2 (Ind. Ct. App. 2011), the Court concluded the following was sufficient evidence to support the trial court's CHINS adjudication: (1) Mother made multiple sexual molestation allegations that were not supported by the evidence; (2) Mother subjected the children to multiple sexual abuse examinations; and (3) Mother failed to enroll the children in ongoing therapy as recommended by DCS. The Court opined that a parent or guardian can endanger a child's mental condition by making multiple false sexual abuse allegations. The Court also did not agree with Mother's proposition that injury is a requirement to adjudicate the children as CHINS; a child may be a CHINS if his or her mental condition is *endangered* (emphasis in opinion).

In **In Re V.C.**, 867 N.E.2d 167, 170-78 (Ind. Ct. App. 2007) the Court affirmed the juvenile court's CHINS adjudication as to Mother and change of custody to Father on the grounds that Mother's acts or omissions were seriously endangering the child's physical and mental health. The Court noted that testimony revealed (1) Mother had engaged in a pattern of false accusations of sexual abuse against Father that was harmful to the child and had a detrimental effect upon the child's relationship with both Father and his family; and (2) Mother's acts of enrolling the child with three different sexual abuse therapists where she was constantly interrogated and educated about sexual abuse, subjecting the child to repeated invasive medical examinations that such a young child should not have to undergo, and repeatedly examining the child's genitalia on a regular basis for signs of sexual abuse, have caused psychological, emotional, and mental harm to the child.

In **Collins v. Hamilton**, 349 F.3d 371, 376 (7th Cir. 2003), parents of mentally ill Indiana children who received Medicaid filed a class action complaint based on Indiana's failure to provide long-term residential treatment in psychiatric facilities for children under the age of twenty-one. The parents sought declaratory and injunctive relief requiring Indiana to provide Medicaid coverage for psychiatric residential treatment found to be "medically necessary" as determined by the Early and Periodic Screening Diagnosis and Treatment program (EPSDT) of the Medicaid Act. The U.S. District Court granted the parents' motion for summary judgment, and the State appealed. The Seventh Circuit Court of Appeals affirmed the District Court. The Court found that a psychiatric residential treatment facility qualifies as an inpatient psychiatric hospital, and that Indiana is required to fund the cost of placement in psychiatric residential treatment facilities for eligible children through Medicaid if the placement is deemed "medically necessary" by an EPSDT screening.

In **In Re K.B.**, 793 N.E.2d 1191, 1200-1 (Ind. Ct. App. 2003), a CHINS case, the OFC attempted to dismiss its CHINS petition, and was denied. The OFC appealed the denial of its motion to dismiss, arguing, inter alia, that the juvenile court improperly based its finding that the child was a CHINS upon facts not alleged in the CHINS petition. Mother had placed the child in a residential treatment facility, and refused to accept custody of him when the facility wanted to discharge him because Medicaid ran out, and they deemed him fit to return home. The Court cited Mother's admission to the allegations of the CHINS petition, which required the juvenile court to enter judgment accordingly and schedule a dispositional hearing pursuant to IC 31-34-10-6. The Court also reviewed the juvenile court's findings, which included: (1) Mother's inability to provide appropriate care for the child in her home; (2) IC 31-34-1-16, which addresses voluntary placement of children with emotional, behavioral, or mental disorders; (3) IC 31-34-1-1 which defines a child in need of services as a child whose mental condition is seriously impaired as a result of parents' financial inability to supply the child with necessary care and supervision; (4) child's need for treatment. The Court held that the findings supported the CHINS adjudication and dispositional decree. The Court concluded that the evidence was sufficient to support the findings based on facts alleged in the CHINS petition and further supported by documentary evidence and oral representations received by the juvenile court at hearings.

See also **In Re W.B.**, 772 N.E.2d 522, 527 (Ind. Ct. App. 2002), a termination case in which the severe developmental delay of older siblings who had been found CHINS was noted in the facts of the case.

Older cases on this topic include: **Matter of Dull**, 521 N.E.2d 972, 975 (Ind. Ct. App. 1988); **In Re Wardship of M.H.**, 490 N.E.2d 1119 (Ind. Ct. App. 1985); **J.K.C. v. Fountain County Dept. of Public Welfare**, 470 N.E.2d 88 (Ind. Ct. App. 1984).

II. I. 2. Physical Condition and Endangerment

A child's physical condition can be impaired or endangered by the parent's failure to provide necessities. Indiana case law tends to assume endangerment to a child's physical condition from failure to provide necessities; i.e. a child is endangered if he does not have a safe place to live, adequate food, weather-appropriate clothing, etc. See also case law above at II.C.

In **In Re S.K.**, 57 N.E.3d 878, 882-883 (Ind. Ct. App. 2016), the Court concluded the juvenile court's determination that Parents' four children were CHINS was clearly erroneous. The children resided with Father, but he took the children to live with Mother when he was about to become homeless. A month later, Mother's drug screen was positive for methamphetamine and amphetamine, so DCS removed the children and placed them with Mother's aunt and

uncle. Mother subsequently provided drug screens to DCS that were negative for illegal drugs, and Father told the caseworker that he had a home for the children. The Court opined that the trial court's findings did not support a conclusion that the children lacked shelter, education, or supervision, noting: (1) the children and Father had stable housing for nearly four years; (2) when Father went through a period of extreme housing instability, he brought the children to Mother before they became homeless; (3) Father found stable housing without state intervention and before the factfinding hearing; (4) the fact that Parents struggled with housing did not support the juvenile court's conclusion that the children were endangered, particularly when the children had never been without shelter. The Court was not persuaded that the positive drug screens by Mother and her boyfriend when they were the sole caregivers for the children were sufficient evidence that the children were endangered. The Court noted: (1) Mother tested positive for methamphetamine and amphetamine twice, four days apart, and her subsequent weekly drug screens were negative; (2) the children told the case manager they had not seen Mother take pills, so she did not expose them to her drug use; (3) the case manager left the children with Mother on the day Mother tested positive for drugs, leading to the inference that Mother was not impaired at the time; (4) the Court previously held that the "finding of an isolated use of methamphetamine, without more, does not support the conclusion of law that [the child] was a CHINS", quoting In Re L.P., 6 N.E.2d 1019, 1021 (Ind. Ct. App. 2014). S.K. at 883. The Court opined that the juvenile court's findings did not support its conclusion that the children's emotional health was seriously endangered, noting that none of the children's counselors testified about the nature or extent of any emotional or mental issues the children had.

In **B.N. v. Marion County Dept. of Child Serv.**, 969 N.E.2d 1021, 1025-6 (Ind. Ct. App. 2012), the Court concluded that the evidence was insufficient to support the juvenile court's determination that the children were CHINS, and reversed the CHINS adjudication. The Court concluded that the CHINS determination was clearly erroneous because there was simply no evidence that the children's physical or mental condition was seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of Mother to supply the children with necessary food, clothing, shelter, medical care, education or supervision. The Court opined that DCS did not meet the burden required by IC 31-34-1-1. The Court noted that the following evidence presented at the fact-finding did not meet the burden: (1) although Mother was charged with possession of marijuana and admitted using marijuana in the past, she tested negative at each drug screening; (2) Mother presented the court with a prescription for oxycodone, which was valid at the time she was arrested; (3) Mother was not charged with any crime relating to her possession of Xanax. The Court opined that the other facts relied upon by the juvenile court also failed to establish that the children were impaired or endangered, in that with respect to Mother's participation in services, Mother volunteered to participate in services after her arrests; these were not mandatory services required by DCS.

In **In Re D.H.**, 859 N.E.2d 737, 744 (Ind. Ct. App. 2007), the Court reversed the CHINS adjudication, finding that it was based on speculation of endangerment and was clearly erroneous. The CHINS petition was based on allegations made by the half-sister; the trial court did not specifically find the half-sister's allegations to be true or not true, but found the allegations to be credible. The trial court's conclusions of law stated that if the sexual abuse allegations were true, the children would be endangered. The trial court did not find that the allegations of the CHINS petition had been proven by a preponderance of the evidence. The Court opined that, while it understood the trial court's desire to obtain what might be much needed services for the family, to permit the children to be declared CHINS based upon speculation that the children would be endangered if the allegations of sexual abuse of their half-sister were true would contravene the CHINS statutes.

The facts of **In Re W.B.**, 772 N.E.2d 522, 525-26 (Ind. Ct. App. 2002), a termination case, show that a CHINS petition was filed regarding infant twins the day after their birth due to the parents' history of neglect regarding older siblings. The twins were placed in foster care upon their release from the hospital and never resided with the parents. At the time of the infant twins' birth, their five older siblings had been adjudicated CHINS, placed in foster care for eight months, and a termination petition had been filed regarding the older siblings. A termination trial regarding the siblings was pending. At the CHINS factfinding hearing regarding the infant twins, the trial court found that the twins were "subject to high risk of abuse and neglect because of prior incidents on behalf of respondent mother. . ."

Practice Note: Practitioners should note that a report of abuse or neglect alleging endangerment may be made regarding a newborn child if the newborn child's siblings have been adjudicated CHINS and the newborn is believed to be in danger. If the DCS assessment of the newborn substantiates abuse or neglect due to endangerment, a CHINS petition may be filed for the newborn child before the newborn is released from the hospital to the parents' custody. Filing a CHINS petition depends on the specific facts of the newborn child's situation, including the child's special needs and the parents' participation in services.

II. I. 3. Failure to Thrive

Failure to thrive refers to the inadequate emotional or physical development of an infant, associated with neglect. Seaman's Medical Dictionary, 26th ed. 1995 defined "failure to thrive" as a "condition in which an infant's weight gain and growth is far below usual levels for age." Failure to thrive may have medical, physical and emotional aspects. It may be caused by the parent's intentional or unintentional failure to provide adequate nutrition for the child, or the parent's failure to nurture the child, or a combination of both. Failure to thrive does not have a specific reference in the 5th Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), but is referenced under Avoidant/Restrictive Food Intake Disorder, as is Reactive Attachment Disorder. Reactive Attachment Disorder is a separate diagnosis, which is described as "characterized by a pattern of markedly disturbed and developmentally inappropriate attachment behaviors, in which a child rarely or minimally turns preferentially to an attachment figure for comfort, support, protection, and nurturance." DSM-V, 313.89. One of the diagnostic criteria is that the child experienced a pattern of extremely insufficient care from caregivers, had the caregivers constantly replaced, interrupting their ability to form attachments, or were raised in "unusual settings that severely limit opportunities to form selective attachments (e.g., institutions with high child-to-caregiver ratios)". DSM-V, 313.89.

In **In Re K.F.**, 797 N.E.2d 310, 312 (Ind. Ct. App. 2003), an unsuccessful appeal of a permanency hearing by Parents, the CHINS petition was filed for two children, ages one year old and three months old because the three-month-old child had been diagnosed with "failure to thrive" caused by Parents' inability or refusal to provide the child with proper nutrition and a clean and healthy home environment. The child allegedly refused to consume nutrients and lost weight while in Parents' custody but was hospitalized on two occasions during which she ate and gained weight. An amended CHINS petition alleged that the one-year-old child had been diagnosed with "failure to thrive" caused by lack of nutrition.

In **M.B. v. Dept. of Public Welfare**, 570 N.E.2d 78, 79 (Ind. Ct. App. 1991), the Court noted the following about the neglect of two failure to thrive children: Mother did not feed, change, and respond appropriately to the two-month-old infant; Mother gave the doctor inaccurate information about the infant's condition; and Mother seemed "ambivalent" when the doctor

discussed parenting skills with her. The doctor testified that the infant's failure to thrive illnesses were due to parental neglect. With regard to the older child, the doctor did not find any medical reasons for the child's failure to gain weight and to develop, but instead attributed the condition to "social and nurturing problems."

III. ABUSE

III. A. Statute

IC 31-34-1-2 provides that a child is a child in need of services if before the child becomes eighteen years of age:

(1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Furthermore, IC 31-34-1-2(b) provides that "Evidence that the illegal manufacture of a drug or controlled substance is occurring on property where a child resides creates a rebuttable presumption that the child's physical or mental health is seriously endangered."

III. B. Injury by Act or Omission

The CHINS abuse category requires proof that the parent, guardian, or custodian injured the child by act or omission. The common perception of abuse is physical injury of a child (i.e. broken bones, bruising, burning, beating). However, sex crimes committed by a parent, guardian, or custodian against the child may also fit into this category or the category entitled "victim of sex offense," which is discussed in this Chapter below at IV. The abuse category includes both physical or mental acts that injure the child and result in serious endangerment to the child's mental health.

The following CHINS cases dealt with physical or mental injury caused by the act of the child's parent, guardian or custodian:

In Re D.F., 83 N.E.3d 789, 797 (Ind. Ct. App. 2017), where the Court affirmed the trial court's order adjudicating Mother's four children to be CHINS, finding there was sufficient evidence to support the CHINS adjudication. Mother physically attacked two of her daughters. Using her hands and a cell phone, Mother repeatedly struck the sixteen-year-old daughter in the face and head, causing swelling to the girl's face. Mother also attacked her fourteen-year-old daughter, who had to shield her face with her arms to protect herself from Mother's blows. Mother pulled and dragged the fourteen-year-old daughter by her hair. The DCS case manager, who met with the girls at the hospital, testified that the fourteen-year-old daughter had a scratch on her face and was missing a chunk of hair. The Court found the coercive intervention of the court was needed because Mother admitted to DCS that she had been diagnosed with bipolar disorder, schizophrenia, and post-traumatic stress disorder, but did not receive treatment, and Mother failed to acknowledge her parenting problems, claiming that the witnesses to the abuse were lying.

Indiana Department of Child Services v. J.D., 77 N.E.3d 801, 808-09 (Ind. Ct. App. 2017), *trans*. *denied*, where the Court reversed and remanded the trial court's denial of the CHINS petition for a two-month-old child. An emergency room physician, a radiologist, and a child abuse pediatrician from Riley Hospital testified about the child's injuries, which included corner fractures, posterior rib fractures, and a fractured clavicle. Physicians testified that the fractures were in different stages of healing, which indicated at least two separate incidents of trauma, the child did not suffer from any medical condition that could have explained the

injuries, Mother was unable to provide an explanation as to how the child was injured, and the injuries were non-accidental. In denying the CHINS petition from the bench, the trial court found it "frankly absurd" that the doctors could characterize the infant's injuries as non-accidental. The Court opined the trial court's statement finding the child was not a CHINS made it clear that the trial court's decision was driven by a misunderstanding and misapplication of the law. The trial court stated that whether the child's injuries were non-accidental was a question of law, but the Court opined that the manner in which the child was injured was a question of fact. The Court explained that: (1) identifying the cause of a patient's injuries is a matter squarely within the purview of medical science; (2) in many cases, doctors or other medical professionals with the appropriate training and education will be the only individuals with the expertise required to understand and explain the biomechanical forces necessary to produce certain types of injuries; (3) such testimony is of particular importance in cases such as this case, where a very young infant has numerous serious injuries for which parents have provided no plausible explanation; (4) the trial court's view overlooked the fact that doctors routinely testify concerning whether injuries are accidental and Indiana Appellate Courts routinely rely on such testimony. The Court said, "[a]lthough a fact-finder is not required to credit a particular physician's opinion as to the cause of a child's injuries, to conclude that all such testimony is improper or inherently lacking probative value would undermine numerous criminal convictions and civil judgments and leave vulnerable children at risk for further abuse by creating a virtually insurmountable evidentiary obstacle for DCS in some CHINS cases." Id. at 808.

In Re C.K., 70 N.E.3d 359, 375 (Ind. Ct. App. 2016), *trans. denied*, where the Court affirmed the juvenile court's order finding that the child, who was four months old at the time of the filing of the CHINS petition, was a CHINS due to neglect and abuse. Mother dropped the infant off at day care, where day care center staff members noticed that he was not making noises, did not move his arms or legs, was non-responsive, and his breathing sounded different. Paramedics transported the infant to the nearest hospital, where he underwent tests that showed intracranial hemorrhaging. A pediatric neurosurgeon at Riley Hospital characterized the child's subdural hematomas, which were on both sides of his brain, as "severe." Tests revealed that the infant also had hemorrhages in the retinas of his right eye. A Riley physician who is board certified in child abuse pediatrics felt the injuries "were suspicious for non-accidental trauma" but acknowledged that other possibilities included an accidental event that had not yet been disclosed or an accidental event associated with a lapse of supervision or neglect. The Court concluded the juvenile court's determination that the infant was a CHINS was supported by the evidence. The Court found the medical testimony on the severity and possible causes of the child's injuries was reflected in the juvenile court's findings, and Parents' arguments were a request to reweigh the evidence, which the Court cannot do. Id. at 374.

In Re Ju.L., 952 N.E.2d 771, 779-83 (Ind. Ct. App. 2011), where the Court opined that the trial court did not err in concluding that two boys were CHINS due to emotional abuse after DCS received at least twenty-five reports alleging physical abuse of the boys by Father. None of the investigations substantiated the allegations against Father, but two of the investigations substantiated emotional abuse by Mother. The Court noted the following evidence: (1) the boys were subjected to multiple interviews, physical examinations, and a sexual abuse exam; (2) the older boy recanted, admitted to lying, and expressed a desire to be truthful; and (3) Mother repeated abuse allegations even though the boys admitted they had lied and there was no substantiated physical evidence.

In Re M.W., 869 N.E.2d 1267, 1270-71 (Ind. Ct. App. 2007), where the Court found that DCS failed to prove its case; the record was devoid of any credible evidence that Mother had physically harmed her sons or that she abused alcohol. The Court noted that (1) Mother and the children denied that Mother abused alcohol or harmed the children and the son who had reported physical abuse testified that he had made it up; and (2) DCS's evidence consisted of the content of reports received by DCS. The Court opined that there was no competent evidence of an alcohol problem or abuse, no witnesses testified about alcohol abuse or child abuse by Mother, and it was not Mother's burden to disprove DCS's allegations.

For older cases on the topic of physical or mental injury cause by the act of the child's parent, guardian, or custodian, see: **Matter of E.M.**, 581 N.E.2d 948, 954-955 (Ind. Ct. App. 1991) (evidence was not sufficient to show that the child's Mother and her boyfriend emotionally abused the child; a child could be a CHINS under IC 31-34-1-3 if Mother failed to protect the child from abuse by another, but derogatory statements by the boyfriend to the child did not constitute emotional abuse); **Roark v. Roark**, 551 N.E.2d 865, 871-2 (Ind. Ct. App. 1990) (boyfriend physically and emotionally disciplined his own children in the past, and these abusive acts, some of which occurred several years prior to the incident with his girlfriend's children which gave rise to the CHINS petition, were not too remote in time to be inadmissible; evidence that a parent had injured any child was sufficient to meet the "injury" requirement of the abuse statute, as long as the evidence also showed that the parent had injured his own child in the past by the parent's action or inaction);

Abuse by omission is defined at IC 31-9-2-87 as, for the purposes of IC 31-34-1-2, "an occurrence in which the parent, guardian, or custodian allowed the child of the parent, guardian, or custodian to receive an injury that the parent, guardian, or custodian had a reasonable opportunity to prevent or mitigate."

The following CHINS cases dealt with physical or mental injury caused by the omission of the child's parent, guardian or custodian:

In Re C.B., 865 N.E.2d 1068, 1073 (Ind. Ct. App. 2007), *trans. denied*, where the Court found that DCS present overwhelming evidence that the child's physical well-being was seriously endangered and that he needed care and treatment he was not receiving from Mother. While it was not certain whether Mother inflicted the injuries upon the child, there was no question that the child suffered this harm while under Mother's care and custody and that, given the multiplicity of the child's injuries, the record suggested that Mother was slow to seek medical treatment for the child. An examining doctor testified that he had examined the child and found multiple abnormal and unusual physical injuries that indicated physical beatings.

In Re A.H., 751 N.E.2d 690, 698-99 (Ind. Ct. App. 2001), where the CHINS petition alleged that the child was a CHINS because she was sexually molested by Father and Mother failed to protect her from the molestation. The Court affirmed the CHINS adjudication and the trial court's finding that Mother failed to protect the child because Mother did nothing to remove Father's opportunity to molest the child. Evidence showed that Mother had been told about the molestation by the child, but she failed to believe the child.

III. B. 1. Termination Cases Based on Abuse by Act or Omission

Many termination of parental rights judgments arise from CHINS adjudications based on acts or omissions of abuse. The following termination cases originated from CHINS cases based on physical abuse by act or omission:

In re N.G., 51 N.E.3d 11671174 (Ind. 2016) (children removed because Mother, who had a history of physically abusing her oldest child, had hit him with a spiked belt and a wooden board);
In Re Q.M., 974 N.E.2d 1021, 1022 (Ind. Ct. App. 2012) (child sustained multiple injuries, including bruises on his penis, hips, and face, laceration to his chin, and damage to his small intestine as a result of "blunt force trauma" that could have been caused by "a punch or a kick");
In Re D.D., 962 N.E.2d 70, 72 (Ind. Ct. App. 2011) (child was whipped by Mother, leaving bruises; other injuries were inflicted by Mother or Maternal Aunt);
K.S. v. Marion County Dept. Child Services, 917 N.E.2d 158, 159 (Ind. Ct. App. 2009) (Mother caused various physical injuries to child, including biting the child);
In Re J.S., 906 N.E.2d 226, 237 (Ind. Ct. App. 2009) (two-month-old infant was removed from Parents because he received several serious injuries, including a skull fracture with bleeding beneath the fracture while in Parents' care);
In Re Termination of Relationship of D.D., 804 N.E.2d 258, 260 (Ind. Ct. App. 2004) (one of the children had been physically abused by Mother's boyfriend, and Mother failed to protect all of her children), *trans. denied*;
Tillotson v. Dept. of Family and Children, 777 N.E.2d 741, 742 (Ind. Ct. App. 2002) (Parents shackled their fourteen-year-old child by his ankles inside a small closet, providing him with only bread and water, and then left for work; Parents planned on continuing this punishment for two weeks);
Everhart v. Scott County Office of Family, 779 N.E.2d 1225, 1227 (Ind. Ct. App. 2002) (Father admitted to physically abusing child and child suffered permanent injuries as a result of the abuse; Father was convicted for the abuse of the child), *trans. denied*;
In Re J.W., 779 N.E.2d 954, 956 (Ind. Ct. App. 2002) (child admitted to the hospital and a drug screen revealed the presence of prescription drug in his system; the child ingested the contaminated baby food when Mother was caring for him), *trans. denied*;
In Re A.L.H., 774 N.E.2d 896, 898 (Ind. Ct. App. 2002) (after the baby was taken to the hospital for failure to thrive, hospital personnel noticed marks on the baby's body which suggested that she suffered from "shaken baby syndrome").

For older termination of parental rights cases on this topic, see **Matter of D.G.**, 702 N.E.2d 777, 781 (Ind. Ct. App. 1998); **Kern v. Wolf**, 622 N.E.2d 201, 203, 206 (Ind. Ct. App. 1993); **Matter of C.D.**, 614 N.E.2d 591, 593-595 (Ind. Ct. App. 1993); **Matter of A.M.**, 596 N.E.2d 236, 237-239 (Ind. Ct. App. 1992).

III. B. 2. Criminal Neglect, Battery, Murder Cases Based on Abuse by Act or Omission

See the following criminal cases based on child abuse by act or omission:

Perryman v. State, 80 N.E.3d 234, 250-52 (Ind. Ct. App. 2017) (while Mother was at work, Mother's Boyfriend held down her eight-year-old son, struck him repeatedly in the face with his closed fist, and son suffered "blunt force trauma"; Court found there was sufficient evidence for reasonable jury to find boyfriend guilty of Level 3 felony battery causing serious bodily injury to child younger than fourteen and Level 6 felony neglect of a dependent);
Carter v. State, 67 N.E.3d 1041, 1049 (Ind. Ct. App. 2016) (Court affirmed Father's conviction for battering his fourteen-year-old daughter by striking her at least fourteen times with a belt, which caused bruises to her buttocks, inner and outer thigh, upper arm. Forearm, and shoulder and lasting pain);
Smith v. State, 34 N.E.3d 252 (Ind. Ct. App. 2015) (Court affirmed Mother's Class A misdemeanor battery conviction for striking her daughter with two belts between ten and twenty times, causing welts and scratches to her thighs, the upper part of her back, and

her forehead and a swollen right shoulder which was painful to touch; trial court found that Mother had "lost control");
Sturgis v. State, 989 N.E. 2d 1287, 1292-93 (Ind. Ct. App. 2013) (Court affirmed Father's murder conviction in death of his ten-year-old son, which was caused by Father's extensive beatings and burnings of son), *trans. denied*
Ceasar v. State, 964 N.E.2d 911, 920 (Ind. Ct. App. 2012) (evidence that Mother beat nine-year-old child for as long as fifteen minutes, causing welts on child's back, arms, legs, and buttocks that were painful and visible the following day when child reported beating to teacher supported Mother's felony battery conviction), *trans. denied*;
Johnson v. State, 959 N.E.2d 334, 336 (Ind. Ct. App. 2011) (Court affirmed Father's conviction in death of infant who suffered fractures, lacerated spleen, liver damage, and blunt force trauma to head and face), *trans. denied*;
Hunter v. State, 950 N.E.2d 317, 321 (Ind. Ct. App. 2011) (evidence that Father beat fourteen-year-old daughter with enough force that scab on her left thigh still hurt and her middle finger was still swollen three and one-half months later supported Father's misdemeanor battery conviction);
Lay v. State, 933 N.E. 2d 38, 42-43 (Ind. Ct. App. 2010) (Court affirmed Father's conviction for neglect of dependent on evidence that deceased three-year-old child suffered extensive bruising and injuries caused by Mother; Father was nearby, heard Mother abusing the child, and took no action), *trans. denied*;
Clark v. State, 915 N.E.2d 126, 129, 133 (Ind. 2009) (Court affirmed murder conviction; two-year-old suffered at least twenty injuries, more than one of which would be lethal);
Whitlow v. State, 901 N.E.2d 659, 661 (Ind. Ct. App. 2009) (sufficient evidence that child suffered serious bodily injury by Stepmother; victim testified that Stepmother repeatedly struck her with a belt, causing severe pain and leaving marks on her body, and that she had never felt anything close to the way those bruises made her feel);
Gauvin v. State, 883 N.E.2d 99, 105 (Ind. 2008) (Sullivan, J. dissenting) (Court affirmed Stepmother's sentence of life imprisonment; she admitted to murdering her four-year-old stepdaughter; trial court did not abuse its discretion in finding torture as aggravating circumstance or in concluding that aggravating circumstances outweighed Stepmother's emotional problems and other mitigators);
Cooper v. State, 831 N.E.2d 1247, 1250 (Ind. Ct. App. 2005) (sufficient evidence supported Mother's conviction for battery; Mother swung child by arm resulting in the child's head striking a doorknob, and struck the child on his face very hard);
Wright v. State, 829 N.E.2d 928, 929 (Ind. 2005) (evidence of multiple rib fractures and malnourished children was sufficient to support convictions);
Hall v. State, 796 N.E.2d 388, 392 (Ind. Ct. App. 2003) (child died from head injuries and suffered other severe injuries while in Stepfather's care), *trans. denied*.

III. C. Prior Acts or Omissions Causing Injury

IC 31-34-12-5 provides that evidence that a prior or subsequent act or omission by a parent, guardian, or custodian injured or neglected a child is admissible in a CHINS proceeding to show: (1) intent, guilty knowledge, absence of mistake or accident, identification, existence of a common scheme or plan, or other similar purposes or (2) a likelihood that the act or omission of the parent, guardian, or custodian is responsible for the child's current injury or condition.

See **Roark v. Roark**, 551 N.E. 2d 865 (Ind. Ct. App. 1990) (evidence of injury to "any" child is admissible, including children who are not the subject of the CHINS); **Matter of J.L.V., Jr.**, 667 N.E.2d 186 (Ind. Ct. App. 1996) (evidence of Mother's prior involvement with office of family and children on four other children was admissible in CHINS case involving later born child).

See also Chapter 7 at X. for detailed discussion on admissibility of prior and subsequent acts.

III. D. Rebuttable Presumption of CHINS Based on Child's Non-Accidental Injury

A rebuttable presumption arises that a child is a CHINS if DCS presents competent evidence at the factfinding hearing that the child was non-accidentally injured while in the care or control of the parent. The rebuttable presumption enables the court to presume a causal link between the act or omission of the parent, guardian, or custodian and the child's injury.

IC 31-34-12-4 states that a rebuttable presumption is raised that a child is a CHINS because of an act or omission of the child's parent, guardian, or custodian if the State introduces competent evidence of probative value that: (1) the child has been injured: (2) at the time the child was injured, the parent, guardian or custodian had the care, custody or control of the child or had the legal responsibility for the care, custody, or control of the child; (3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian; and (4) there is a reasonable probability that the injury was not accidental.

Ind. Evid. R. 301 address presumptions and burdens of proof as follows: "In a civil case, unless a constitution, statute, judicial decision, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally. A presumption has continuing effect even though contrary evidence is received."

In **Indiana Department of Child Services v. J.D.**, 77 N.E.3d 801, 809 (Ind. Ct. App. 2017), the Court reversed and remanded the trial court's denial of the CHINS petition for a two-month-old infant who had suffered rib fractures, corner fractures, and a broken clavicle. A radiologist, an emergency room physician, and a child abuse pediatrician testified about the injuries and their opinions that the injuries were non-accidental. Parents testified that the infant had not been out of their care and had not sustained any trauma. The Court found DCS presented competent and probative evidence which was sufficient to trigger the application of IC 31-34-12-4, the Presumption Statute, and shift the burden of producing evidence to rebut the presumption to the infant's parents. The Court explained that in cases where a child has injuries that suggest neglect or abuse, the Presumption Statute shifts the burden to the party who is most likely to have knowledge of the cause of the injuries—the parent, guardian, or custodian—to produce evidence rebutting the presumption that the child is a CHINS. The Court said the importance of the Presumption State is underscored in cases such as this case, where the injured child is too young to speak for himself. The Court opined that DCS "need only produce some relevant and admissible evidence tending to establish the elements of the Presumption Statute in order to shift the burden of production to the parents or custodians." The Court found that DCS undoubtedly did so in this case. The Court observed that: (1) there was no question that the child was seriously injured and evidence established that from his birth until his removal, the child was continuously in his parents' care; and (2) three physicians concluded based on their training and experience that the child's injuries were non-accidental and indicative of child abuse.

In **In Re C.K.**, 70 N.E.3d 359, 374 (Ind. Ct. App. 2016), *trans. denied*, the Court affirmed the juvenile court's determination that the infant, who was four months old at the time the CHINS petition was filed, was a CHINS pursuant to the neglect and abuse statutes (IC 31-34-1-1 and IC 31-34-1-2). The Court concluded the juvenile court correctly applied IC 31-34-12-4, the rebuttable presumption of CHINS statute. The Court noted the juvenile court had before it sufficient evidence to establish that while he was in Mother's care, the infant suffered injuries, he was showing symptoms of a head injury upon his arrival at daycare, his injuries were of a type not ordinarily sustained except for an act or omission of a parent, and the injuries were not

accidental. The Court could not say the juvenile court erred in applying the rebuttable presumption statute or that Parents presented sufficient evidence to rebut the presumption.

In **In Re C.B.**, 865 N.E.2d 1068, 1073 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the CHINS adjudication, finding that DCS had presented overwhelming evidence that the two-year-old child's physical well-being was seriously endangered and that he needed care and treatment he was not receiving from Mother. The Court noted the physician's testimony that (1) he examined the child and found multiple physical injuries, including a broken arm, a bruised eye and face, and bruises and swelling on his chest, neck, back of his head, groin, and buttocks; (2) the bruise found on the back of the child's head was "definitely abnormal" and signified that the child "was hit with some kind of object in the back of the head"; (3) it would be unusual for a two-year-old child to suffer bruising in the middle of his chest or in his groin area; (4) the child's buttocks indicated "[r]ather vigorous spanking"; (5) "either [the child] fell 100 times in [ ] a very short period of time from great heights or he was beaten"; and (6) he had concluded that the child was beaten "probably on several occasions." Citing IC 31-34-12-4, "Presumption that child is child in need of services," the Court found that, while it was not certain whether Mother inflicted these injuries upon the child, there was no question that the child suffered this harm while under Mother's care and custody and that, given the multiplicity of the child's injuries, the record suggested that Mother was slow to seek medical treatment for the child.

In **In Re C.W.**, 723 N.E. 2d 956, 957-9, 961 (Ind. Ct. App. 2000), the Court noted in its statement of facts that the child was diagnosed with "shaken infant syndrome," and Mother admitted at the CHINS factfinding hearing that the child was a CHINS, but denied that she caused the injuries. The Court stated that "a rebuttable presumption is raised that the child is a CHINS if the state introduces evidence that the child has been injured. Ind. Code 31-34-12-4." The Court continued on to state that the child "was presumed to be a CHINS because of the injuries she incurred while in the care of Mother." Although the rebuttable presumption was not at issue in the appeal, the Court's discussion is helpful in understanding the possible use of the presumption when a parent admits the existence of the child's injury, but there is no direct evidence that the parent caused the injury.

III. E. State of Mind

The CHINS Abuse category does not specifically require proof that the parent, guardian, or custodian acted intentionally, knowingly, or recklessly in injuring the child.

Abuse by omission, however, may contain a state of mind element. The definition of omission at IC 31-9-2-87, provides that the parent, guardian or custodian "allowed" the child to receive an injury and had a "reasonable opportunity to prevent or mitigate" the injury. This language seems to require proof that the person knew of the injury, or potential for injury, and had the means to prevent or avoid further injury. However, it can be argued that the term "allows" only requires proof of a reckless state of mind. IC 35-41-2-2(c) states that a person engages in conduct "recklessly" if he acts in plain, conscious, and unjustifiable disregard of harm which might result, and the disregard involves a substantial deviation from acceptable standards of conduct.

III. F. Child's Health Seriously Endangered

The abuse category requires proof that the child was injured and that the child's mental or physical health is seriously endangered due to the injury. There must be a showing that the child is seriously endangered.

III. F. 1. Mental Health

The CHINS Abuse category does not require proof that the child received an injury to his mental health, or in other words, that he be mentally abused. Instead it requires proof that the child is injured and that the injury seriously endangers the child's mental or physical health. A number of fact situations can be envisioned in which physical injury (sexual acts, burns, beatings, etc.) seriously endangers the child's mental condition by creating an emotional disturbance or even a mental illness. See **Alexander v. La Porte Co. Welfare Dept.**, 465 N.E.2d 223, 225 (Ind. Ct. App. 1984) (Court opined that "[t]here was considerable testimony at trial that [the child] had become a severely disturbed child as a result of the abuse").

Children who have been physically abused may also have mental health issues. In **A.F. v. MCOFC**, 762 N.E.2d 1244, 1248 (Ind. Ct. App. 2002), a termination case, the facts indicate that both children had stated repeatedly that they experienced abuse in Father's home. The children were diagnosed with multiple physical and emotional problems, including oppositional-defiant disorder, post-traumatic stress disorder, a thought disorder, guarded personality, verbal and physical aggression and encopresis.

III. F. 2. Physical Health

In **In Re A.G.**, 6 N.E.3d 952, 955-56 (Ind. Ct. App. 2014), Mother appealed the trial court's CHINS adjudication of her two children. The trial court found that Mother was afflicted with Factitious Disorder by Proxy, was responsible for the two-year-old child's life threatening cyanotic episodes, and that neither child was safe in Mother's care. The Court noted the following pertinent findings by the trial court: (1) medical providers could not explain the child's cyanotic episodes unless there was external action on the child; (2) an expert examined Mother and the history of the two-year-old child's case and diagnosed Mother with Factitious Disorder by Proxy with a reasonable degree of medical certainty; (3) Mother refused to testify, which drew a negative inference that Mother was concerned about incriminating herself through her testimony; (4) while the child had frequent cyanotic episodes when with Mother, the child suffered only one of these incidents since restriction from Mother, which was explained physiologically. Mother's sole contention on appeal was that the trial court erred when it drew a negative inference from her invocation of her Fifth Amendment right not to testify. See Chapter 2 at IV.J. for discussion on the Fifth Amendment issue in this case.

See also **Roark v. Roark**, 551 N.E.2d 865, 872 (Ind. Ct. App. 1990) (children who were abused by Father in the past were currently endangered due to Father's abuse of girlfriend's child; CHINS statutes do not require that the courts and the Welfare Department wait until a tragedy occurs to intervene; a child can be a CHINS when the child is placed in danger by a parent's action or inaction. "Certainly, a child who has been injured in the past by a parent may be considered endangered when that parent's acts or omissions cause injuries as severe as those sustained in this case to another child in the parent's care"); **Alexander v. La Porte Co. Welfare Dept.**, 465 N.E.2d 223, 224-5 (Ind. Ct. App. 1984) (child removed from home because she was abused by Mother's boyfriend; expert psychologist testified that "statistically, abuse can be expected to recur in a home where conditions have not changed; that is, if the abuser still resides there and changes have not been brought about through counseling").

III. F. 3. Abusive Head Trauma

Case law, both CHINS and termination of parental rights, that deals with Abusive Head Trauma, which was formerly called Shaken Infant Syndrome, includes the following:

In Re C.K., 70 N.E.3d 359, 374 (Ind. Ct. App. 2016), a CHINS case where the infant was diagnosed and treated by three different physicians for severe subdural hematomas on both sides of his brain and hemorrhages in the retina of his right eye; infant's injuries were suspicious for non-accidental trauma).
In Re A.L.H., 774 N.E.2d 896, 898 (Ind. Ct. App. 2002), a termination case based on a CHINS proceeding filed due to child's diagnosis of severe failure to thrive and marks suggestive of shaken baby syndrome.
In Re C.W., 723 N.E.2d 857 (Ind. Ct. App. 2000), where the evidence in the CHINS case showed that the child suffered from Shaken Infant Syndrome. Although Mother admitted the child was a CHINS, she denied causing the injury.
In Re J.J., 711 N.E. 2d 872 (Ind. Ct. App. 1999), where the Court found evidence that the child had suffered from Shaken Baby Syndrome supported the termination of parental rights judgment.
Waltz v. Daviess County Dept. of Public Welfare, 579 N.E.2d 138, 139-41 (Ind. Ct. App. 1991), where the infant was removed from the home on the allegation that she was suffering from "shaken baby syndrome." The parents admitted the child was a CHINS, but neither parent took specific responsibility for the shaking in the admission nor gave explanation for the circumstances of the child's injury. Expert testimony defined shaken baby syndrome as "cerebral hemorrhage and possibly permanent atrophy of brain tissue, resulting from the violent shaking of a child younger than eighteen months." The Court declined to find that the termination could hinge on the shaken baby incident because the evidence showed the abuse occurred within a narrow time frame, was unaccompanied by other abuse by Mother, it was unclear whether Mother was the actual shaker, and the particular abuse of shaken baby syndrome could not recur because of the child's age at the time of the termination hearing. The Court found the remainder of the evidence to be insufficient to support termination of Mother's rights.

See this Chapter above at III.D. for cases on presumption of CHINS when child is injured while in the care of the parent.

Abusive Head Trauma, formerly called Shaken Infant Syndrome may also be at issue in criminal cases; for cases on this topic, see:

Russell v. State, 970 N.E.2d 156 (Ind. Ct. App. 2012) (child diagnosed with shaken baby syndrome and resulting injuries; defendant's sentence for battery was affirmed);
Kincaid v. State, 839 N.E.2d 1201, 1202 (Ind. 2005) (two-month-old child's injuries consistent with shaken baby syndrome; child blinded and profoundly disabled);
Ray v. State, 838 N.E.2d 480, 484-85 (Ind. Ct. App. 2005) (two-year-old died of shaken baby syndrome while in care of maternal uncle; child diagnosed with bilateral retinal hemorrhages and subdural hematoma), *trans. denied*;
Ault v. State, 705 N.E.2d 1078, 1080 (Ind. Ct. App. 1999) (Court affirmed the sentence of boyfriend who admitted to violently shaking the baby, who was diagnosed with shaken baby syndrome and suffered permanent brain damage)

III. G. Corporal Punishment Defense

IC 31-34-1-15(1) states that the juvenile code does not limit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when disciplining a child. Consequently, Indiana law does not prohibit the use of reasonable corporal punishment, but the term "reasonable" is a key issue.

The determination of what is reasonable or is not reasonable is addressed in Indiana case law. See immediately below for case law.

In **Carter v. State**, 67 N.E.3d 1041, 1045-8 (Ind. Ct. App. 2016), the Court held that the evidence was sufficient to overcome the parental defense and support Father's battery conviction. The Court noted that there are no brightline rules regarding what is reasonable for parental discipline of children; however, a parent has the ability to apply such reasonable force or impose reasonable confinement upon his or her child as the parent reasonably believes is necessary for the proper control, training, or education of the child. The factors to be considered include: (1) whether the actor is the parent; (2) the age, sex, and physical and mental condition of the child; (3) the nature of the child's offense and the motive; (4) the influence of the child's example upon other children of the same family or group; (5) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command; and (6) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm. This list is not exhaustive. Father argued that he tried unsuccessfully to use a progressively increasing form of punishment, and only resorted to the beating at the end. The Court noted that the trial court was charged with determining reasonableness, and in this case, determined it was not reasonable after clearly deliberating and weighing the various factors and circumstances.

In **Smith v. State**, 34 N.E.3d 252 (Ind. Ct. App. 2015), the Court determined that there was sufficient evidence to refute the defendant's claim of parental privilege in discipline the child. The Court noted the following evidence: (1) child was badly behaved thirteen-year-old who was having inappropriate conversations with boys; (2) the defendant had tried less severe methods of discipline; (3) punishment was warranted; (4) the defendant hit the child as many as twenty times, using two different belts; (5) the defendant was not calm when she disciplined the child, but rather was angry; (6) the force was unreasonable.

In **Ceaser v. State**, 964 N.E.2d 911, 920 (Ind. Ct. App. 2012), *trans. denied*, two years prior to the felony battery, Mother had been convicted of class A misdemeanor battery of the same child. In the class A misdemeanor case, the unclothed child was whipped with a belt, sustained swelling and bruising to her face and other parts of her body, and was removed from Mother's care by DCS. In the class D felony case, Mother hit the child repeatedly with a video game controller cord, resulting in welts which were shown to the child's teacher and a DCS family case manager. DCS removed the child from Mother's home. On appeal, Mother argued, inter alia, that the evidence presented at trial was insufficient to rebut her claim of parental privilege. The Court said that in order to convict a parent for battery where parental privilege is asserted, "the State must prove that either: (1) the force the parent used was unreasonable or (2) the parent's belief that such force was necessary to control the child and prevent misconduct was unreasonable." The Court affirmed Mother's felony battery conviction, stating that Mother's arguments on appeal were an invitation to reweigh the evidence, which the Court will not do. The following evidence was sufficient to support the jury's conclusion that the State disproved the parental privilege defense: (1) Mother had beaten the then seven-year-old child in 2006, the child was removed from the home after the beating, and Mother was ultimately convicted of battering the child; (2) in 2008, Mother beat the same child, then nine years old, for as long as fifteen minutes with a video game controller for failing to perform her chores and lying about homework; (3) this beating caused the child pain and left welts on her back, arms, legs, and buttocks; (4) the marks were still painful and visible the following day when the child reported the beating to her teacher.

In **Hunter v. State**, 950 N.E.2d 317, 320 (Ind. Ct. App. 2011), the Court affirmed Father's class A misdemeanor battery conviction for striking his fourteen-year-old daughter. Father likened his discipline of the child to that which the Indiana Supreme Court found to be permissible in Willis v. State, 888 N.E.2d 177 (Ind. 2008), but the Court concluded that the facts and circumstances of the Hunter case were distinguishable. The Court noted the following evidence: (1) Father

instructed his fourteen-year-old daughter to remove her clothing down to her undergarments and to come downstairs to the living room; (2) Father acknowledged that it was not normal for him and his daughter to have a conversation while she was wearing only her undergarments; (3) the daughter's stepmother and two half-brothers were home at the time, which could undoubtedly make the daughter's near-naked conversation with Father and daughter's punishment unnecessarily embarrassing and degrading; (4) Father hit his daughter with a belt approximately twenty times with enough force that a scab on her left thigh still hurt to the touch and one of her middle fingers was still swollen approximately three and one-half months later. The Court said that, despite Father's argument to the contrary, "the arguably degrading and long-lasting physical effects" of his daughter's injuries differentiated this case.

In **McReynolds v. State**, 901 N.E.2d 1149, 1154 (Ind. Ct. App. 2009)) the Court concluded, as a matter of first impression, that a caregiver such as the babysitter was not a person in loco parentis, and therefore the parental privilege defense was not available to him. The Court noted that (1) the defendant was neither a stepparent nor romantically involved with the child's mother; (2) he did not act as a father figure or have the responsibilities of a father or stepfather; (3) he did not make parenting decisions on his own or even in conjunction with the mother; (4) he acknowledged that he "didn't really ask questions" about the mother's parental decisions; (5) he drove the children to school and helped them with their homework; (6) when necessary, he asked the mother's permission to discipline the children, although he did not do so on this occasion; and (7) at all times, he was subject to the mother's direction. The Court also found that, even if the defendant were entitled to assert the parental privilege defense, it would fail because his use of force was unreasonable in that it was disproportionate to the offense, unnecessarily degrading, and could even result in permanent scarring and long-term emotional trauma.

In **Willis v. State**, 888 N.E.2d 177, 180-84 (Ind. 2008) (Sullivan, J., dissenting), the Indiana Supreme Court set aside Mother's conviction for battery on a child, holding that, considering the totality of the circumstances, the State failed to disprove beyond a reasonable doubt the Mother's defense of parental discipline privilege. The Court quoted IC 31-34-1-15(1), noting "This chapter does not … [l]imit the right of a parent, guardian or custodian of a child to use reasonable corporal punishment when disciplining the child." The Court noted that (1) a parental privilege to use moderate or reasonable physical force, without criminal liability, was recognized at common law; (2) although a number of jurisdictions have specifically codified a parental discipline privilege, Indiana has not; (3) Indiana courts have construed IC 31-41-3-1 (which provides: "A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.") as including reasonable parental discipline that would otherwise constitute battery; (4) as the Court of Appeals has observed, "there is still precious little Indiana caselaw providing guidance as to what constitutes proper and reasonable parental discipline of children and there are no bright-line rules;" and (5) since adoption of the Criminal Code, the Indiana Supreme Court has not had the occasion to address the parental discipline privilege. The Court found favorable and adopted the Restatement view: "'A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for its proper control, training, or education.' Restatement of the Law (Second) Torts, §147(1)(1965)." As to the defense of parental privilege, the Court opined that, (1) like self-defense, it is a complete defense, and, thus, a valid claim of parental privilege is a legal justification for an otherwise criminal act, IC 35-41-3-1; (2) to negate a claim of parental privilege, the State must disprove at least one element of the defense beyond a reasonable doubt; (3) thus, to sustain a conviction for battery in the face of a claim of parental privilege, the State must prove that (a) either the force the parent used was unreasonable; or (b) the parent's belief that such force was necessary to control her child and prevent misconduct was unreasonable, See Restatement, §147; (4) the State may refute a claim of the defense of parental privilege by direct

rebuttal or by relying upon the sufficiency of the evidence in its case-in-chief; and (5) the decision of whether a claim of parental privilege has been disproved is entrusted to the fact-finder.

The Willis Court evaluated the facts of this case using provisions of the Restatement. The Court observed that most parents would likely consider as serious their eleven-year-old child's behavior in being untruthful and taking property of others. In this regard, the Court quoted portions of Restatement §150 comment c indicating that the appropriate severity of the punishment would depend on the age of the child and whether the offense was serious, intentional, or resulted from "a mere error of judgment or careless inattention" as well as whether "the child has shown a tendency toward certain types of misconduct." In evaluating whether Mother employed reasonably necessary and appropriate force to compel obedience to her insistence that Son tell the truth, the Court looked to the statement of Restatement §150 comment d which provides in part that "the actor is not privileged to use a means to compel obedience if a less severe method appears to be likely to be equally effective." In this regard, the Court noted the "progressive forms of discipline" Mother had used before deciding, after considering it all weekend, that "swatting with a belt" would be more effective. In considering whether the punishment Son received was unnecessarily degrading, disproportionate to the offense, or likely to cause Son serious or permanent harm, the Court observed that Son received five to seven swats on his buttocks, arm, and thigh for what many parents might reasonably consider a serious offense, and found that (1) there was "nothing "particularly degrading about this manner of punishment;" (2) in context, it was not "readily apparent that the punishment was disproportionate to the offense;" and (3) "in essence it appears from the record that the bruises were neither serious nor permanent....[which] militates against a conclusion that the punishment was unreasonable."

In **Matthew v. State**, 892 N.E.2d 695, 699-702 (Ind. Ct. App. 2008) (Baker, C.J., dissenting) *trans. denied*, the Court affirmed Mother's conviction for battery, for her use of corporal punishment on her twelve-year-old daughter. The majority held that under the circumstances of the case, sufficient evidence existed "to support the trial court's finding that the [mother's] hitting of [the child] repeatedly with a closed fist and a belt – both in the bathroom, and then, after [the child] escaped, in the bedroom – was not reasonable."

In **Cooper v. State**, 831 N.E.2d 1247, 1251-52 (Ind. Ct. App. 2005), *trans. denied*, the defendant Mother grabbed her four-year-old child's arm and struck him in the face very hard with her open hand when the child violated her instruction to stay in the house. Mother was convicted of battery upon a child causing injury, a class D felony. On appeal, Mother argued that the jury should have been instructed that she had legal authority to discipline her child. The Court was not persuaded, stating that Mother's conduct exceeded the bounds of reasonable discipline, and whether she had legal authority to discipline her child was not at issue.

In **Johnson v. State**, 804 N.E.2d 255 (Ind. Ct. App. 2004), Mother jumped on her thirteen-year-old daughter, knocked her down, dragged her down three concrete steps and repeatedly hit her, causing a bloodied lip and a bruise on her head. Mother argued on appeal that her conviction should be reversed because she had legal authority to discipline. The Court affirmed Mother's conviction and opined that the evidence was sufficient for the trial court to find that Mother's treatment of her child was excessive and not reasonable parental discipline.

Older cases on this topic include the following: **Law v. Law**, 676 N.E.2d 771, 773 (Ind. Ct. App. 1997) (a finding of excessive corporal punishment by Father was inconsistent with awarding Father custody); **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E.2d 824 (Ind. Ct. App. 1995) (Court affirmed a termination of parental rights judgment on evidence of Father's belief that hitting and

using a belt on a child were acceptable and Father's unwillingness to consider different means of discipline); **In Re Children: T.C. and Parents: P.C.**, 630 N.E.2d 1368 (Ind. Ct. App. 1994) (Court found that the welfare department's overt goal of requiring Mother to renounce corporal punishment, due to one past incident of unreasonably harsh corporal punishment, was not required of a parent. The Court ruled that only "unreasonable corporal punishment is proscribed by statute"); **Roark v. Roark**, 551 N.E.2d 865 (Ind. Ct. App. 1990) (Court rejected argument that Father's use of a belt on his children was protected by the corporal punishment defense; "use of a belt on any child under the age of ten is an unreasonable form of corporal punishment").

IV. SEXUAL ABUSE AND HUMAN AND SEXUAL TRAFFICKING

IV. A. Overview

IC 31-34-1-3, 3.5, 4, and 5 are the CHINS Sex Abuse categories based on sex and human trafficking crimes that involve children. In determining the specific sex offense and CHINS category applicable to a child, it may be helpful to distinguish the sex offenses upon these factors: (1) age requirement of the child; (2) age requirement of alleged perpetrator; (3) relationship requirement between child and perpetrator (biological parent, legal or adoptive parent, stepparent, custodian, professional relationship with child, or none); and (4) type of sexual act or conduct prohibited.

The CHINS Sex Abuse categories are grouped together in this section because they all involve forms of child sexual abuse, and this section includes generic information about child sexual abuse. The CHINS Sex Abuse categories are also dealt with separately in this Chapter at IV.B. (Victim of Sex Offense), IV.C. (Parental Allowance of Child's Participation in Obscene Performance), and IV.D. (Parental Allowance of Child's Commission of Sex Offense). IC 31-34-1-3.5, Victim of Human or Sexual Trafficking, a CHINS category which may involve sexual abuse, forced labor, or marriage, is discussed in this Chapter at IV.E.

A variety of different legal actions can be used to address child sexual abuse in addition to the CHINS Sex Abuse categories. A parent or juvenile sexual abuser could be charged with a sex crime or a comparable delinquency action. A parent could also be charged with criminal neglect of a dependent (IC 35-46-1-4) or failure to report child abuse (IC 31-33-22-1) when the parent fails to protect the child from sexual abuse by another. There is no legal impediment to pursuing both criminal and CHINS actions involving the same act of child sexual abuse.

IV. A. 1. Pleading Multiple CHINS Categories in CHINS Sex Abuse Cases

It may be advisable for DCS to plead multiple CHINS categories when dealing with child sexual abuse. In addition to pleading one of the CHINS Sex Abuse categories, the CHINS Abuse category at IC 31-34-1-2 may be applicable to child sexual abuse, since sexual abuse may constitute an injury by act or omission which seriously endangers the physical and mental health of a child. The rebuttable presumption of CHINS at IC 31-34-12-4 (child presumed to be in need of services if non-accidentally injured while in the care or custody of his parent, guardian or custodian) may be helpful in proving a CHINS case when the identity of the sexual perpetrator is unknown or uncertain. This may apply particularly if the victim is too young to indicate the perpetrator's identity, but has injuries to the sexual organs or a disease that is transmitted only through sexual activity. See **In Re C.K.**, 70 N.E.3d 359, 374 (Ind. Ct. App. 2016) (Court concluded juvenile court correctly applied IC 31-34-12-4, the rebuttable presumption of CHINS statute, and found DCS presented competent and probative evidence which was sufficient to support the CHINS adjudication), *trans. denied*; and **Indiana Department of Child Services v. J.D.**, 77 N.E.3d 801, 809 (Ind. Ct. App. 2017) (Court reversed trial court's denial of CHINS petition, finding DCS presented competent and

probative evidence which was sufficient to trigger application of IC 31-34-12-4; Court also noted importance of statute where the injured child is too young to speak for himself). The CHINS Neglect category at IC 31-34-1-1 is also an appropriate pleading in the situation where a parent, guardian, or custodian allows or does not protect a child from sexual abuse. Child Self-Endangerment at IC 31-34-1-6 could also apply, if a child is endangered by sexual activity but the identity of the perpetrator cannot be proven.

The need for pleading multiple CHINS categories was discussed in **Maybaum v. Office of Family & Children**, 723 N.E. 2d 951 (Ind. Ct. App. 2000). The office of family and children alleged in the CHINS petition that the child was a victim of sexual molestation by adoptive Father (Father) under the CHINS Sex Abuse category at IC 31-34-1-3. At the factfinding hearing, the office of family and children caseworker testified to medical examination results that showed "clear evidence of penetrating injury" to the child, but the results did not identify a perpetrator. The child's testimony was equivocal as to whether Father was the molester. The trial court entered findings of fact and conclusions of law that the child was the victim of molestation and that there were incidents of sexual activity and abuse over the past six years, including masturbation, sexual exploration, and contact with siblings. Although the trial court concluded there was insufficient evidence to find that Father molested the child as alleged by the office of family and children, the trial court concluded that the child fit within the CHINS Abuse category, IC 31-34-1-2, because Father had a legal responsibility to care for the child, and by either Father's act or omission he failed to protect the child from injury. In reversing the CHINS judgment, the Court concluded that the office of family and children did not give the parents notice that they were required to defend against a claim that they had failed to protect the child. Id. at 955. The Court stated that "to permit the trial court to base its decision upon a theory not set forth by the OFC would contravene the purpose of the CHINS statutes, which specifically require the OFC to provide a citation to the precise section of the CHINS statute and the specific facts underlying the allegation." Id. at 956. But see **In Re M.O.**, 72 N.E.3d 527, 532 (Ind. Ct. App. 2017) (finding that the issue of whether the child was a CHINS pursuant to IC 31-34-1-6 was tried by consent under T.R. 15(B), Court held that juvenile court did not err in adjudicating child to be a CHINS on different grounds from those set forth in the CHINS petition); and **In Re V.C.**, 867 N.E.2d 167, 179 (Ind. Ct. App. 2007) (juvenile court did not err in adjudicating child as a CHINS on different grounds from those set forth in CHINS petition).

In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), a CHINS case, the OFC alleged in the CHINS petition that the child was a CHINS because she was sexually molested by Father and Mother did not believe the child was truthful. Id. at 694. The OFC pled three different statutory categories of CHINS: neglect (IC 31-34-1-1), abuse by act or omission (IC 31-34-1-2), and victim of sex offense of criminal misconduct with a minor (IC 31-34-1-3).

IV. A. 2. Must DCS Prove all Elements of the Criminal Charge?

Each CHINS Sex Abuse category is based on the commission of a particular sexual crime. There has been disagreement on whether all of the elements of the alleged criminal sex offense must be proven in the CHINS litigation. There are two different positions on this issue. The first position contends that the child cannot be a victim unless there is a crime, and there is no crime without proof of all of the elements of the crime, including the identity of the perpetrator. The second position contends that the "victim of sex offense" category only requires proof that the child is a victim, and that victimization can be proven without proving who committed the crime or that the perpetrator had the requisite criminal intent. The authors believe the second position is more congruent with the purpose of CHINS proceedings because the child may be unable or unwilling to identify the perpetrator but may still need the

assistance and protection provided by the CHINS process. See IC 31-10-2-1(5), which states that it is the policy of this state and the purpose of this title to ensure that children in the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation. There is no CHINS case law addressing whether proof of criminal intent is necessary to show that the child is a victim of a sex offense for purposes of the CHINS law.

In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), the Court rejected Father's allegation that the evidence was insufficient because the "juvenile court did not explicitly find that Father molested [A.H.]". The Court found that the evidence was sufficient because the juvenile court made a finding that the child was a "victim of the offense of Sexual Misconduct with a Minor as defined in IC 35-42-4-9" and Father was the person alleged to have molested the child. Id. at 695.

IV. A. 3. Sufficiency of the Evidence of Sexual Abuse

The uncorroborated testimony of a child victim is sufficient to support a criminal sex abuse conviction. See **Amphonephong v. State**, 32 N.E.3d 825, 832 (Ind. Ct. App. 2015) and **Hoglund v. State**, 962 N.E.2d 1230, 1238 (Ind. 2012). The child victim's uncorroborated testimony would also support a CHINS Victim of Child Sexual Abuse adjudication, since the burden of proof in CHINS cases is the "preponderance of the evidence" instead of the criminal "beyond a reasonable doubt" burden.

In **Slater v. Dept. of Child Services**, 865 N.E.2d 1043 (Ind. Ct. App. 2007), a CHINS case, Parents had two children, who were twelve years old and two years old at the time of the CHINS proceeding. Parents' twelve-year-old daughter reported to DCS that Father had "French-kiss[ed]" her and rubbed her breast and buttock areas over and under her clothing. Mother stated that she was unaware of any abuse, was unsure whom to believe regarding the older child's allegations, and was unsure what she would do if the older child's reports were true. DCS filed a CHINS petition alleging that both the older child and the younger child (about whom no allegations of sexual abuse had been made), were CHINS pursuant to IC 31-34-1-1(neglect) and IC 31-34-1-3 (victim of a sex offense or living in same household as a child who is a victim of a sex offense). At the conclusion of the factfinding, the trial court found both children to be CHINS.

On appeal, Father argued that the evidence was insufficient to support the CHINS adjudication of the younger child because: (1) Father had not been convicted of any sex offenses listed in IC 31-34-1-3; (2) the trial court had adjudicated both children to be CHINS in the same proceeding, but the younger child could not be found to be a CHINS until after the older child was adjudicated a CHINS; and (3) OFC failed to show the caseworker placed the younger child in an informal adjustment and subsequently decided further intervention was necessary or the caseworker determined an informal adjustment was not appropriate, as required by IC 31-34-1-3(b)(4) [recodified at IC 31-34-1-3(c)].The Court opined that whether IC 31-34-1-3(b)(2) requires a child sex abuse victim to be adjudicated to be a CHINS before the victim's sibling can be adjudicated to be a CHINS was a matter of first impression, requiring the Court to construe the statute. Id. at 1047. The Court found that: (1) IC 31-34-1-3(b)(2) contains no terms dictating the timing of the CHINS determination of the sex offense victim and the victim's sibling; (2) the statute merely requires the entry of a judgement determining the sibling to be a CHINS after a factfinding; (3) Father's construction of IC 31-34-1-3(b)(2) would leave the sibling of a sex abuse victim unprotected while the trial court determined the CHINS status of that victim; (4) Father's interpretation ran afoul of the CHINS statutes, which include "ensur[ing] that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation", quoting IC 31-

10-2-1(5). Id. at 1047-48. The Court concluded that the trial court must necessarily determine the victim to be a CHINS before it may adjudicate the sibling to be a CHINS, but the statute does not require separate proceedings. Id. at 1048. The Court explained that "[t]he statute is satisfied when the sex offense victim and the sibling are adjudicated CHINS in the same dispositional order." Id. The Court also disagreed with Father's argument that the trial court should not have adjudicated the younger child to be a CHINS because OFC did not show that the caseworker placed the younger child into a period of informal adjustment and later decided that further intervention was necessary, or, alternatively, the caseworker determined a period of informal adjustment was not appropriate. Id. In support of its holding, the Court noted the CHINS petition allegations that "[c]oncerns for the safety of the children precluded offering services to prevent removal". Id. The Court opined that OFC made the necessary showing under IC 31-34-1-3(b)(4) by requesting emergency custody of the children, which showed that a program of informal adjustment was not appropriate. Id. The Court held the trial court did not err when it determined the younger child to be a CHINS. Id.

In **In Re D.H.**, 859 N.E.2d 737 (Ind. Ct. App. 2007), the CHINS adjudication was based on the seventeen-year-old half-sister's allegations of past sexual abuse by Father who lived in the home with Mother and the younger children and allegations of neglect by Mother in failing to protect the children. The Court reversed the trial court's judgment, finding it to be based on speculation of endangerment and clearly erroneous. Id. at 744. The Court found that the Rape Shield Statute does not apply in CHINS proceedings and the trial court had abused its discretion by excluding evidence of the half-sister's miscarriage and sexual history based upon the Rape Shield Statute. Id. at 741. The Court concluded that any error in the exclusion of evidence based on the Rape Shield Statute was harmless because the excluded testimony was cumulative of other admitted evidence. Id.

In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684 (Ind. Ct. App. 2006), a CHINS petition was filed due to the allegations by an eight-year-old child that he had been molested by Father. The child made inconsistent statements to Father's former live-in girlfriend, the child's therapist, the CPS investigator, and the forensic interviewer. The trial court granted the CHINS petition, but the Court reversed and remanded the CHINS adjudication due to errors in the trial court's use of the child hearsay procedure at IC 31-34-13-1 through 4. Id. at 689. See Chapter 7 at IX.D.2. and 4 for further discussion of the child hearsay procedure issues in this case.

In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), a CHINS case, the child had a medical condition called myoclonus which caused rhythmic contractions in her abdominal region and for which medications that had side effects of confusion, sleepiness, amnesia, intoxication, and sedation were prescribed. Parents were instructed by the child's doctor to place a hand on the child's naval after she had gone to sleep at night to determine whether the contractions were occurring. This testing was Father's responsibility while Mother worked third shift. The child told a friend, a Bartholomew County OFC case manager, and an Indiana State Police detective that, when checking her abdomen, Father had repeatedly inserted his finger into her vagina. The child also said that Father had felt her breasts and inserted his finger in her vagina when the child sleepwalked into Father's bedroom and crawled into his bed. The case manager and detective testified at the fact finding. The juvenile court concluded that the child was a CHINS under the three CHINS categories of neglect, abuse, and victim of a sex offense.

On appeal the Court found the record indicated that four people, including the case manager and detective, testified that the child told them Father had come into her bedroom and

touched her inappropriately on a number of occasions. Id. at 698. The Court opined that this evidence was sufficient for the juvenile court to find by a preponderance of evidence that Father abused the child by committing sexual misconduct with a minor. Id. The Court rejected Father's allegation that the evidence was insufficient because the juvenile court did not explicitly find that Father molested the child. Because the juvenile court made a finding that the child was a "victim of the offense of Sexual Misconduct with a Minor as defined in IC 35-42-4-9" and Father was the person alleged to have molested the child, the Court rejected Father's argument that the evidence was insufficient. Id. at 695. The Court also held that the findings of the trial court were not erroneous despite expert testimony of a psychiatrist and a pharmacist that the medications that the child was taking could have side effects including confusion, sleepiness, amnesia, intoxication, and sedation. Id. at 697. The Court noted that other testimony showed the child was oriented to person, time and place, and also noted that the trier of fact is "permitted to give more weight to lay testimony than to expert testimony." Id. at 698. The Court also affirmed the CHINS judgment that Mother failed to protect the child, which was based on testimony from the child's friend, the case manager, and the detective. Id. at 699. These three witnesses testified that the child told them that she had told Mother of the molestation and that Mother did not believe her. Id. The Court rejected Mother's claim that she did do something to protect the child by questioning Father about the child's allegations and arranging for the child to receive counseling. Id. The Court opined that Mother's actions did not remove Father's opportunity to molest the child in the future. Id.

In **Hallberg v. Hendricks Cty. Office**, 662 N.E.2d 639 (Ind. Ct. App. 1996), the office of family and children alleged that Father was sexually abusing the children, and Mother was unable to prevent the abuse because it occurred during Father's visitations which were ordered by the divorce court. The Court considered the case under the CHINS Abuse and CHINS Sex Abuse categories and affirmed the CHINS adjudication. Id. at 647. The trial court determined that the children were sexually abused by Father, and that Mother was unable to supervise them to prevent the abuse as long as the court ordered visitations were occurring. On the issue of whether the sexual abuse occurred, the Court found the following evidence sufficient: testimony of the physician that "nothing led him to believe that the allegations of sexual abuse were untrue"; testimony of the child victim that Father touched her "privates"; and testimony of the caseworker that the child told her that Father touched and kissed her "private" parts. Id. The Court noted the trial court's finding that the child had been sexually abused by Father also supported a finding on the required element that the children were in need of care and treatment that would not otherwise be provided. Id. at 647 n.10.

IV. A. 4. Sexual Activity Between Children

Sexual activity between children can be dealt with in a variety of ways, depending upon whether it is characterized as normal or inappropriate experimentation or as something more serious. The CHINS Neglect category may apply under the theory that the parent's supervision in allowing this activity is neglectful. The CHINS Self Endangerment category may apply if the child's sexual behavior towards himself or other children is mentally or physically harmful. The CHINS Sexual Abuse categories could apply if the acts and the ages of the children involved fit within one of the sex crimes identified in the category.

Children were found to be juvenile delinquents due to their sexual abuse of other children in the following cases. See **C.S. v. State**, 71 N.E.3d 848, 855 (Ind. Ct. App. 2017) (Court affirmed ten-year-old boy's delinquency adjudication for molesting three-year-old daughter of his mother's boyfriend; victim testified at the age of five years and Court found victim's statements were not incredibly dubious); **J.L. v. State**, 5 N.E.3d 431, 444 (Ind. Ct. App.

2014) (Court affirmed twelve-year-old juvenile's delinquency adjudication for touching his six-year-old cousin's penis, an act that would be class C felony child molesting if committed by an adult); **State v. I.T.**, 4 N.E.3d 1139, 1147 (Ind. 2014) (Court construed juvenile mental health statute to provide both use and derivative use immunity in delinquency case where juvenile admitted to molesting additional child victims during his treatment for prior delinquency adjudication); **T.G. v. State**, 3 N.E.3d 19, 27 (Ind. Ct. App. 2014) (Court affirmed eleven-year-old juvenile's delinquency adjudication for rubbing six-year-old child's vagina and repeatedly urging her to touch his penis, an act that would constitute class C felony child molesting if committed by an adult); **A.R.M. v. State**, 968 N.E.2d 820, 826 (Ind. Ct. App. 2012) (Court affirmed thirteen-year-old juvenile's delinquency adjudication for sexual act involving seven-year-old victim that would be class C child molesting if committed by an adult); **D.A. v. State**, 967 N.E.2d 59, 63-64 (Ind. Ct. App. 2012) (Court discussed but did not have jurisdiction to resolve trial court's decision to accept conditional plea agreement in delinquency child molesting charge against thirteen-year-old juvenile who had touched vagina of three-year-old); **T.W. v. State**, 953 N.E.2d 1120 (Ind. Ct. App. 2011) (Court affirmed trial court's order requiring registration as sex offender for ten years; seventeen-year-old juvenile had molested two girls who were under the age of ten); **D.B. v. State**, 842 N.E.2d 399, 401 (Ind. Ct. App. 2006) (Court affirmed adjudication of a fifteen-year-old juvenile who raped his twelve-year-old niece); **D.G.B. v. State**, 833 N.E.2d 519, 522 (Ind. Ct. App. 2005) (child molesting and intimidation adjudications affirmed on evidence falling within the "excited utterance" exception to the hearsay rule that fifteen-year-old molested a six-year-old female's genitalia with a fork and knife to the extent that surgery was required); **M.T. v. State**, 787 N.E.2d 509, 511 (Ind. Ct. App. 2003) (child molesting adjudication of a juvenile who molested his cousin's four-year-old daughter affirmed); **J.J.M. v. State**, 779 N.E.2d 602, 604 (Ind. Ct. App. 2002) (sexual battery adjudication affirmed against high school student who walked up behind a classmate, put his leg around her shoulder and grabbed her head, pulling it towards his crotch).

But see **C.D.H. v. State**, 860 N.E.2d 608, 612-13 (Ind. Ct. App. 2007) (child molestation adjudication of ten-year-old juvenile reversed because offender must be proven to be older than victim; delinquency proceedings could be brought for sexual battery, rape, or criminal deviate conduct because these statutes do not mention age of perpetrator or victim), *trans. denied*.

IV. A. 5. Using Criminal Conviction in CHINS Sexual Abuse Case

In cases of child sexual abuse, it is common to have both CHINS and criminal proceedings filed regarding the same acts of sexual abuse. A child could also be adjudicated to be a CHINS because a parent, guardian, or custodian allowed contact with a person who was previously convicted of a sex offense, or a sibling victim lives in the same household as the child, if all other requirements are met. IC 31-34-1-3(b) and (c).

Records of felony convictions may be admitted into evidence in CHINS case if the requirements of IC 34-39-3-1 are met. IC 34-39-3-1(a) provides that evidence of a final judgment that: (1) is entered after a trial or upon a plea of guilty; and (2) adjudicates a person guilty of a crime punishable by death or imprisonment of more than one year; shall be admissible in a civil action to prove any fact essential to sustaining the judgment, and is not excluded from admission as hearsay regardless of whether the declarant is available as a witness. IC 34-39-3-1(b) provides that the pendency of an appeal may be shown but does not affect the admissibility of evidence under this section. See **Kimberlin v. DeLong**, 637 N.E.2d 121 (Ind. 1994) (criminal felony judgment is admissible in civil trial and can serve as basis for offensive use of collateral estoppel to bar defendant from denying liability, but may

not necessarily serve as conclusive proof in civil trial of factual issue determined by criminal judgment); **Meridian Ins. Co. v. Zepeda**, 734 N.E.2d 1126 (Ind. Ct. App. 2000) (trial court erred when it failed to grant insurance company's summary judgment motion against convicted battery defendant and allowed defendant to relitigate issue of his intent in declaratory judgment action); and **Doe v. Tobias**, 715 N.E.2d 829 (Ind. 1999) (abuse of discretion to deny collateral estoppel effect to rapist's conviction). See also Ind. Evidence Rule 803(22) (hearsay exception for felony judgment).

See Chapter 7 at VIII.D.6. for discussion of admitting public records of criminal convictions into evidence pursuant to Ind. Evidence Rules 201(b) (judicial notice of records of other courts) and 803(8) (public records) and related case law. See also Chapter 11 at VI.E. for additional information.

IV. A. 6. Rights of Alleged Sex Offenders

If the alleged sex offender in the CHINS case is the child's parent, guardian, or custodian, then the offender is entitled to: (1) receive notice of the proceedings (IC 31-34-10-2); (2) deny the CHINS petition (IC 31-34-10-6); and (3) subpoena witnesses and tangible evidence, cross-examine witnesses, and present evidence in his/her own behalf at the factfinding hearing (IC 31-32-2-3(b)). The juvenile code does not give the alleged offender the constitutional or statutory protections reserved for persons charged with crimes, since CHINS proceedings are civil proceedings, not criminal proceedings. The civil rules of procedure apply in CHINS cases. IC 31-32-1-3. Alleged offenders who are the child's parent, guardian or custodian may request court appointed counsel if they are indigent. See **In Re G.P.**, 4 N.E.3d 1158, 1163 (Ind. 2014) (Court opined that trial court must appoint counsel for parents in CHINS cases if a parent requests the appointment of counsel and is found to be indigent). The CHINS standard of proof is preponderance of the evidence. IC 31-34-12-3.

The juvenile code does not specifically provide any rights, or grant party status, to alleged offenders who are not the child's parent, guardian, or custodian. In fact, IC 31-34-10-6 and IC 31-34-10-7 provide that if a CHINS petition is filed under IC 31-34-1-6 or IC 31-34-1-3.5, the juvenile court does not determine if the parent, guardian, or custodian admits or denies the allegations of the petition, but instead must ascertain if the child admits or denies the allegations. A failure to respond constitutes a denial. This could eliminate the ability of an alleged offender himself or herself in the juvenile court CHINS case. A stepparent, a live-in boyfriend or girlfriend, or a live-in relative who is the alleged offender may qualify as a custodian for purposes of obtaining party status and contesting the CHINS allegations. The term "custodian" is defined very broadly in the juvenile code at IC 31-9-2-30(a) as "a person with whom a child resides."

Case law indicates that a person who has been charged with a child sex offense in both a juvenile CHINS proceeding and a criminal proceeding may have constitutional protection regarding the admissibility of evidence in the CHINS proceeding into the criminal proceeding. See Chapter 4 at IV.D.2.

IV. A. 7. Reasonable Efforts Toward Reunification Not Required for Parent Convicted of Specified Sex Offenses

IC 31-34-21-5.6 provides that a court can enter a finding that reasonable efforts toward parent-child reunification are not required when the parent has been convicted of rape, criminal deviate conduct, child molesting, child exploitation, sexual misconduct with a minor, or incest, and the victim was less than sixteen years of age, and was the parent's biological child, adopted child, or step child. The full listing of applicable sex crimes are offenses

described in IC 31-35-3-4(1)(B) or IC 31-35-3-4(1)(D) through IC 31-35-3-4(1)(J). There are other criminal convictions for which reasonable efforts are not required. When the trial court makes a ruling under this provision, expedited permanency proceedings are required. See Chapter 4 at VI.C. for further discussion on the reasonable efforts exception and Appendix 2.

IV. A. 8. Termination Cases Involving Sexual Abuse

Sexual abuse is often a factor in termination of the parent-child relationship cases. When a parent has been convicted of molesting his or her biological child, adopted child, or stepchild, that conviction is prima facie evidence in an involuntary termination of parental rights case under IC 31-35-3 that the conditions that resulted in the removal of the child from the parent will not be remedied or that continuation of the parent-child relationship poses a threat to the well-being of the child. See **In Re E.P.**, 20 N.E.3d 915 (Ind. Ct. App. 2014) and **Ramsey v. Madison County Dept. of Family**, 707 N.E. 2d 814 (Ind. Ct. App. 1999).

The following termination cases originated from CHINS cases based on allegations of sexual abuse: **In Re S.L.H.S.**, 885 N.E.2d 603, 617-18 (Ind. Ct. App. 2008) (Court affirmed termination of Father's parental rights, noting his history of substantiated sexual molestation of a former stepdaughter and his niece as well as his failure to complete court-ordered counseling and specific treatment for sex offenders); **In Re A.J.**, 877 N.E.2d 805, 816 (Ind. Ct. App. 2007) (CHINS petition alleged several concerns, including that children had been molested by Father), *trans. denied*; **J.M. v. Marion County OFC**, 802 N.E.2d 40, 42 (Ind. Ct. App. 2004) (Mother of four children was aware that her ten-year-old daughter was being molested by the daughter's older brother, and Mother did nothing to prevent any further molestations of the daughter or to protect the two younger children), *trans. denied*; **Adams v. Office of Fam. & Children**, 659 N.E.2d 202, 206 (Ind. Ct. App. 1995) (evidence of Father's sexual abuse and Parents' failure to complete sexual abuse treatment was sufficient to support termination); **Matter of Relationship of M.B.**, 638 N.E.2d 804, 807 (Ind. Ct. App. 1994) (termination affirmed on evidence of abnormal sexual behavior of children indicating they had been subjected to, or exposed to, inappropriate sexual activity); **Matter of Y.D.R.**, 567 N.E.2d 872, 877 (Ind. Ct. App. 1991) (the court rightfully considered evidence that Mother cohabited with a boyfriend suspected of being a child molester because Mother took no actions to alleviate welfare department's concerns that he was a danger to the children and boyfriend refused suggested counseling).

IV. A. 9. Possible Criminal Charges in Child Sexual Abuse

A parent, guardian or custodian could be charged with a specific sexual crime (such as child molesting, incest, etc) for acts perpetrated upon the child. When parents have failed to protect their children from sexual abuse they may be charged with criminal neglect of dependent or failure to report child abuse. In **Muehe v. State**, 646 N.E.2d 980 (Ind. Ct. App. 1995), Mother was convicted of neglect of dependent for failing to take steps to prevent Father's continued sexual abuse of their fourteen-year-old daughter. The Court affirmed the conviction upon Mother's incriminating statement and the following evidence: Mother knew that Father had previously been convicted of fondling the daughter; Father discussed his sexual feelings for the daughter with Mother; the family had ceased professional counseling; Mother's proximity to the sexual events in a small house should have put her on notice; and the daughter had developed behavioral problems. Id. at 983. The Court inferred from the above circumstances that Mother had knowledge of the abuse, stating that the "nature of the peril" to which the daughter had been exposed was such that Mother should have been aware of Father's sexual conduct. Id. The Court found that Mother had an obligation as a parent to remove the daughter from the situation and to prevent Father from spending time alone with the daughter, or at the very least, to report her suspicions to the proper authorities. Id. Mother

argued that she had no legal right to prevent Father's access to the daughter or to place restrictions on the father-child relationship, and that she was powerless to prevent the continuing abuse. The Court rejected Mother's argument, noting the alternatives available to Mother to protect the child. Id. The Court explained that if the family was "not intact", Mother could protect the daughter by legally challenging court approved visitation or seeking an emergency injunction or restraining order to stop visitation. Id. Affirming Mother's conviction, the Court stated:

> A parent's failure to take appropriate steps to protect his or her child from the abuse of the other parent is tantamount to neglect of that child, not to mention moral complicity with the base crime being perpetrated upon the child by the other parent. In a situation where it is the other parent perpetuating the abuse upon the child, the non-abusing parent is under an even greater duty to take steps necessary to prevent the abuse. First, the parent has a higher probability of knowing about the abuse because she lives with both the victim and the abuser. Second, the relationship of the child-victim to the parent-abuser presents additional problems that do not arise when the abuser is a stranger.

Id. at 983-84.

Criminal cases in which convictions of parent or custodian sexual abuse perpetrators were affirmed include the following: **Ferguson v. State**, 40 N.E.3d 954, 958 (Ind. Ct. App. 2015) (Court affirmed conviction of Mother's live-in boyfriend for committing oral sex acts on Mother's six-year-old daughter, who testified at trial); **Remy v. State**, 17 N.E.3d 396, 401 (Ind. Ct. App. 2014) (Court affirmed conviction of Mother's boyfriend for molesting eleven-year-old child based on child's testimony about the sexual acts despite the trial court's harmless admission of pornographic images into evidence), *trans. denied*; **Robey v. State**, 7 N.E.3d 371, 379-81 (Ind. Ct. App. 2014) (Court affirmed Father's felony convictions for molesting his daughter, who was age six or seven at the time of the crimes; Father failed to establish that DCS case manager's and counselor's testimony included impermissible vouching); **Deaton v. State**, 999 N.E.2d 452, 457 (Ind. Ct. App. 2013) (Daughter's statement that Father had forced her to perform oral sex on multiple occasions was sufficient evidence to support conviction for child molesting; child molesting conviction may be based on victim's uncorroborated testimony), *trans. denied*; **Hoglund v. State**, 962 N.E.2d 1230, 1240 (Ind. 2012) (Court affirmed class A felony child molesting charge against Father who began molesting daughter when she was four years old; conviction was supported by substantive independent evidence and admission of vouching testimony did not constitute fundamental error and was only cumulative); **Young v. State**, 973 N.E.2d 1225, 1227 (Ind. Ct. App. 2012) (Court affirmed Father's conviction for sexually molesting daughter despite Father's claim that daughter's testimony on intercourse and digital penetration seemed confused and inconsistent), *trans. denied*; **Levya v. State**, 971 N.E.2d 699, 700-01 (Ind. Ct. App. 2012) (Court affirmed Father's conviction for sexually molesting eleven-year-old daughter by digital penetration; testimony of forensic interviewer, daughter, and sexual assault nurse examiner was also admitted into evidence), *trans. denied*; **Mastin v. State**, 966 N.E.2d 197, 202 (Ind. Ct. App. 2012) (Court affirmed Father's conviction for molesting five-year-old daughter on evidence of Father's admission and sexual assault nurse examiner who found scars on daughter's genitals from herpes lesions, scarring on labia majora, and bilateral redness of labia minora), *trans. denied*; **Harris v. State**, 964 N.E.2d 920, 926 (Ind. Ct. App. 2012) (Court affirmed child molesting conviction of Mother's boyfriend; child testified by closed circuit television but could see boyfriend and jury and boyfriend could see her; lengthy cross-examination of child was conducted by boyfriend), *trans. denied*; **Schlatter v. State**, 891 N.E.2d 1139, 1143 (Ind. Ct. App. 2008) (in a postconviction proceeding, Court held that defense of automatism (existence in any person of behavior of which he is unaware and over

which he has no conscious control) was not available to Father who had pleaded guilty to Class B felony sexual misconduct with his minor daughter; because Father acted voluntarily in becoming intoxicated, he could not claim that his actions which resulted from his intoxication were involuntary); **Surber v. State**, 884 N.E.2d 856, 862-63 (Ind. Ct. App. 2008) (Father's conviction for child molesting of his daughter as a class A felony was affirmed), *trans. denied*; **Garner v. State**, 777 N.E.2d 721, 723 (Ind. 2002) (child molesting convictions affirmed on evidence that Mother's live-in boyfriend had sexual intercourse and participated in various other sexual acts with twelve-year-old child); **Pennycuff v. State**, 745 N.E.2d 804, 806 (Ind. 2001) (Court affirmed trial court's convictions for incest, child molesting, and sexual misconduct with a minor on evidence that Father made numerous sexual advances and contacts with his teenage daughter over a three year period); **McCoy v. State**, 856 N.E.2d 1259, 1261 (Ind. Ct. App. 2006) (Stepfather's child molesting conviction affirmed on stipulation of DNA evidence of miscarried fetus and thirteen-year-old child victim's testimony); **Gasper v. State**, 833 N.E.2d 1036, 1039 (Ind. Ct. App. 2005) (child molesting conviction affirmed on evidence that live-in boyfriend inserted his finger into eight-month-old girl's vagina while bathing her), *trans. denied*; **Weis v. State**, 825 N.E.2d 896, 899 (Ind. Ct. App. 2005) (child molesting conviction affirmed on evidence that Stepfather repeatedly engaged in vaginal, anal, and oral sex with stepdaughter over a four year period beginning when his stepdaughter was three years old); **Saunders v. State**, 807 N.E.2d 122, 124 (Ind. Ct. App. 2004) (conviction of sexual misconduct with a minor affirmed on evidence that Stepfather had sexual intercourse with fourteen-year-old stepdaughter); **Asher v. State**, 790 N.E.2d 567, 569 (Ind. Ct. App. 2003) (child seduction conviction affirmed on evidence that Stepfather had oral sex with stepdaughter when she was ten, eleven, twelve, and sixteen years old); **Willis v. State**, 776 N.E.2d 965, 966 (Ind. Ct. App. 2002) (conviction of child molesting affirmed on evidence that Father performed oral sex on his seven-year-old daughter); **Simmons v. State**, 746 N.E.2d 81, 85 (Ind. Ct. App. 2001) (child molesting conviction affirmed on evidence that live-in boyfriend penetrated three-year-old child's vagina with his finger), *trans. denied*; **Burdine v. State**, 751 N.E.2d 260, 262 (Ind. Ct. App. 2001) (child molesting and neglect of a dependent convictions affirmed on evidence that Stepfather performed criminal deviate conduct with three-year-old stepdaughter), *trans. denied*.

Criminal cases in which convictions of parents or custodians for child sexual abuse were reversed include the following cases: **Bean v. State**, 15 N.E.3d 12, 23 (Ind. Ct. App. 2014) (Court reversed Father's conviction for molesting his nine-year-old daughter due to improper vouching by Mother and DCS investigator and prosecutorial misconduct), *trans. denied*; **Van Patten v. State**, 986 N.E.2d 255, 267-68 (Ind. 2013) (Court reversed and remanded Father's conviction for molesting six-year-old daughter due to insufficient evidence; child recanted her allegations when testifying and the only substantive evidence of Father's guilt was nurse examiner's testimony which did not qualify as hearsay exception under Indiana Rule of Evidence 803(4)); **Kindred v. State**, 973 N.E.2d 1245, 1255-58 (Ind. Ct. App. 2012) (Court reversed and remanded child molesting conviction of live-in boyfriend of custodial grandmother; cumulative effect of drumbeat repetition of victim's story by other witnesses and impermissible vouching for victim's credibility were fundamental error), *trans. denied*; **Howard v. State**, 853 N.E.2d 461, 470 (Ind. 2006) (Stepfather's conviction for child molestation reversed and remanded because child's deposition was used instead of child's testimony without the statutorily required finding that child was unavailable); **Carpenter v. State**, 786 N.E.2d 696, 698 (Ind. 2003) (Father's conviction for molesting three-year-old child reversed due to insufficient evidence, absent improperly admitted hearsay evidence); **Greenboam v. State**, 766 N.E.2d 1247, 1257 (Ind. Ct. App. 2002) (Father's child molesting convictions reversed due to the erroneous admission of testimony regarding prior

molestations), *trans. denied*; **Schaefer v. State**, 750 N.E.2d 787, 794 (Ind. Ct. App. 2001) (Father's child molesting and incest convictions reversed on evidence that Father received ineffective assistance of counsel due to counsel's failure to properly object to the admissibility of medical records); **Davis v. State**, 749 N.E.2d 552, 555 (Ind. Ct. App. 2001) (Stepfather's child molesting conviction reversed because exclusion of child victim's sexual history unfairly bolstered her testimony).

IV. B. Victim of Sex Offense

IV. B. 1. Statute

IC 31-34-1-3 states:

(a) A child is a child in need of services if, before the child becomes eighteen (18) years of age:
(1) the child is the victim of a sex offense under:
(A) IC 35-42-4-1 [rape]
(B) IC 35-42-4-2 [criminal deviate conduct](before its repeal)
(C) IC 35-42-4-3 [child molesting]
(D) IC 35-42-4-4 [child exploitation; possession of child pornography]
(E) IC 35-42-4-5 [vicarious sexual gratification]
(F) IC 35-42-4-6 [child solicitation]
(G) IC 35-42-4-7 [child seduction]
(H) IC 35-42-4-8 [sexual battery]
(I) IC 35-42-4-9 [sexual misconduct with a minor];
(J) IC 35-45-4-1 [public indecency];
(K) IC 35-45-4-2 [prostitution];
(L) IC 35-45-4-3 [making unlawful proposition];
(M) IC 35-45-4-4 [promoting prostitution];
(N) IC 35-46-1-3 [incest]
(O) the law of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in clauses (A) through (N); and
(2) the child needs care, treatment, or rehabilitation that:
(A) the child is not receiving; and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

(b) A child is a child in need of services if, before the child becomes eighteen (18) years of age, the child:
(1) lives in the same household as an adult who:
(A) committed an offense described in subsection (a)(1) against a child and the offense resulted in a conviction or a judgment under IC 31-34-11-2 [CHINS adjudication]; or
(B) has been charged with an offense described in subsection (a)(1) against a child and is awaiting trial; and
(2) needs care, treatment or rehabilitation that:
(A) the child is not receiving; and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

(c) A child is a child in need of services if, before the child becomes eighteen (18) years of age:

(1) the child lives in the same household as another child who is the victim of an offense described in subsection (a)(1);
(2) the child needs care, treatment, or rehabilitation that:
(A) the child is not receiving; and
(B) is unlikely to be provided or accepted without the coercive intervention of the court; and
(3) a caseworker assigned to provide services to the child:
(A) places the child in a program of informal adjustment or other family or rehabilitative services based upon the existence of the circumstances described in subdivision (1) and (2) and the caseworker subsequently determines further intervention is necessary; or
(B) determines that a program of informal adjustment or other family or rehabilitative services is inappropriate.

(d) A child is a child in need of services if, before the child becomes eighteen (18) years of age:
(1) the child lives in the same household as an adult who:
(A) committed a human or sexual trafficking offense under IC 35-42-3.5-1 or the law of another jurisdiction, including federal law, that resulted in a conviction or a judgment under IC 31-34-11-2 [CHINS adjudication]; or
(B) has been charged with a human or sexual trafficking offense, including federal law, and is awaiting trial; and
(2) the child needs care, treatment, and rehabilitation that:
(A) the child is not receiving; and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Practice Note: An issue may arise if the victim child was removed from the home but the non-victim child was initially left in the home. If the DCS later determines that a CHINS petition should be filed for the non-victim child, it may be difficult to use IC 31-34-1-3(c) because the non-victim child may not currently be living in the same household with the victim child. IC 31-34-1-1, the CHINS category which alleges neglect of supervision, could be used instead if it is believed that the non-victim child is endangered due to neglect.

See Appendix 1 for the complete text of the criminal offenses listed in the CHINS statutes effective July 1, 2017.

See also IC 31-34-12-4.5 which provides:

(a) There is a rebuttable presumption that a child is a child in need of services if the state establishes that the child lives in the same household as an adult who:
(1) committed an offense described in IC 31-34-1-3 or IC 31-34-1-3.5 against a child and the offense resulted in a conviction or a judgment under IC 31-34-11-2; or
(2) has been charged with an offense described in IC 31-34-1-3or IC 31-34-1-3.5 against a child and is awaiting trial.
(b) The following may not be used as grounds to rebut the presumption under subsection (a):
(1) The child who is the victim of the sex offense described in IC 31-34-1-3 is not genetically related to the adult who committed the act, but the child presumed to be the child in need of services under this section is genetically related to the adult who committed the act.

(2) The child who is the victim of the sex offense described in IC 31-34-1-3 differs in age from the child presumed to be the child in need of services under this section.

(c) This section does not affect the ability to take a child into custody or emergency custody under IC 31-34-2 if the act of taking the child into custody or emergency custody is not based upon a presumption established under this section. However, if the presumption established under this section is the sole basis for taking the child into custody or emergency custody under IC 31-34-2, the court must first find cause to take the child into custody or emergency custody following a hearing in which the parent, guardian, or custodian of the child is accorded the rights described in IC 31-34-4-6(a)(2) through IC 31-34-4-6(a)(5).

Practice Note: The rebuttable presumption above cannot be the sole basis for taking a child into custody without a hearing. Practitioners should note subsection (c) of the above statute, which states, in pertinent part, that if the presumption established under this section is the sole basis for taking a child into custody or emergency custody under IC 31-34-2, the court first must find cause to take the child into custody or emergency custody following a hearing in which the parent, guardian or custodian of the child is accorded the rights in IC 31-34-4-6(a)(2) through (5).

IV. B. 2. Generally

This CHINS category includes a child who has been sexually abused by any person, including (but not limited to) the child's parent, guardian, or custodian. When the perpetrator is not the child's parent, guardian, or custodian, DCS may not need to initiate a CHINS action if the parent, guardian, or custodian is able to protect the child from the perpetrator and is able to provide necessary care and treatment for the child.

A criminal conviction for the sex offense alleged in the CHINS petition is strong evidence in the CHINS factfinding. However, the statute does not require a criminal conviction as a prerequisite to a CHINS adjudication. Nothing prevents the juvenile court from proceeding with the CHINS factfinding while the criminal case is pending, but the defendant may choose not to testify to avoid incriminating statements that might be used in his subsequent criminal trial. See Chapter 4 at IV.D.2.

IV. B. 3. Rape

Rape occurs when a person (no age specified) has sexual intercourse or other sexual conduct with a victim (no age specified) of the opposite sex, if the intercourse or conduct is: (1) compelled by force or threat of force; (2) the victim is unaware the intercourse is occurring; (3) the victim is so mentally disabled or deficient that the victim cannot give consent to the intercourse. IC 35-31.5-2-221.5 defines "other sexual conduct" as an act involving a sex organ of one person and the mouth or anus of another person; or the penetration of the sex organ or anus of a person by an object.

IV. B. 4. Criminal Deviate Conduct

The criminal offense of "criminal deviate conduct" was repealed in 2013. The conduct prohibited by the offense of criminal deviate conduct is now part of the definition of rape. See this Chapter at IV.B.3.

IV. B. 5. Child Molesting

The elements of the offense of child molesting, IC 35-42-4-3, are summarized as: (1) child victim must be under the age of fourteen; (2) no age requirement for perpetrator except that

perpetrator must be older than victim (see **J.L. v. State**, 5 N.E.3d 431, 433 (Ind. Ct. App. 2014)); (3) no legal or biological relationship between perpetrator and victim is required; (4) prohibited acts include performing or submitting to sexual intercourse or other sexual conduct as defined by IC 35-31.5-2-221.5 and performing or submitting to fondling or touching with the intent to arouse or satisfy the sexual desires of the victim or the perpetrator.

IV. B. 6. Child Exploitation and Possession of Pornography

The significant elements of the offense of child exploitation (IC 35-42-4-4(b) and (c)) include: (1) child must be under the age of eighteen; (2) no age requirement for perpetrator; (3) no legal or biological relationship between the child and the perpetrator is required; (4) prohibited conduct includes knowingly or intentionally managing, producing, presenting, sponsoring, exhibiting, photographing, filming, creating a digitized image of, disseminating or offering to disseminate, sending or bringing into Indiana, or making available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child under the age of eighteen with the intent to arouse or satisfy the sexual desires of any person or any performance or incident that includes the uncovered genitals or female nipples of a child under the age of eighteen. The significant elements of the offense of possession of child pornography (IC 35-42-4-4(d) and (e)) include knowingly or intentionally possessing or accessing with intent to view a picture, drawing, photograph, negative image, undeveloped film, motion picture, digitized image, or any pictorial representation that depicts or describes sexual conduct by a child whom the person knows is or who appears to be under the age of eighteen and that lacks serious literary, artistic, political, or scientific value. IC 35-42-4-4(f), (g), (h), (i), (j), and (k) discuss the defenses to these crimes.

In **Peaver v. State**, 937 N.E.2d 896 (Ind. Ct. App. 2010), *trans. denied*, the Court found there was sufficient evidence to support Defendant's child exploitation conviction. Id. at 902-03. Defendant lived with his girlfriend and her minor daughter. Defendant's girlfriend discovered a videotape depicting her daughter naked from the waist down, including a close-up depiction of the daughter's vagina. When the girlfriend confronted her daughter about the videotape, the daughter stated that Defendant had told her to take her underwear off and made the videotape. The girlfriend contacted police, the videotape was confiscated by police, and the daughter was interviewed by a forensic interviewer. On appeal of his class C felony child exploitation conviction, Defendant contended that the evidence was insufficient to prove that he had the intent to arouse or satisfy the sexual desires of any person. The Court observed that the State was required to show that Defendant knowingly or intentionally videotaped sexual conduct by the daughter, who was under the age of eighteen, and that "sexual conduct" includes "exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person." IC 35-42-4-4(a). Id. at 902. The Court said that, in the context of child molesting cases, "[t]he intent to arouse or satisfy the sexual desires of the child or the older person may be established by circumstantial evidence and may be inferred 'from the actor's conduct and the natural and usual sequence to which such conduct points.'" Id. (Multiple citations omitted.) The Court opined that the same rule applies in the context of child exploitation cases. Id. The Court said that the defendant's conduct and the natural and usual sequence to which that conduct usually points, supported a reasonable inference that the defendant videotaped his girlfriend's daughter with the intent to arouse or satisfy the sexual desires of any person. Id.

In **In Re J.V.**, 875 N.E.2d 395 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's adjudication of the four children of Mother and Father to be CHINS. Id. at 403. Police officers arrived at Parents' home in response to a 911 call. The police officers were

admitted to Parents' home and found a digital camera that contained pictures of Mother naked in separate photographs with each of two of the children. The officers left the camera where they found it, and when other officers returned at least a day later with a search warrant, they found the digital camera empty of pictures and missing the memory card. The memory card was not found. Parents appealed the trial court's finding that the children were CHINS. The Court held that sufficient evidence was presented to support the trial court's determination that the children were CHINS. Id. at 402-03. To Parents' contention that the trial court's findings related to alleged sexual abuse must be based on the standard of proof of beyond a reasonable doubt, the Court responded that the present case only determined that the children were CHINS, a civil determination, and, thus, the appropriate standard of proof was a preponderance of the evidence. Id. at 402 n.1. In finding the evidence sufficient, the Court noted the following: (1) police officers arrived at Parents' residence in response to a 911 call; (2) Mother allowed them into the residence to make sure everything was fine; (3) inside, the officers observed women's lingerie, high heels, and many empty beer bottles in the living room; (4) when the officers spoke to Father, he admitted that he and Mother had been engaged in "kinky sex" on the couch in the living room which the officers observed was within sight of the children's bedrooms; (5) the officers discovered a digital camera that contained pictures of Mother, naked, on the couch in the living room in sexual poses and pictures of Mother and Father engaged in sex acts; (6) there were also pictures of one of the children with Mother, who was naked, and in at least one of these pictures, the child was touching Mother in her vaginal area; (7) there were naked pictures of Mother with another of the children who was giving the thumbs up sign; (8) Mother had a long history of involvement with DCS, she did not complete or benefit from the services provided to her by DCS, and her parental rights to her four other children had been previously involuntarily terminated. Id. at 402-03.

In **Mehring State**, 884 N.E.2d 371 (Ind. Ct. App. 2008), *trans. denied*, Defendant, charged with multiple counts of child exploitation and possession of child pornography, took an interlocutory appeal from the trial court's denial of his motion to suppress evidence from a search based on alleged invalidity of the search warrant. The Court affirmed the trial court's denial of Defendant's motion, finding that: (1) the information contained in the probable cause affidavit was not stale despite the ten-month time period between the collection of the basic evidence to the issuance of the search warrant; (2) it was reasonable for the magistrate to conclude from the information in the probable cause affidavit that it was Defendant rather than someone else with the same name who resided at the search address on the search warrant; (3) given the information contained in the affidavit, the nature of the crime being investigated, the nature of the items being sought, and the normal and common sense inferences regarding where one might keep such items, the issuing magistrate had a substantial basis for concluding that probable cause existed and there was a fair probability that evidence of child pornography was probably present at Defendant's residence; and (4) upon review of the totality of the circumstances, the search of Defendant's apartment pursuant to the search warrant was reasonable and did not violate article 1, section 11 of the Indiana Constitution. Id. at 374-81.

IV. B. 7. Vicarious Sexual Gratification and Sexual Conduct in Presence of Minor

The offense of vicarious sexual gratification, IC 35-42-4-5(a) and (b), criminalizes the following conduct by a person who is eighteen years of age or older: (1) knowingly or intentionally directing, aiding, inducing, or causing a child under the age of sixteen to touch or fondle himself or herself or another child under the age of sixteen with intent to arouse or satisfy the sexual desires of the child or the older person; (2) knowingly or intentionally directing, aiding, inducing, or causing a child under the age of sixteen to engage in sexual

intercourse with another child under sixteen; (3) knowingly or intentionally directing, aiding, inducing, or causing a child under the age of sixteen to engage in other sexual conduct (as defined in IC 35-31.5-2-221.5) with another person or an animal. The offense of performing sexual conduct in the presence of a minor (IC35-42-4-5(c)) criminalizes the following conduct by a person who is age eighteen or older and who knowingly or intentionally in the presence of a child less than fourteen years old: (1) engages in sexual intercourse; (2) engages in other sexual conduct; or (3) touches or fondles the person's own body.

Case law on the crime of vicarious sexual gratification includes: **Townsend v. State**, 26 N.E.3d 619, 627 (Ind. Ct. App. 2015) (Defendant's vicarious sexual gratification conviction affirmed on evidence that he knowingly or intentionally directed, aided, induced, or caused his girlfriend's thirteen-year-old niece, who had been given vodka to drink, to engage in deviate sexual conduct with her aunt and her fourteen-year-old friend with the intent to arouse Defendant's or the thirteen-year-old girl's sexual desires), *trans denied*; **Eastwood v. State**, 984 N.E.2d 637, 642 (Ind. Ct. App. 2012) (conviction for fondling in the presence of a minor (IC 35-42-4-5(c)(3)) affirmed on child's testimony and admission of her recorded interviews with detective that Defendant masturbated in her presence); **Baumgartner v. State**, 891 N.E.2d 1131, 1138-39 (Ind. Ct. App. 2008) (conviction for performing sexual activity in the presence of a minor, IC 35-42-4-5(c), affirmed on evidence that Defendant's girlfriend saw him masturbating while looking at her sleeping children; statute does not require that defendant's conduct was witnessed by child; statute is not unconstitutionally vague).

IV. B. 8. Child Solicitation

The crime of child solicitation, IC 35-42-4-6, occurs when a person eighteen years of age or older knowingly or intentionally solicits a child under fourteen years of age or an individual whom the person believes to be under fourteen years of age, to engage in sexual intercourse, other sexual conduct (as defined by IC 35-31.5-2-221.5), or any fondling or touching intended to arouse or satisfy the sexual desires of the child or the older person. A person who is at least twenty-one years of age who knowingly or intentionally solicits a child who is fourteen or fifteen years of age or an individual whom the person believes is fourteen or fifteen years of age to engage in sexual intercourse, other sexual conduct, or fondling or touching to arouse or satisfy sexual desires also commits child solicitation. IC 35-42-4-6(c). IC 35-42-4-6(a) defines "solicit" as to command, authorize, urge, incite, request, or advise the child to perform the sexual acts. Solicitation may be in person, by telephone or wireless device, in writing, by using a computer network (as defined in IC 35-43-2-3(a)), by advertisement, or by any other means.

Case law on proving the crime of child solicitation includes **Pavlovich v. State**, 6 N.E.3d 969, 983 (Ind. Ct. App. 2014) (Court affirmed child solicitation conviction on evidence that Defendant, who believed that he was sending and receiving text messages with an adult female prostitute whom he had previously met, solicited the prostitute's nine-year-old sister to engage in oral sex with her adult sister in Defendant's presence), *trans. denied*; **Neff v. State**, 915 N.E.2d 1026, 1037 (Ind. Ct. App. 2009) (Court found sufficient evidence to support child solicitation conviction; Defendant drove to Hamilton County believing he was meeting a twelve-year-old girl whom he had solicited via instant messaging to have sexual intercourse with him; conviction reversed and remanded for case to be transferred to correct venue of Madison County), *trans. denied*; **Aplin v. State**, 889 N.E.2d 882, 886 (Ind. Ct. App. 2008) (Court affirmed Defendant's conviction on evidence that he sent emails to a detective whom Defendant believed was a fifteen-year-old girl in which Defendant arranged a meeting so she would engage in oral sex with him), *trans. denied*; **Kuypers v. State**, 878 N.E.2d 896,

899 (Ind. Ct. App. 2008) (Court affirmed child solicitation conviction on evidence that Defendant engaged in online chat with a person whom he believed to be a fifteen-year-old girl in which Defendant requested and advised the girl to meet him to engage in sexual intercourse with him), *trans. denied*; **LaRose v. State**, 820 N.E.2d 727, 732 (Ind. Ct. App. 2005) (Court opined that IC 35-42-4-6 is not void for vagueness; the urging to perform the act, rather than the performance of the act, constitutes child solicitation), *trans. denied*; **Laughner v. State**, 769 N.E.2d 1147, 1152 (Ind. Ct. App. 2002) (Court affirmed child solicitation conviction on evidence that Defendant used instant messaging to solicit a detective whom Defendant thought was a thirteen-year-old boy to meet for the purpose of having sex with Defendant), *trans. denied*.

IV. B. 9. Child Seduction

The elements and definitions of the offense of child seduction are found at IC 35-42-4-7. A victim of child seduction is a sixteen or seventeen-year-old child with whom a perpetrator (who is at least eighteen years of age and who is in a specified relationship with the child) engages in sexual intercourse, other sexual conduct (as defined by IC 35-31.5-2-221.5), or fondling or touching with intent to arouse or satisfy sexual desires of the child or the other person. The specified relationships are: guardian, custodian, adoptive parent, adoptive grandparent, stepparent, child care worker, a military recruiter, or a person who has a professional relationship with the child (including a mental health professional or a law enforcement officer). IC 35-42-4-7(e) defines "custodian" as "any person who resides with a child and is responsible for the child's welfare." The broad definition of "child care worker" at IC 35-42-4-7(d) includes: (1) a person who provides care, supervision, or instruction to a child within the scope of a person's employment in a shelter care facility; and (2) a person employed by or affiliated with a school corporation, charter school, nonpublic school, or special education cooperative who is in a position of trust with a child who attends the school or cooperative, provides care or supervision to a child who attends the school or cooperative, and is at least four years older than the child victim. The term does not include a student who attends the school or cooperative.

In **Brown v. Indiana**, 67 N.E.3d 1127 (Ind. Ct. App. 2017), the Court affirmed the Level 5 felony child seduction convictions of Brown, who was a part-time assistant director of the Plainfield High School Show Band. Id. at 1131. Brown had sexual intercourse with two female students who were over the age of sixteen and were members of the Show Choir. The Show Band, which Brown directed, played the music while the Show Choir sang. Some of Brown's inappropriate sexual encounters with the students took place on school property. The Court looked to IC 35-42-4-7(n), which provides that a person commits child seduction when he or she: (1) has a professional relationship with a child who is at least sixteen years old but less than eighteen years old whom the person knows to be at least sixteen but less than eighteen years old that is based on the person's employment or licensed status; (2) may exert undue influence on the child because of the person's current or previous relationship with the child; and (3) uses or exerts the person's professional relationship to engage in sexual intercourse or other sexual conduct …or any fondling or touching with the child with the intent to arouse or satisfy the sexual desires of the child or the person. Id. at 1129-30. Although Brown claimed that the State failed to establish that he had a professional relationship with the victims, the State cited evidence that Brown was employed as a part-time director of the School Band, and as a result of his employment, was asked to participate as director of the Show Band, and established friendly relationships with members of the Show Choir. Since the State was required to prove Brown knew the victims were at least sixteen but less than eighteen years of age, the Court noted that Brown had experience directing high school students, and a reasonable trier of fact could conclude that Brown was

aware of the high probability that the victims were under the age of eighteen. Id. at 1131. The Court found the evidence firmly established that Brown's relationships with the students were based on his employment. Id. at 1130-31. The Court concluded the State presented sufficient evidence to support Brown's convictions for child seduction. Id. at 1131.

In **Corbin v. State**, 17 N.E.3d 270 (Ind. 2014), the Indiana Supreme Court affirmed the trial court's refusal to dismiss charges of attempted child seduction by a teacher and coach, who communicated with a sixteen-year-old student via social media to "sneak out of her house" so he could see her breasts and she could take care of his sexual arousal. Id. at 272. The Court opined that the charges matched the statutory elements of IC 35-42-4-7, child seduction, and were sufficient to survive Corbin's motion to dismiss. Id.

In **Stratton v. State**, 791 N.E.2d 220 (Ind. Ct. App. 2003), *trans. denied*, the Court held that the legislature intended "child care worker" to mean an individual who occupies a position of trust, authority, and responsibility in loco parentis. Id. at 224. The defendant dean of students for a private, non-accredited grade school was charged with child seduction. The Court affirmed the trial court's denial of the defendant's motion to dismiss. The Court noted that the defendant's primary responsibility was to handle the disciplinary matters of the students and he was able to render any punishment that he deemed necessary and appropriate without consulting anyone of higher authority. The Court opined that the defendant was a "child care worker" within the meaning of the statute. Id. The Court further found that the defendant's claim that the charge was invalid because he was employed by a church as social pastor rather than a school lacked merit. Id.

IV. B. 10. Sexual Battery

The offense of sexual battery, IC 35-42-4-8, occurs when a person, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person: (1) touches another person when that person is compelled to submit to the touching by force or the imminent threat of force; or so mentally disabled that consent to the touching cannot be given; or (2) touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring.

The offense of sexual battery requires not only that sexual touching occurred but also that the victim was compelled to submit to the touching by force or the threat of force. The victim of sexual battery may be an adult or a child. In **Frazier v. State**, 988 N.E.2d 1257 (Ind. Ct. App. 2013), Defendant was a corrections officer at the Marion County Jail and the victim, an adult female, was a Marion County Sheriff's Deputy. The Court affirmed Defendant's sexual battery conviction, finding that he forcefully grabbed the female Deputy's hand and placed it on his crotch. Id. at 1261. It is the victim's perspective, not the assailant's from which the presence or absence of force or compulsion is to be determined in a sexual battery prosecution. See **Perry v. State**, 962 N.E.2d 154, 158 (Ind. Ct. App, 2012), citing **Chatham v. State**, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006).

IV. B. 11. Sexual Misconduct With a Minor

IC 35-42-4-9, sexual misconduct with a minor, occurs when a person at least eighteen years of age performs or submits to sexual intercourse, other sexual conduct (defined by IC 35-31.5-2-221.5), or fondling or touching to arouse sexual desires with a victim who is fourteen or fifteen years of age. In **Seal v. State**, 38 N.E.3d 717 (Ind. Ct. App, 2015), *trans. denied*, Father was convicted for two counts of class A felony child molesting, two counts of class B felony incest, and one count of class B felony sexual misconduct with a minor. The Court noted the evidence showed that Father regularly and frequently sexually molested both of his

daughters, including sexual intercourse and deviant sexual conduct, from the time each daughter became ten years of age until his older daughter was sixteen years of age. Id. at 723-24. On appeal, Father asserted that the continuous crime doctrine applied to his convictions, and required that the sexual misconduct conviction should be merged with his child molesting convictions. The Court opined that the continuous crime doctrine did not apply to Father's multiple acts which were committed over a five year period. Id. at 725.

IC 35-42-4-9(e) provides a defense to sexual misconduct with a minor. The defense requires that the following must all apply: (1) the perpetrator is under twenty-one years old and not more than four years older than the victim; (2) there was no use of deadly force or the threat of deadly force and the perpetrator was not armed with a deadly weapon; (3) the crime did not result in serious bodily injury; (4) the crime was not facilitated by furnishing the victim with a drug or controlled substance without the victim's knowledge; (5) the perpetrator and victim have a "dating relationship or an ongoing personal relationship" that does not include a family relationship; (6) the perpetrator does not have a position of authority or substantial influence over the victim: (7) the perpetrator has not committed another sex offense, including a delinquent act, against any other person. See **Beedy v. State**, 58 N.E.3d 987, 991 (Ind. Ct. App. 2016), *trans. denied*, a case of first impression, in which the eighteen-year-old Defendant conceived a child with his fourteen-year-old girlfriend. The Court reversed the conviction, finding Defendant had established his entitlement to this defense. *Practice Note:* The defense at IC 35-42-4-9(e) does not change the elements of the offense, or the conditions under which a child is a victim of a sex offense as required by IC 31-34-1-3.

IV. B. 12. Incest

IC 35-46-1-3 states that incest occurs when a person eighteen years or older engages in sexual intercourse or other sexual conduct (defined at IC 35-31.5-2-221.5) with another person (no age required) that he/she knows is related biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew. In **Bohall v. State**, 546 N.E.2d 1214, 1216 (Ind. 1989), the Indiana Supreme Court overruled prior law and held that the incest statute includes a biological father who has intercourse with his minor daughter after the daughter has been adopted by another person. See also **Sargent v. State**, 875 N.E.2d 762, 767 (Ind. Ct. App. 2007) (Court found sufficient evidence to support Father's incest conviction based on sixteen-year-old daughter's credible testimony that Father had sexual intercourse with her); and **Winters v. State**, 727 N.E.2d 758, 760 (Ind. Ct. App. 2000) (Court found sufficient evidence to sustain Father's incest conviction based on daughter's testimony about vaginal penetration).

IV. C. Parental Allowance of Child's Participation in Obscene Performance

IV. C. 1. Statute

IC 31-34-1-4 provides:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child's parent, guardian, or custodian allows the child to participate in an obscene performance (as defined by IC 35-49-2-2 or IC 35-49-3-2); and
>
> (2) the child needs care, treatment, or rehabilitation that:
>
> (A) the child is not receiving; and
>
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IV. C. 2. Obscene Performance Crimes

Three criminal statutes are relevant to this CHINS category. IC 35-49-2-2 states:
A matter or performance is harmful to minors for purposes of this article if:

(1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
(2) considered as a whole, it appeals to the prurient interest in sex of minors;
(3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
(4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

IC 35-49-3-2 provides:
A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance commits a Class A misdemeanor. However, the offense is a Class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under eighteen (18) years of age.

IC 35-49-2-1 defines obscene performance. It is included here because IC 35-49-2-3 (contained in the CHINS statute) refers to an obscene performance. IC 35-49-2-1 states:
A matter or performance is obscene for purposes of this article if:

(1) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;
(2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and
(3) the matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Indiana's obscenity statute, IC 35-49-2-1, which defines obscene matter and performance, was upheld against a constitutional challenge of vagueness and overbreadth in **Van Sant v. State**, 523 N.E.2d 229 (Ind. Ct. App. 1998). The case does not deal specifically with child pornography or child participation in obscene performances. In **Fordyce v. State**, 569 N.E.2d 357 (Ind. Ct. App. 1991), the Court upheld Indiana's obscenity statute against constitutional challenge, and affirmed the trial court's ruling that the obscene matter depicted sexual conduct involving persons under the age of sixteen.

The following Indiana criminal cases discuss obscene performance. In **Melton v. State**, 993 N.E.2d 253 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed Defendant's conviction for dissemination of matter harmful to minors (IC 35-49-3-3), finding sufficient evidence to support the conviction. Defendant had shown pornography and his penis to a fourteen-year-old girl who was the friend of his live-in girlfriend's daughter and Defendant masturbated in the fourteen-year-old's presence in the living room of Defendant's home. The Court observed that the offense of dissemination of matter harmful to minors is governed by IC 35-49-3-3, which provides that "a person who knowingly or intentionally …engages in or conducts a performance that is harmful to minors…commits a Class D felony." Id. at 255-56. Although Defendant argued that he was in his own private residence when he engaged in the conduct at issue, and thus he did not engage in a "performance", the Court clarified that the statute contains no requirement that the performance take place in public, and that merely being in a private place is not a defense to the charge. Id. at 260. In **Zitlaw v. State**, 880 N.E.2d 724 (Ind. Ct. App. 2008), *trans. denied*, the Court affirmed the trial court's denial of Defendant's

motion to dismiss a performance harmful to minors charge, IC 35-49-3-3(a). The Court held that (1) not all subsections of IC 31-49-3-3(a) require that a minor actually be present for the "performance"; it is enough that minors have the ability to see or hear the conduct or the ability to be present; (2) it was unnecessary for the State to name specific minor victims or to include the phrase "unless each minor is accompanied by the minor's parent or guardian" in the charging information; (3) the performance harmful to minors statute is not unconstitutionally vague, in that individuals of ordinary intelligence would comprehend the statute adequately enough to inform them of the proscribed conduct; and (4) Defendant's alleged conduct of exposing himself in a public park for the purpose of engaging in oral sex was clearly within the conduct proscribed by the statute. Id. at 729-82. In **Adams v. State**, 804 N.E.2d 1169 (Ind. Ct. App. 2004), Defendant's convictions for exhibition and distribution of obscene matter were affirmed. Id. at 1176. The Court noted the following in ruling on Defendant's insufficiency of the evidence claim: (1) obscenity is not protected speech under the free speech clause of the Indiana Constitution; (2) an obscenity determination may be based solely on the fact finder's viewing of the allegedly offensive material; (3) the State is not required to submit expert testimony on community standards, or show that no reasonable person would find value in the material. Id. at 1173. In **Lewis v. State**, 726 N.E.2d 836 (Ind. Ct. App. 2001), *trans. denied*, the Court affirmed Defendant's convictions for disseminating matter harmful to minors and conducting a performance harmful to minors. Id. at 847. Defendant showed a videotape of himself on a bed naked and kissing a woman to his girlfriend's fourteen-year-old niece. On the sufficiency of the evidence, the Court held the following: (1) in determining whether a matter or performance is obscene, the jury must consider community standards; (2) the State need not present any evidence regarding community standards; (3) the tape's depiction of naked Defendant engaged in intimate activity with a woman supported the conclusion that the disseminated material was harmful to minors. Id. at 842.

IV. C. 3. State of Mind and Act or Omission of Parent, Guardian, or Custodian

It is not clear what state of mind and what act or omission are required by the term "allows." The dictionary defines the term "allow" as: to concede or permit. Both words appear to require actual knowledge by the parent, guardian, or custodian of the child's participation in the obscene performance. An argument can be made that the term "allows" only requires proof of reckless culpability as set out at IC 35-41-2-2(c) (a conscious and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct), rather than a knowing state of mind.

IV. C. 4. Child's Participation in Obscene Performance

The juvenile code does not define "participation." It may include appearances in live obscene performances and/or being photographed or filmed in the creation of an obscene performance. This statute is not, on its face, limited to obscene performances for commercial purposes.

IV. D. Parental Allowance of Child's Commission of Sex Offense

IV. D. 1. Statute

IC 31-34-1-5 provides:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by IC 35-45-4; and
>
> (2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

IV. D. 2. Prohibited Sex Offenses

IC 35-45-4 includes the offenses of public indecency and indecent exposure (IC 35-45-4-1), public nudity (IC 35-45-4-1.5), prostitution (IC 35-45-4-2), making an unlawful proposition (IC 35-45-4-3), promoting prostitution (IC 35-45-4-4), voyeurism, public voyeurism, and remote aerial voyeurism (IC 35-45-4-5), and indecent display by youth (IC 35-45-4-6).

IC 35-45-4-1(a) and (b) state that a person commits the offense of public indecency when the person knowingly or intentionally, in a public place, engages in sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5), or appears in a state of nudity with the intent of arousing sexual desires, or fondles the person's genitals or the genitals of another person. IC 35-45-4-1(d) states that "nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state. IC 35-45-4-1(e) states that a person who, in a place other than a public place, with the intent to be seen by persons other than the invitees or occupants of that place, engages in sexual intercourse or other sexual conduct, or fondles the person's genitals or the genitals of another person, or who appears in a state of nudity, where the person can be seen by others than invitees and occupants of that place commits indecent exposure.

IC 35-45-1-4-1.5 states that a person who knowingly or intentionally appears in a public place in a state of nudity commits the offense of public nudity.

IC 35-45-4-2(a) states that a person who is at least eighteen years old or older who knowingly or intentionally: (1) performs, or offers or agrees to perform, sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5); or (2) fondles, or offers or agrees to fondle, the genitals of another person for money or other property commits the offense of prostitution. It is a defense to a prosecution under this section that the person was a victim or an alleged victim of an offense under IC 35-42-3.5-1 at the time the person engaged in the prohibited conduct.

IC 35-45-4-3 states that a person who knowingly or intentionally pays, or offers or agrees to pay, money or property to another person: (1) for having engaged in, or on the understanding that the other person will engage in sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) with the person or any other person; or (2) for having fondled, or on the understanding that the person will fondle, the genitals of the person or any other person, commits the offense of making an unlawful proposition.

IC 35-45-4-4(a) defines "juvenile prostitution victim" as a person less than eighteen years old who engages in juvenile prostitution. IC 35-45-4-4(b) defines the offense of "promoting prostitution" as knowingly or intentionally: (1) enticing or compelling another person to become a prostitute or a juvenile prostitution victim; (2) procuring or offering or agreeing to procure another person for prostitution or juvenile prostitution; (3) having control over the use of a place, permitting another person to use the place for prostitution or juvenile prostitution; (4) receiving money or other property from a prostitute or juvenile prostitution victim knowing it was earned from prostitution or juvenile prostitution; (5) conducting or directing another person to a place for prostitution or juvenile prostitution.

IC 35-45-4-5 defines the offenses of voyeurism, public voyeurism, and remote aerial voyeurism. IC 35-45-4-5(a)(2) states that "peep" means any looking of a clandestine, surreptitious, prying, or secretive nature. IC 35-45-4-5(b) states that a person who knowingly or intentionally peeps or goes upon the land of another with the intent to peep into an occupied dwelling of another person, or who peeps into an area where an occupant may be expected to disrobe (including restrooms, baths, showers, and dressing rooms) without the consent of the other person, commits voyeurism. IC 35-45-4-5(d) provides that a person who: (1) without the consent of the individual and (2) with the intent to peep at the private area (defined by IC 35-45-4-5(a)(3) as the naked, or undergarment clad genitals, pubic area, or buttocks) of an individual; peeps at the private area of an individual and records an image by means of a camera commits public voyeurism. IC 35-45-4-5(g) establishes the offense of remote aerial voyeurism, which includes the operation of an unmanned aerial vehicle to facilitate peeping.

IC 35-45-4-6 states that the class A misdemeanor offense of indecent display by youth is committed when a person under the age of eighteen produces, presents, exhibits, photographs, records, creates, disseminates, or offers to disseminate matter that: (1) depicts or describes sexual conduct by a child at least twelve years of age who the person knows is less than sixteen years of age or who appears to be less than sixteen years of age; and (2) the matter lacks serious literary, artistic, political, or scientific value.

In **Sandleben v. State**, 22 N.E.3d 782 (Ind. Ct. App. 2014), the Court affirmed Defendant's convictions for three counts of public voyeurism on evidence that he recorded nearly an hour of images of two twelve-year-old girls' pubic areas while they were swimming, which included images of visible gaps between the girls' bathing suits and bare skin, including the buttocks and where the inner thighs met the pubic arch of the pelvis. Id. at 792-93. Defendant used an underwater camera, and when one of the girls asked him about his underwater camera, he stated that he was not filming with it. The Court opined that Defendant knew that he did not have the consent of one of the girls when he recorded her image; thus, he knowingly recorded her in a clandestine or secretive manner. Id. at 793. The Court concluded that the public voyeurism statute was not unconstitutional as applied. Id. at 798.

In **C.T. v. State**, 939 N.E.2d 626 (Ind. Ct. App. 2010), *trans. denied*, the Court affirmed the sixteen-year-old female juvenile's delinquency adjudication that she had committed class B misdemeanor public nudity if committed by an adult. The Court, responding to the juvenile's claim that Indiana's public nudity statute violates the Equal Protection Clause of the Fourteenth Amendment because it criminalizes the public display of female, but not male, nipples. The Court concluded that the Indiana statute did not run afoul of the Equal Protection Clause because the statute serves the important governmental objective of preserving order and morality and does not disadvantage women in any significant way. Id. at 630.

In **Chiszar v. State**, 936 N.E.2d 816 (Ind. Ct. App. 2010), *trans. denied*, the Court found that the voyeurism statute, IC 35-45-4-5, was not unconstitutionally vague. Id. at 824.

In **Glotzbach v. State**, 783 N.E.2d 1221 (Ind. Ct. App. 2003), the Court found that the following evidence supported Defendant's class D felony conviction for public indecency in a public place where a child less than sixteen years of age is present: (1) Defendant was masturbating in the adult area of the public library; (2) there were children in the area of the check-out desk who may have been able to see the defendant through the book shelving; (3) the children's area was opposite the adult area on the same floor where Defendant was

located; and (4) there was no reason to suppose that children would not enter the adult area from time to time, for example, to consult the library staff. Id. at 1227. The Court opined that the State need not prove that children actually witnessed Defendant's act. Id. For children to be "present" within the meaning of IC 35-45-4-1(b)(1), they must only be in the general area in the public place where the perpetrator is so that there is a reasonable prospect that children might be exposed to the perpetrator's conduct. Id.

IV. D. 3. State of Mind and Act or Omission of Parent, Guardian or Custodian
See this Chapter above at IV.C.3. for discussion.

IV. D. 4. Child's Commission of Sex Offense
The statute does not require a delinquency adjudication that the child committed the alleged sex offense. DCS must show that the alleged sex offense occurred, but it is not necessary to prove all of the elements of the criminal offense. The focus of this CHINS category is upon parental allowance of activities that are harmful to a child, not on establishing the child's legal responsibility for committing the acts.

IV. E. Victim of Human or Sexual Trafficking

IC 31-34-1-3.5 provides:

(a) A child is a child in need of services if, before the child becomes eighteen (18) years of age:
  (1) The child is the victim of:
    (A) human or sexual trafficking (as defined in IC 9-2-133.1); or
    (B) a human or sexual trafficking offense under the law of another jurisdiction, including federal law, that is substantially equivalent to the act described in clause (A); and
  (2) the child needs care, treatment, or rehabilitation that:
    (A) the child is not receiving; and
    (B) is unlikely to be provided or accepted without the coercive intervention of the court.

(b) A child is considered a victim of human or sexual trafficking regardless of whether the child consented to the conduct described in subsection (a)(1).

IC 31-9-2-133.1 defines "victim of human or sexual trafficking" for purposes of IC 31-34-1-3.5 as a child who is "recruited, harbored, transported, or engaged in: (1) forced labor; (2) involuntary servitude; (3) prostitution; (4) juvenile prostitution, as defined in IC 35-31.5-2-178.5; (5) child exploitation, as defined in IC 35-42-4-4(b); (6) marriage, unless authorized by a court under IC 31-11-1-6; or (7) trafficking for the purpose of prostitution, juvenile prostitution, or participation in sexual conduct as defined in IC 35-42-4-4(a)(4)."

IC 35-42-3.5-1 sets forth the elements of the criminal offenses of promoting promotion of human trafficking (IC 35-42-3.5-1(a)); promotion of human trafficking of a minor (IC 35-42-3.5-1(b)); and sexual trafficking of a minor (IC35-42-3.5-1(c)). IC 35-42-3.5-4 describes the rights of an alleged victim of human and sexual trafficking offenses, which include that the victim may not be jailed, fined, or otherwise penalized due to having been a victim of the offense and that the victim shall be provided protection if the victim's safety is at risk or there is danger of additional harm. IC 35-42-3.5-4(c) states that if a law enforcement agency detains an alleged victim who is under the age of eighteen, the law enforcement agency shall immediately notify DCS that the alleged victim has been detained and may be a victim of child abuse or neglect.

Practice Note: IC 31-34-10-7 provides that the child, not the parent, guardian, or custodian, must admit or deny the allegations in this CHINS category. Presumably, this statutory requirement prevents the exclusion of the child from the CHINS proceedings pursuant to IC 31-34-6-8. IC 31-34-10-7 provides that if the child fails to respond, this constitutes a denial. If the child denies the allegations or fails to respond, a factfinding hearing should be scheduled. The child will have a guardian ad litem/court appointed special advocate appointed under IC 31-34-10-3, but may also need representation by a court appointed attorney. The child's guardian ad litem/court appointed special advocate may request the court to appoint an attorney to represent the child pursuant to IC 31-32-4-2(b).

In **Singh v. State**, 40 N.E.3d 981 (Ind. Ct. App. 2015), the Court affirmed Defendant's conviction for attempted promotion of human trafficking on evidence that he: (1) threatened to kill his wife if she left his apartment; (2) made telephone calls soliciting money from other men in exchange for "one night" with his wife; (3) brought one man to the apartment apparently for the purpose of trading sex with his wife for five hundred dollars; (4) beat his wife when she refused to go with the man. Id. at 985-86.

V. CHILD'S ENDANGERMENT OF SELF OR OTHERS

V. A. Statute

IC 31-34-1-6 provides:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child substantially endangers the child's own health or the health of another individual; and
>
> (2) the child needs care, treatment, or rehabilitation that:
>
> (A) the child is not receiving; and
>
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

V. B. Generally

This CHINS category does not require proof that the parent, guardian, or custodian has harmed or endangered the child, or in any other way caused the child's condition. It does require proof, under the "needs treatment" element, that the parent, guardian, or custodian is unable or unwilling to provide the child with needed care, treatment, or rehabilitation without court intervention. DCS must also prove that the child has seriously endangered himself or another person.

This CHINS category may be appropriate for children who are exhibiting suicidal behavior, substance addiction, or endangering sexual activity, or children who are exhibiting aggressive or violent behavior due to emotional disability or mental illness. It may also be appropriate for children who are committing the status delinquency acts of running away, truancy, and alcohol offenses, if these acts are committed in such a way (or to such an extent) that the child's physical or mental health is substantially endangered.

This CHINS category may also be used to assist children who have run away from home. IC 31-34-1-8 created a CHINS category on missing children which may also be appropriate for dealing with runaway children. A missing child is defined, in part, as a child who is a temporary or permanent resident of Indiana whose location cannot be determined by the child's parent or legal custodian. See this Chapter at VII. for discussion on missing children.

V. C. Rights of Child

IC 31-34-10-7 provides that the child, not the child's parent, guardian or custodian, must admit or deny the allegations of endangerment to self or others. Presumably this requirement prevents the exclusion of the child from the CHINS proceeding pursuant to IC 31-34-6-8. IC 31-34-10-7 also provides that if the child does not respond, this constitutes a denial. If the child denies the allegations or fails to respond, a factfinding hearing should be scheduled. The child will have a guardian ad litem/court appointed special advocate appointed pursuant to IC 31-34-10-3, but may also need representation by a court appointed attorney. The child's guardian ad litem/court appointed special advocate may request the court to appoint an attorney to represent the child pursuant to IC 31-32-4-2(b). Special efforts should be made to protect the rights of the child in this CHINS category. The child may not be competent to make an admission due to age or immaturity, and the allegations of endangerment to self or others may constitute acts that could be charged as delinquent offenses against the child.

V. D. Case Law

In **In Re M.O.**, 72 N.E.3d 527 (Ind. Ct. App. 2017), the Court affirmed the juvenile court's determination that the sixteen-year-old child was a CHINS pursuant to IC 31-34-1-6. Id. at 533. The child was the mother of two young sons, had completed her placement pursuant to a delinquency adjudication, her parents would not allow her to live in their homes, she had run away from temporary DCS placement with her cousin, and she failed to work with the DCS case manager or to appear at court when the judge ordered her to do so. DCS filed a CHINS petition alleging that the child was a CHINS pursuant to IC 31-34-1-1, which involves parental inaction or neglect. The juvenile court found that DCS had failed to meet its burden on the claim that the child was a CHINS due to neglect, but allowed Parents to present evidence that the child was a CHINS pursuant to IC 31-34-1-6. After hearing evidence from Parents about the child's negative behaviors and taking judicial notice of the child's extensive history as shown in court records, the juvenile court found that the child was a CHINS under IC 31-34-1-6. The child appealed. Finding that the issue of whether the child was a CHINS under IC 31-34-1-6 was tried by consent under Ind. Trial Rule 15(B), the Court held the juvenile court did not err in adjudicating the child to be a CHINS on different grounds from those set forth in the CHINS petition. Id. at 532. Based on the evidence presented at the factfinding hearing, the Court concluded it was proven by a preponderance of the evidence that the child substantially endangered her own health or the health of another individual, and was a CHINS as defined by IC 31-34-1-6. Id. at 533. The Court noted the following evidence in support of the juvenile court's finding of endangerment: (1) the child was only sixteen at the time the CHINS case was initiated, she had a history of running away from her placements, and continued to be on the run at the time of the factfinding hearing; (2) the child refused to appear at court after she spoke to the judge on the telephone and the judge ordered her to appear; (3) the child substantially endangered her health because "bad things could happen to a young girl on her own trying to avoid authority"; (4) the juvenile court took judicial notice of its own records that the child had sixteen referrals to the juvenile court, was a respondent in a termination of parental rights case for her son, had been the subject of a previous CHINS case, had previously failed referrals for services, and had true delinquency findings for theft, resisting law enforcement, and modification of her probation; (5) Mother offered into evidence emails between the case manager and the staff of Carmelite Home about the child's behavior during her stay at the Home pursuant to a delinquency case; and (6) Father testified that the child was a threat to herself and others, in need of mental health treatment, and had attempted suicide two years prior to the hearing. Id.

VI. PARENTAL FAILURE TO PARTICIPATE IN SCHOOL DISCIPLINARY PROCEEDING

VI. A. Statute

IC 31-34-1-7 provides:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child's parent, guardian, or custodian fails to participate in a disciplinary proceeding in connection with the student's improper behavior, as provided for by IC 20-33-8-26, if the behavior of the student has been repeatedly disruptive in the school; and
>
> (2) the child needs care, treatment, or rehabilitation that:
>
> > (A) the child is not receiving; and
> >
> > (B) is unlikely to be provided or accepted without the coercive intervention of the court.

Practice Note: this CHINS category requires behavior that is "repeatedly disruptive" in school. School disciplinary actions involve a wide range of responses to a wide range of behaviors. Many children may receive disciplinary action requiring parent participation that is not related to "repeatedly disruptive" behavior. There is no reported case law on this CHINS category. For information about educational neglect and school attendance requirements, see this Chapter at II. D.

VI. B. School Rules Requiring Parental Participation in Discipline Proceeding.

IC 20-33-8-26 reads as follows:

> (a) The governing body of a school corporation may adopt rules that require a person having care of a dependent student to participate in an action taken under this chapter in connection with a student's behavior. The rules must include the following:
>
> > (1) Procedures for giving actual notice to the person having care of the dependent student.
> >
> > (2) A description of the steps that the person must take to participate in the school corporation's action.
> >
> > (3) A description of the additional actions in connection with the student's behavior that are justified in part or in full if the person does not participate in the school corporation's action.
>
> (b) A dependent student is a child in need of services under IC 31-34-1-7 if, before the student child becomes eighteen (18) years of age:
>
> > (1) the student's parent fails to participate in a disciplinary proceeding in connection with the student's improper behavior, as provided for by this section, if the behavior of the student has been repeatedly disruptive in the school; and
> >
> > (2) the student needs care, treatment, or rehabilitation that the child:
> >
> > > (A) is not receiving; and
> > >
> > > (B) is unlikely to be provided or accepted without the coercive intervention of the court.

VI. C. School Disciplinary Actions

See Chapter 3 at II.G.17. for case law on the limited authority of the juvenile court to override a school expulsion of child who has been adjudicated to be a CHINS or a delinquent.

VI. C. 1. Statutes Regarding School Discipline

School law provides a range of actions and discretion in dealing with discipline issues in the school. The principal has broad discretion to take action reasonably necessary to carry out or

prevent interference with an educational function or school purpose (IC 20-33-8-10). The school superintendent and principal can establish regulations and guidelines for disciplinary procedures (IC 20-33-8-12)(b)). The school corporation "must" establish written discipline rules and provide notice of the rules (IC 20-33-8-12(a)). A student may be suspended from school for up to ten days (IC 20-33-8-7) as a disciplinary action or expelled for a longer period of time. IC 20-33-8-3; IC 20-33-8-20. Expulsion for at least one calendar year is mandatory if the child's conduct involves bringing a firearm or a destructive device to school. IC 20-33-8-16. Teachers and school staff are authorized under IC 20-33-8-25 to require the following disciplinary actions: counseling, parent conferencing, assigning additional work, rearranging class schedules, requiring after school attendance, restricting extracurricular activities, removal of the student from class, assignment to service at a non-profit organization, or reassignment by the principal to an alternative educational program or an alternative school.

IC 20-33-8-25(c) states that, when a student physically assaults a person having authority over the student, the principal of the school where the student is enrolled shall refer the student to the juvenile court having jurisdiction over the student. "Physical assault" is defined in IC 20-33-8-25(c) as the "knowing or intentional touching of another person in a rude, insolent, or angry manner." Students with disabilities are subject to procedural safeguards under federal law and rules adopted by the state board. See 20 U.S.C. § 1415, IC 20-33-8-34.

In **D.L. v. Pioneer School Corp.**, 958 N.E.2d 1151 (Ind. Ct. App. 2011), the Court affirmed the high school student's expulsion despite the student's claim that his due process rights were violated during the administrative expulsion hearing. Id. at 1153. The student's attorney was permitted to be present on the school premises during the hearing but was not allowed to attend the hearing. The Court, quoting Lake Central School Corp. v. Scartozzi, 759 N.E.2d 1185, 1190 (Ind. Ct. App. 2001), said that, in the context of expulsion proceedings, the Court has consistently held that the general due process requirements of "notice and an opportunity for hearing appropriate with the nature of the case" apply to expulsion hearings. Pioneer School at 1154. The Court said that the full panoply of due process protections need not be provided at an expulsion hearing. Id. The student argued that he did not receive "proper notice of the allegations" against him. The Court quoted the expulsion notice statute, IC 20-33-8-19(b), which provides that notice must be made by certified mail or by personal delivery; contain the reasons for the expulsion; and contain the procedure for requesting an expulsion meeting. Id. The Court noted that the record included the certified mail receipts from the notices sent to the student and his parents, which indicated that he was subject to expulsion based on "inappropriate sexual behavior (5 allegations)" and the procedure by which an expulsion hearing would be held. Id. The Court declined to hold that the trial court which conducted a judicial review of the student's expulsion erred in finding that he received proper notice. Id. at 1155. The Court held the student's argument that he was denied due process because he was "deprived of the right to counsel at the expulsion hearing" failed. Id. The Court said that the Federal and State constitutions do not confer the right to counsel in an expulsion meeting. Id.

VI. C. 2. Court Assisted Resolution of Suspension and Expulsion Cases

Statutory procedures at IC 20-33-8.5-1 through 12 which are independent of CHINS or delinquency proceedings provide for agreed court assisted resolution of suspension and expulsion cases in public schools by the juvenile court. IC 20-33-8.5-2. The agreement may require the court to: (1) establish a flexible program for supervision of suspended or expelled students; (2) supervise a suspended or expelled student; or (3) require a suspended or expelled student to participate in a school program, including an alternative education program. IC 20-

33-8.5-3. The agreement may require the school corporation to: (1) define the violation for which a suspended or expelled student shall be referred to court; (2) refer a suspended or expelled student to court for a defined violation; or (3) establish a school program for supervision of suspended or expelled students, including an alternative education program. IC 20-33-8.5-4. The agreement must provide how the expenses of supervising the suspended or expelled student are funded. IC 20-33-8.5-5.

IC 20-33-8.5-6 provides that the student shall be given an informal hearing before the juvenile court, in a setting agreed upon by the court and the school system as soon as practicable following the referral to court, after notice has been provided to the student's parent. IC 20-33-8.5-8 provides that a parent or guardian has the right to be present and may be required to be present during the student's appearance. IC 20-33-8.5-12 provides that the chapter does not deprive the child of any due process rights to which the child may be entitled.

The hearing is not a hearing to determine if the suspended or expelled student is a child in need of services, but if the court determines that the student may be a child in need of services or have committed a delinquent act, the court may notify DCS or the prosecuting attorney. IC 20-33-8.5-7. The student's appearance in court shall not be used against the child or the child's parents or guardians in any subsequent court proceeding, including but not limited to any delinquency or child in need of services matter. IC 20-33-8.5-9. When the student completes the out-of-school suspension or expulsion program, all records of the student's court appearance shall be expunged. IC 20-33-8.5-10.

VII. MISSING CHILD

VII.A. Statute

IC 31-34-1-8 states:

> A child is a child in need of services if before the child becomes eighteen (18) years of age:
>
> (1) the child is a missing child (as defined in IC 10-13-5-4); and
>
> (2) the child needs care, treatment, or rehabilitation that:
>
> (A) the child is not receiving; and
>
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

VII.B. Defining Missing Child

IC 10-13-5-4 states that a "missing child" means a person less than eighteen (18) years of age who:

(1) is, or is believed to be:

(A) a temporary or permanent resident of Indiana;

(B) at a location that cannot be determined by the person's parent or legal custodian; and

(C) reported missing to a law enforcement agency; or

(2) is, or is believed to be:

(A) a temporary or permanent resident of Indiana; and

(B) a victim of the offense of criminal confinement (IC 35-42-3-3) or interference with custody

(IC 35-42-3-4).

The juvenile court has concurrent original jurisdiction in cases involving adults charged with criminal confinement and interference with custody. IC 31-30-1-3(4) and (5).

VII.C. Reporting and Locating a Missing Child

See Chapter 4 at I.I. for statutes regarding reporting and locating missing children, the Indiana Clearinghouse on Missing Children and Missing Endangered Adults, and the Amber Alert program.

VIII. ALCOHOL OR DRUG AFFECTED NEWBORNS AND YOUNG CHILDREN

Two CHINS categories deal with children who are born affected by their mother's use of alcohol, illegal substances, or certain prescribed substances during pregnancy. Indiana law has not addressed the right and responsibility of DCS to intervene to protect the fetus of a mother who is using illegal substances. The Court ruled in **Herron v. State**, 729 N.E.2d 1008 (Ind. Ct. App. 2000), that a fetus was not a dependent for the purpose of convicting a mother of neglect of dependent because she used cocaine during her pregnancy. See Chapter 2 at III.B.2.

VIII.A. Alcohol or Drug Affected Newborns

IC 31-34-1-10 states that except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

(1) the child is born with:

(A) fetal alcohol syndrome;

(B) neonatal abstinence syndrome; or

(C) any amount, including a trace amount, of a controlled substance, a legend drug, or a metabolite of a controlled substance or legend drug in the child's body, including the child's blood, urine, umbilical cord tissue, or meconium; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; or

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

VIII.B. Injury, Abnormal Development, or Endangering Condition Caused by Mother's Substance Use During Pregnancy

IC 31-34-1-11 states:

Except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

(1) the child:

(A) has an injury;

(B) has abnormal physical or psychological development;

(C) has symptoms of neonatal intoxication or withdrawal; or

(D) is at a substantial risk of a life threatening condition;

that arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; or

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

VIII.C. Summarizing the Elements of Proof for Both CHINS Categories

These two CHINS categories have been grouped together because of their similarities, but they also have significant differences. The first category (IC 31-34-1-10) involves children who are born with fetal alcohol syndrome, neonatal abstinence syndrome, or having a trace amount of a controlled substance or legend drug in their systems. Expert medical testimony will be needed to prove the existence of substances in the child's system, or the fetal alcohol syndrome or neonatal abstinence syndrome diagnosis. Specific testimony on the child's need for care, treatment, or

rehabilitation will also be needed. See **In Re S.M.**, 45 N.E.3d 1252 (Ind. Ct. App. 2015), a CHINS case, in which the Court found there was insufficient evidence to support the child's CHINS adjudication pursuant to IC 31-34-1-10. Id. at 1256. The child's meconium tested positive for marijuana when he was born. The Court opined that there was no evidence showing *how*, specifically, having a marijuana-positive meconium endangered the child (emphasis in opinion). Id. Reversing the trial court's CHINS adjudication, the Court found the record devoid of any evidence that the child needed care, treatment, or rehabilitation that he was not receiving or that would be unlikely to be provided without the coercive intervention of the court. Id. at 1256-57.

The second CHINS category (IC 31-34-1-11) requires proof that the child has an injury, symptoms of neonatal intoxication or withdrawal, abnormal development, or substantial risk of a life-threatening condition that is caused or aggravated by the mother's use of alcohol or drugs during pregnancy. There is no age requirement for this CHINS category, although presumably the diagnosis would be made when the child was very young. Like the situation in IC 31-34-1-10, expert testimony will likely be needed from a physician or a developmental psychologist to prove the child is a CHINS under IC 31-34-1-11.

The term "legend drug" is defined at IC 31-9-2-76 as having the meaning set forth in IC 16-18-2-199. The term "controlled substance" is defined at IC 31-9-2-24 as having the meaning set forth in IC 35-48-1. Generally, it is considered that the term "controlled substance" includes illegal street drugs, i.e. heroin, LSD, cocaine, etc., whereas "legend drug" includes drugs which require a prescription. The legal definitions should be consulted carefully regarding the particular drug involved, and information from an expert may be needed.

VIII.D. Defense for Valid Prescription and Good Faith Use of Drugs

The defenses at IC 31-34-1-12 and IC 31-34-1-13 provide that a child is not a CHINS if the mother had a valid prescription for the controlled substance or legend drug that was detected in the child's body at birth, or the mother had a valid prescription for the controlled substance or legend drug that she consumed during pregnancy which caused damage or endangerment to the child's development. The mother must show that she made a good faith attempt to use the drug according to prescription instructions.

VIII.E. Obtaining Drug Testing on Newborns in Hospital

If DCS has credible information that a woman was using illegal drugs during her pregnancy, the agency may request that the hospital conduct tests to determine if her child was born with a trace amount of a controlled substance or illegal drug in his system. The hospital or the child's physician may initiate the tests to diagnose the condition of the child. Alternatively, DCS could seek a court order for the tests under the statute that authorizes medical examinations of children in emergency situations, IC 31-32-12. DCS could also direct the hospital to hold the child as a victim of child abuse or neglect under investigation pursuant to IC 31-33-11-1.

The facts of **G.B. v. Dearborn Cty. Div. of Fam. & Child.**, 754 N.E.2d 1027, 1029 (Ind. Ct. App. 2001), a CHINS case in which Parents appealed the dispositional order finding that reasonable efforts for reunification were not required pursuant to IC 31-34-21-5.6, show that the child's meconium stool analysis revealed the presence of cannabinoids (marijuana). The toxicologist explained that meconium is a material that accumulates in the intestinal tract during fetal development during the last trimester and includes a mixture of fluids, cells, sloughed off cells in the G.I. tract, and oils. Id. at 1029 n.1. The facts of the case also indicate that the Dearborn County Hospital nurse collected the child's meconium stool for analysis because of Mother's inconsistent prenatal care and in compliance with the Indiana Meconium Screening Program. Id. at 1029.

VIII.F. Mandatory Reporting

The CHINS categories IC 31-34-1-10 and 11 are included in the definition of "victim of child abuse or neglect" at IC 31-9-2-133. Children whose situations are referenced in these two CHINS categories must be reported under the mandatory child abuse and neglect reporting law at IC 31-33-5. IC 31-33-5-2.5 is the specific statute which applies to reporting by hospital staff.

VIII.G. Termination Cases Involving Drug Affected Children

The following termination cases originated from CHINS cases based on drug affected children: **Matter of G.M.**, 71 N.E.3d 898, 909 (Ind. Ct. App. 2017) (child removed from Parents because Mother admitted using unprescribed painkillers and heroin during pregnancy; Father's probation for rape conviction did not allow him to have unsupervised contact with child); **In Re A.G.**, 45 N.E.3d 471, 474 (Ind. Ct. App. 2015) (newborn infant removed from Mother's care because he tested positive for cocaine and marijuana at birth; infant was hospitalized in intensive care due to severe drug withdrawal for the first two weeks of his life); **In Re Z.C.**, 13 N.E.3d. 464, 465 (Ind. Ct. App. 2014) (infant was born with controlled substances in his bloodstream and remained hospitalized for a number of weeks due to severe withdrawal symptoms; Mother admitted using heroin, morphine, Xanax, and Oxycontin), *trans. denied*; **Parent-Child Rel. v. Indiana Child Services**, 933 N.E.2d 1264, 1265 (Ind. 2010) (newborn infant was removed from Mother by DCS after child tested positive for amphetamines); **In Re A.B.**, 924 N.E.2d 666, 668 (Ind. Ct. App. 2010) (Mother admitted she had used crack cocaine five days before child's birth; newborn tested positive for cocaine); **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 144 (Ind. 2005) (infant tested positive for cocaine at birth, so the hospital authorities notified the Lake County OFC, which assumed jurisdiction over the infant); **Baker v. County Office of Family & Children**, 810 N.E.2d 1035, 1037 (Ind. 2004) (Mother used cocaine as late as days before prematurely delivering a baby, and the baby was hospitalized, placed in an emergency shelter, and eventually in foster care); **In Re I.A.**, 903 N.E.2d 146, 148 (Ind. Ct. App. 2009) (Mother used cocaine during entire nine months of pregnancy; infant was born with numerous medical problems about which Mother failed to educate herself); **In Re E.E.**, 853 N.E.2d 1037, 1039 (Ind. Ct. App. 2006) (one or more of Mother's children were born with fetal alcohol syndrome or a trace amount of controlled substance; Mother also used drugs while children were in her care and custody); **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 867 (Ind. Ct. App. 2006) (infant was removed from Mother's care when he tested positive for cocaine after his birth); **Termination of Parent-Child Rel. of L.V.N.**, 799 N.E.2d 63, 66 (Ind. Ct. App. 2003) (Mother's newborn was temporarily removed from Mother because he tested positive for cocaine); **In Re C.C.**, 788 N.E.2d 847, 849 (Ind. Ct. App. 2003) (infant tested positive for cocaine at his birth; infant was released from the hospital ten days later and went to live with foster parents), *trans. denied*; **In Re Invol. Term. of Parent-Child Rel.**, 755 N.E.2d 1090, 1094 (Ind. Ct. App. 2001) (Mother had two children who tested positive for cocaine at birth, and admitted to using cocaine while pregnant; the children were eventually placed together with a foster mother).

IX. Preventative Programs for At-Risk Children

IC 31-32-3-11 permits the juvenile court to establish a voluntary preventative program for at-risk children. At-risk children, defined at IC 31-9-2-9.9, means children who: (1) are at risk of becoming involved in a juvenile proceeding, being suspended or expelled from school, or dropping out of school; (2) were previously CHINS and who are in need of ongoing supervision and assistance; or (3) have been victims of domestic violence.

IC 31-32-3-11(b) states that a juvenile court which establishes a preventative program may appoint staff and an early intervention advocate who have passed a criminal history check for felonies, misdemeanors relating to child health and safety, and juvenile adjudications for acts that

would be felonies listed at IC 31-27-4-13(a). IC 31-9-2-43.2 defines "early intervention advocate" as a volunteer or staff member of a preventative program who is appointed by the court as an officer of the court to assist, represent, and protect the interests of at-risk children. IC 31-32-3-11(c) states that program staff or an early intervention advocate may receive information concerning an at-risk child from any person and use the information to create, implement, and maintain an individualized plan for the at-risk child and the child's family if the child's parent, guardian, or custodian has consented to the child's participation in the program. The plan may include counseling, tutoring, or mentoring. All information received by the staff or an early intervention advocate is confidential and may be disclosed only to program staff or the early intervention advocate; any person engaged in creating, implementing, and maintaining the plan; and the juvenile court. IC 31-32-3-11(d). Privileged communications may not prevent an individual from reporting to, requesting assistance from, or cooperating with program staff or an early intervention advocate. IC 31-32-3-11(e). IC 31-32-3-11(g) states that after receiving a request that a child receive assistance under the program or after receiving information that a child may be an at-risk child, program staff or an early intervention advocate shall determine whether the child would benefit from the program, inform the child's parent, guardian, or custodian of the determination, and request permission for the child to participate in the program. IC 31-32-3-11(g) also states that the child (and the parent, guardian, or custodian) may participate in the program only with the consent of the parent, guardian, or custodian. IC 31-32-3-11(h) states that a person who, in good faith, makes a request, provides information concerning a child to program staff or an early intervention advocate, or participates in a plan is immune from civil or criminal liability. Except as provided under IC 31-33-5 (mandatory child abuse or neglect reporting statute), no information received under the program by program staff or an early intervention advocate may be used against the child in a criminal or civil proceeding. IC 31-32-3-11(i).