CHAPTER 4
REPORTING ABUSE and NEGLECT, DCS, AND ASSESSMENT

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I. REPORTING SUSPECTED ABUSE OR NEGLECT

I. A. Duty to Report

An individual who has "reason to believe" that a child is a "victim of child abuse or neglect" shall make an immediate oral report to the Department of Child Services [DCS] or to a law enforcement agency. IC 31-33-5-1 (duty to report); IC 31-33-5-4 (where to make report). The phrase "reason to believe" is defined as "evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected." IC 31-9-2-101.

Child abuse and neglect reports should be made to the Statewide Hotline number, which is 1-800-800-5556. IC 31-33-1-2 states that a judge who wishes to contact DCS about a potential case of child abuse or neglect shall first use the hotline to report the suspected abuse or neglect. If the judge does not obtain a response from the hotline or the response the judge obtains from the hotline will not, in the judge's opinion, serve the child's best interests, the judge may contact the local office of DCS directly to report the suspected abuse or neglect.

IC 31-33-18-5(a) provides that an audio recording of a telephone call to the child abuse hotline is confidential and may be released only upon a court order. IC 31-33-18-5(b) states that an audio recording of a report of child abuse or neglect that is the subject of a complaint made to a prosecuting attorney under IC 31-33-22-3 [knowing, intentional false reporting] shall be released without a court order to the prosecuting attorney.

IC 20-19-3-11(a)(2) requires the state department of education to identify and develop a model for child abuse and child sexual response policies and reporting procedures. The model must include information on the duty to report suspected child abuse or neglect under IC 31-33-5. IC 20-19-3-11(b) states that the state department of education shall make the model available to assist schools with the implementation of child abuse and child sexual abuse education programs and child abuse and child sexual abuse response and reporting policies not later than July 1, 2018. IC 20-26-5-35.5(b) provides that a school corporation, including a charter school and a nonpublic school, may not establish any policy that restricts or delays the duty of an employee or individual to report suspected child abuse or neglect as required under IC 31-33-5. IC 20-28-3-4.5(a) provides that each school corporation, charter school, and accredited nonpublic school shall require each school employee who is likely to have direct, ongoing contact with children to attend or participate in training on child abuse or neglect, including: (1) training on the duty to report suspected child abuse and neglect under IC 31-33-5; and (2) training on recognizing possible signs of child abuse or neglect.

In **Smith v. State**, 8 N.E.3d 668 (Ind. 2014), the Indiana Supreme Court opined that the Indiana statutory scheme contemplates erring on the side of *over*reporting suspected child abuse or neglect (emphasis in opinion). Id. at 683. The Court observed that the General Assembly has made the risk to an alleged abuser's reputation arising from an unsubstantiated report secondary to the statutory scheme of promoting more reports in an effort to provide better protection for children. Id. at 690.

I. A. 1. Victim of Child Abuse and Neglect

The definition of "victim of child abuse or neglect" is found at IC 31-9-2-133. IC 31-9-2-133 states that this term refers to a child described in IC 31-34-1-1 through IC 31-34-1-5; IC 31-34-1-10; or IC 31-34-1-11 regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of the court. The statute requires that a child abuse or neglect report must be made even if the potential complainant believes that the child's safety has been secured through a guardianship, custody or parenting time modification, or the issuance of a protective order. In **Smith v. State**, 8 N.E.3d 668 (Ind. 2014), the Indiana Supreme Court opined that the duty to report for school and medical officials is significantly stricter. Id. at 686. The Court clarified that the child abuse or neglect report must be made regardless of whether the child is being cared for by parents, guardians, or the State, and regardless of how the official assesses the quality of that care. See this Chapter at I.A. and I.F.

See Chapter 1 for detailed discussion of CHINS definitions, including case law.

I. A. 2. Reporting Consensual Teenage Kissing

The definition of "victim of child abuse or neglect" does not require reporting teenage children as being the victims of child molestation when they were engaging in minor consensual touching such as hugging and kissing. IC 31-9-2-133 states that the definition of "victim of child abuse or neglect" (for whom a duty to report child abuse or neglect exists):

> (b) ... does not include a child who is alleged to be a child in need of services if that child is alleged to be a victim of a sexual offense under IC 35-42-4-3 [child molestation] unless the alleged offense under IC 35-42-4-3 involves the fondling or touching of the buttocks, genitals, or female breasts.

IC 31-27-4-35 requires licensees, including foster parents, to notify DCS of any current or prior under age sixteen sexual contact involving a foster child. Sexual contact is defined at IC 25-1-9-3.5 as (1) sexual intercourse, (2) other sexual conduct, or (3) fondling or touching intended to arose or satisfy desire of either individual. Licensees, including foster parents, must also notify DCS of delinquency or criminal charges involving foster children as alleged victims or perpetrators of sex offenses.

I. B. Who Must Report

I. B. 1. Individuals

IC 31-33-5-1 and IC 31-33-5-4 mandate that a person who has reason to believe a child is a victim of child abuse and neglect "shall immediately make an oral or written report" to DCS or to a local law enforcement agency. See this Chapter at I.A. and I.A.1. for definitions of "reason to believe" and "victim of child abuse or neglect."

I. B. 2. Staff Members of Schools, Institutions, and Hospitals

IC 31-33-5-2 discusses an individual's duty to report child abuse/neglect in the individual's capacity as a member of the staff of a medical or other public or private institution, school, facility, or agency. IC 31-33-5-2 does not apply to an individual who is a member of the staff of a hospital. (IC 31-33-5-2.5 specifically applies to hospitals, and is discussed below). IC 31-33-5-2(b) provides that an individual who is required to make a child abuse/neglect report in the individual's capacity as a staff member of a medical or other public or private institution, school, facility, or agency shall immediately make a report to DCS or the local law

enforcement agency. After making the report, the staff member shall notify the individual in charge of the institution, school, facility, or agency or the individual's designated agent that the report of child abuse/neglect was made. IC 31-33-5-5(b) provides that a medical institution or other public or private institution, public or nonpublic school, school corporation, facility, or agency may not establish any policy that restricts or delays the duty of an employee or individual to report child abuse/neglect. IC 31-33-5-5(a) states that this section does not apply to a hospital.

See the following cases, discussed in this Chapter at I.F., concerning allegations of failure to report child abuse on the part of school personnel: **Smith v. State**, 8 N.E.3d 668 (Ind. 2014); **Gilliland v. State**, 979 N.E.2d 1049 (Ind. Ct. App. 2012); **Lebo v. State**, 977 N.E.2d 1031 (Ind. Ct. App. 2012).

IC 31-33-5-2.5 applies only to hospitals and outlines the duty of an individual who is required to make a report of child abuse/neglect in the individual's capacity as a member of the staff of a hospital. IC 31-33-5-2.5(b) provides that if an individual is required to make a child abuse/neglect report in the individual's capacity as a member of the staff of a hospital, the individual shall immediately notify the person in charge of the hospital or the designated agent of the person in charge of the hospital. IC 31-33-5-2.5(c) provides that the person in charge of the hospital or the designated agent shall immediately report or cause a report to be made to DCS or the local law enforcement agency.

I. B. 3. Law Enforcement

IC 31-33-7-7(a) provides that a law enforcement agency which receives a report pursuant to IC 31-33-5-4 that a child may be a victim of child abuse or neglect must: (1) "immediately communicate the report to the department [DCS], whether or not the law enforcement agency has reason to believe there exists an imminent danger to the child's health or welfare"; and (2) "conduct an immediate onsite assessment of the report" with DCS whenever the law enforcement agency has reason to believe that an offense has been committed. IC 31-33-7-7(b) states the law enforcement agency shall forward any information, including copies of assessment reports, on incidents of cases in which a child may be a victim of child abuse or neglect to DCS and to the juvenile court as part of the preliminary inquiry under IC 31-34-7. See this Chapter at I.I.1. for information on the duties of law enforcement regarding missing children.

I. B. 4. DCS Notice to Law Enforcement

IC 31-33-7-5 provides that DCS "shall" immediately make available to: (1) law enforcement; (2) the prosecutor; and (3) in a case involving death, the coroner, a copy of the written report of child abuse or neglect that DCS is required by IC 31-33-7-4 to prepare within forty-eight hours of receiving an oral complaint of child abuse or neglect. In **H.B. v. State**, 713 N.E. 2d 300 (Ind. Ct. App. 1999), the children brought suit against the Elkhart Division of Family and Children alleging the Division was negligent in failing to notify law enforcement when the Division received a report that the children were sexually molested. The Court found that the Division's failure to report to law enforcement occurred within the context of an existing CHINS court case and therefore was protected by judicial immunity. Id. at 303.

I. C. Privilege Laws Affecting the Duty to Report

Communications made within certain relationships are considered privileged. These communications (when they are intended to be private) are generally protected by statute from

disclosure. The juvenile code contains a specific statute abrogating privileges for the specific purpose of reporting child abuse or neglect. Additionally, many of the professional communications protected by privilege may be overridden by specific statutory provisions directing or permitting a specific professional category to report child abuse or neglect. Some of the privileged relationships relevant to reporting child abuse or neglect in Indiana include: Husband-Wife, IC 34-46-3-1(4); Physician-Patient, IC 34-46-3-1(2); School Counselor-Student, IC 20-28-10-17; School Psychologist-Student, IC 20-28-12-5; Psychologist-Patient, IC 25-33-1-17; Clergyman-Confessor or recipient of counseling or spiritual advice, IC 34-46-3-1(3); Attorney-Client, IC 34-46-3-1(1); Victim Counselor-Victim, IC 35-37-6-9; Marriage and Family Therapist, Social Worker, Clinical Social Worker, Mental Health Counselor-Client and Addiction Counselor-Client, IC 25-23.6-6-1.

I. C. 1. Juvenile Code Overrides Privileges for Purposes of Reporting Child Abuse or Neglect

IC 31-32-11-1 provides that revelations of child abuse or neglect communicated in certain relationships are not protected as privileged, and the person receiving that information is not excused from making a report of child abuse or neglect.

IC 31-32-11-1, which abrogates privileges for reporting and testifying concerning child abuse or neglect states:

> The privileged communication between
> (1) a husband and wife;
> (2) a health care provider and the health care provider's patient;
> (3) a:
> (A) licensed social worker;
> (B) licensed clinical social worker;
> (C) licensed marriage and family therapist;
> (D) licensed mental health counselor;
> (E) licensed addiction counselor; or
> (F) licensed clinical addiction counselor;
> and a client of any of the professionals described in clauses (A) through (F);
> (4) a school counselor and a student; or
> (5) a school psychologist and a student;
> is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect or relating to the subject matter of the report or failing to report as require by IC 31-33.

The broadest professional category listed in IC 31-32-11-1 is "health care provider." This term is defined at IC 31-9-2-52 to include:

> (1) A licensed physician, intern or resident.
> (2) An osteopath.
> (3) A chiropractor.
> (4) A dentist.
> (5) A podiatrist.
> (6) A registered nurse or other licensed nurse.
> (7) A mental health professional.
> (8) A paramedic or emergency medical technician.
> (9) A social worker, an x-ray technician, or a laboratory technician employed by a hospital.

(10) A pharmacist.
(11) A person working under the direction of any of the practitioners listed in subdivision (1) through (10).

I. C. 2. Physician-Patient Privilege

Physicians are included within the definition of health care providers at IC 31-9-2-52 and therefore the physician-patient privilege is not a ground for failing to report child abuse and neglect under IC 31-32-11-1.

In **Planned Parenthood of Indiana v. Carter**, 854 N.E.2d 853 (Ind. Ct. App. 2006), the Indiana Medicaid Fraud Control Office sought access to Planned Parenthood's medical records regarding seventy-three minor patients to investigate a complaint that Planned Parenthood neglected the patients by allegedly failing to report child sexual abuse as required by Indiana law. The trial court denied Planned Parenthood's motion for an injunction, and the Court reversed and remanded, ordering the trial court to immediately enter a preliminary injunction in favor of Planned Parenthood and that the Medicaid Fraud Control Unit return the medical records in its possession to the trial court under seal pending resolution of the trial on the merits of Planned Parenthood's informational privacy claim. Id. at 883. The Court further stated that the Medicaid Fraud Unit could refer any neglect complaint to any appropriate criminal investigative or prosecutive authority pursuant to federal law and that the attorney general and a Medicaid Fraud Unit investigator may issue a subpoena for the medical records pursuant to IC 4-6-10-3. Id. The Court noted that the subpoena would be subject to a motion to modify or a motion to quash based on informational privacy concerns. Id. at 882. The Court opined that allowing a neutral third party to review the requested medical records prior to disclosure would allow the Medicaid Fraud Unit to pursue its neglect investigation and safeguard the privacy rights of Planned Parenthood's minor patients. Id. In its opinion the Court held that Planned Parenthood has standing to raise a Fourteenth Amendment informational privacy claim on behalf of its minor patients and that those patients have a limited constitutional right to privacy in their medical records. Id. at 856. The Court also discussed the child abuse reporting statutes, IC 31-33-5-1 et seq. and noted that reports are confidential pursuant to IC 31-33-18-1 and 2 and are not accessible to the Medicaid Fraud Control Unit. Id. at 865.

See also **Williams v. State**, 819 N.E.2d 381, 386 (Ind. Ct. App. 2004), *trans. denied*, a criminal deviate conduct and rape case where the Court affirmed the trial court's denial of defendant's motion for adult victim's medical records because the defendant had not properly complied with statutory procedures to gain access to the records.

I. C. 3. Psychologist-Patient Privilege

Psychologists are included in the definition of a health care provider (a mental health professional) at IC 31-9-2-52(7); therefore, IC 31-32-11-1(2) provides that the psychologist-patient privilege is not a reason for failing to report child abuse or neglect. The psychologist-patient privilege (IC 25-33-1-17) specifically provides that the privilege or confidentiality between the psychologist and patient is abrogated for "circumstances under which privileged communication is abrogated under the law of Indiana."

I. C. 4. Husband-Wife Privilege

The husband-wife privilege is specifically overridden by IC 31-32-11-1 for purposes of reporting child abuse or neglect or excluding evidence in a CHINS case.

Pursuant to IC 31-32-11-1 and IC 31-34-12-6, the spousal privilege cannot be used to exclude evidence in a CHINS proceeding, or any other proceeding arising from a report of child abuse or neglect. For other proceedings, the Indiana Supreme Court clarified the spousal privilege at **Glover v. State**, 836 N.E.2d 414, 422 (Ind. 2005) and **State v. Wilson**, 836 N.E.2d 407, 414 (Ind. 2005). The Court concluded in both cases that the marital privilege prevents a court from requiring a spouse to testify as to confidential marital communications, but does not bar the spouse from testifying if the spouse chooses to do so. In **Dixson v. State**, 865 N.E.2d 704, 712-14 (Ind. Ct. App. 2007), *trans. denied*, the Court held that, given the evidence that jail inmates were well informed in a number of ways that their telephone calls were recorded, the trial court could clearly have concluded that the Defendant's telephone conversation with his wife was made in the presence of a third party, the Marion County Sheriff's Department and its agents, and therefore it was not covered by the marital communications privilege codified at IC 34-46-3-1.

In **Muehe v. State**, 646 N.E.2d 980 (Ind. Ct. App. 1995), a criminal neglect of dependent case, the Court did not address the husband-wife privilege with regard to the duty to report child abuse or neglect, but the Court found that Mother's failure to protect her child from her husband's sexual abuse by separating from her husband or by reporting the abuse to the "appropriate authorities" was sufficient to support Mother's conviction for neglect of a dependent. Id. at 984.

I. C. 5. School Personnel

Any privileged or confidential relationship between a school counselor-student or a school psychologist-student is overridden by IC 31-32-11-1 for purposes of reporting child abuse and neglect. See also IC 20-28-10-17 (school counselor-student privilege overridden for reporting); IC 20-28-12-5 (school psychologist-student privilege overridden for reporting).

IC 20-28-10-17(b) provides that matters communicated to a school counselor are privileged and protected against disclosure except as provided in IC 31-32-11-1. IC 20-28-12-5(6) allows a school psychologist to disclose information acquired from persons with whom the school psychologist has dealt in a professional capacity in "circumstances under which privileged communication is lawfully invalidated", which would include reporting of child abuse or neglect.

I. C. 6. Mental Health Professionals, Mental Health Counselors, Counselors, Social Workers, Marriage and Family Therapists, and Addiction Counselors

A wide variety of statutes deal with the privileged communications of service providers who deliver mental health, counseling, and other behavior modification services. IC 31-32-11-1 provides that social workers, clinical social workers, certified marriage and family therapists, and health care providers who serve as "mental health professionals" are not exempt from the duty to report child abuse or neglect. These categories are also covered by IC 25-23.6-6-1. That statute provides that communications between one of those professionals and their clients are "privileged information and may not be disclosed by the counselor to any person" except if the communication reveals the contemplation or commission of a crime or a serious harmful act, or the information imparted indicates that an unemancipated client was the victim of abuse or a crime, or "circumstances under which privileged communication is abrogated under Indiana law."

The law on mental health records at IC 16-39-2-6(10)(E) provides that a mental health record may be disclosed without the patient's consent, "[t]o the extent necessary to satisfy reporting requirements" under the child abuse and neglect reporting statute at IC 31-33-5-4.

Criminal cases have dealt with child abuse reporting by counselors and the admissibility of the reports into evidence. See **Hayes v. State**, 667 N.E.2d 222 (Ind. Ct. App. 1996) (stepfather sought treatment for his sexual molestation of his twelve year old stepdaughter, his therapist notified child protection service of stepfather's revelations of abuse, and Court ruled that disclosure for purpose of reporting child abuse and neglect was not protected by privilege and was admissible evidence); **Devore v. State**, 658 N.E.2d 657 (Ind. Ct. App. 1995) (based on communications with defendant, hospital reported defendant for child sexual abuse, and defendant's medical records from hospital were properly admitted into evidence at his criminal sentencing hearing since juvenile code specifically abrogates physician-patient privilege for purpose of admitting evidence in judicial proceedings resulting from report of child abuse). But see **Daymude v. State**, 540 N.E.2d 1263 (Ind. Ct. App. 1989) (confessions of Father in therapy required by the CHINS informal adjustment were not admissible because duty to report statute had already been satisfied in the earlier initiation of CHINS proceeding).

IC 25-23.6 establishes the definitions and state licensing standards for addition counselors and clinical addiction counselors. IC 25-23.6-1-4.3 and 4.5; IC 25-23.6-10.5. IC 25-23.6-1-5.7 defines the practice of addiction counseling and IC 25-23.6-1-5.9 defines the practice of clinical addition counseling. Both practices are defined as "providing of professional services...that are designed to change substance abuse or addictive behavior, and that involve specialized knowledge and skill related to addictions and addictive behaviors...." Neither an addiction counselor, nor a clinical addition counselor may provide diagnosis. IC 25-23.6-1-5.7(b); IC 25-23.6-1-5.9(b). A licensed addiction counselor or licensed clinical addiction counselor may provide factual testimony but may not provide expert testimony. IC 25-23.6-10.1-5. Both addiction counselors may do the following: (1) gather information through structured interview screens; (2) review assessment findings to develop individualized treatment plans and coordinate services; (3) provide client and family education related to addictions; (4) provide information for referrals and discharge planning; (5) provide individual, and group counseling to treat addiction and substance abuse; (6) participate in multidisciplinary treatment team meetings or consult with clinical addiction professionals. IC 25-23.6-1-5.7(a); IC 25-23.6-1-5.9(a). Clinical addiction counselors may also: (1) use standardized clinical instruments; (2) provide psychosocial evaluations; (3) provide assessment updates; (4) use psychotherapeutic techniques and provide family counseling; (5) provide counseling in private practice. Unlicensed individuals may not profess to be licensed addiction or licensed clinical addiction counselors, but there are many statutory exceptions. Among the exceptions are: (1) members of the clergy who may use the title "pastoral addiction counselor," IC 25-23.6-10.1-1(c); (2) government employees who remain in the same job classification or job family; (3) school counselors; (4) employees of court alcohol/drug programs, drug courts, or re-entry courts certified by the Indiana Judicial Center; (5) probation officers; (6) persons providing addiction counseling services in licensed health facilities, hospitals, substance abuse facilities, home health agencies, community health centers, community mental health centers, and institutions operated by the department of correction. IC 25-23.6-10.1-2; IC 25-23.6-10.1-3. IC 31-32-11-1 abrogates the privilege for the reporting of child abuse or neglect or testifying in a judicial proceeding resulting from a report of child abuse or neglect.

In **Rogers v. State**, 60 N.E.3d 256, 267-68 (Ind. Ct. App. 2016), *trans. denied*, an interlocutory appeal in a child molesting case, the Court found that the counselor/client privilege at IC 25-23.6-6-1 does not include communications with unlicensed social workers.

J.B. v. E.B., 935 N.W.2d 296 (Ind. Ct. App. 2010), is a child custody proceeding involving the application of the counselor/client privilege, which is abrogated by IC 31-32-11-1. Id. at 297. Father sought physical custody of Daughter because Son was adjudicated delinquent for sexual battery of Daughter, and Son received counseling thereafter. Son's counselor noted that Son remained at high risk to reoffend. At the custody modification hearing, Father offered Son's counseling records into evidence, but the trial court excluded the records, finding them inadmissible pursuant to the counselor/client privilege. The trial court denied Father's request to modify custody, but the Court found that IC 31-32-11-1 applied to the custody case. Id. at 300. The Court found that the trial court erred in excluding the counseling records on the basis of privilege and that the error was not harmless, given the content of the records and the limited grounds on which the trial court based its ruling. Id. at 300-01.

In **State v. Pelley**, 828 N.E.2d 915, 918-20 (Ind. 2005), a murder case, the Court held that the social worker/mental health counselor privilege statute concerns only disclosures made after the statute was enacted on July 1, 1990 and has only prospective application from that date.

Father argued that he had been deprived of his right to due process by the use of his invocation of his right against self-incrimination during counseling sessions in **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225 (Ind. Ct. App. 2002), *trans. denied,* a termination case. A CHINS petition had been filed due to alleged child physical abuse by Father. Father had several counseling sessions with a social worker while Father was incarcerated pending action on criminal charges arising from physical abuse. During the sessions, Father discussed his own plight but did not discuss the abuse events upon advice of his counsel and instead invoked the Fifth Amendment. Father was concerned that any statements made to the social worker concerning abuse would be used against him in the criminal proceedings. Later, Father pleaded guilty to aggravated battery as a class B felony and to neglect of a dependent as a class D felony and was sentenced to fourteen years of incarceration. At the termination hearing the OFC offered into evidence, through the testimony of the social worker, the fact that counseling with Father was limited to issues not pertaining to the abuse. The OFC appeared to use the testimony to show that counseling was limited in scope and that the social worker did not have all the facts necessary to determine whether Father could be rehabilitated. The Court agreed that the social worker could have disclosed any information revealed by Father which would have indicated his guilt in child physical abuse pursuant to IC 25-23.6-6-1(2), and that Father's only recourse to protect himself was to invoke the Fifth Amendment. Id. at 1231.

I. C. 7. Victim Advocate-Victim Privilege

IC 35-37-6-9 provides that communications between a victim advocate and the victim of certain crimes are privileged. IC 35-37-6-3.5 defines victim advocate as an individual employed or appointed by or who volunteers for a victim services provider. The term does not include a law enforcement officer or prosecuting attorney or an employee or agent of a law enforcement officer or a prosecuting attorney's office. IC 35-37-6-9 provides that a victim advocate or victim service provider may not be compelled to give testimony, produce records, or disclose confidential communications in any judicial, legislative, or administrative proceeding without the victim's specific consent. IC 35-37-

6-8 states that a victim advocate is not relieved from the duty to report child abuse or neglect.

In **In Re Crisis Connection, Inc.**, 949 N.E.2d 789 (Ind. 2011), the Court observed that, by enacting the victim advocate privilege, the General Assembly recognized the societal value of protecting the confidences existing within that relationship. Id. at 793. The Court noted that the statute (IC 35-37-6-1.5(b)) contemplates only two instances where the information is not confidential: (1) if the victim files criminal charges, institutes a civil suit, or reports allegations of criminal conduct to a law enforcement agency against the victim service provider or victim advocate; and (2) alleged child abuse or neglect that is required to be reported under IC 31-33. Id. at 793 n.5.

See Chapter 7 at II.C.9. for further discussion on victim advocate-victim privilege.

I. C. 8. Attorney-Client Privilege

The child abuse and neglect reporting statute at IC 31-33-5-1 does not exclude lawyers from the reporting mandate. On the other hand, Indiana Rule of Professional Conduct 1.6 requires that an attorney maintain client confidentiality. In Indiana, there is no statutory provision abrogating the attorney-client privilege for the purpose of reporting child abuse or neglect; therefore, such a report may be a breach of the ethical mandate of attorney-client privilege. Ind. Rule of Professional Conduct 1.6(b) allows a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime, or to comply with other law or a court order. These exceptions could include child physical or sexual abuse or child neglect situations, and permit the lawyer to report child abuse or neglect. Lawyers should encourage their clients to report child abuse or neglect in family law cases, including custody, parenting time, guardianship, and adoption cases.

In **Shanabarger v. State**, 798 N.E.2d 210 (Ind. Ct. App. 2003), *trans. denied*, Father's conviction for the murder of his infant son was affirmed. Id. at 220. The Court was not persuaded by Father's claim that the trial court had erred in permitting Father's original court appointed counsel to testify about Father's conversations with his sister and brother-in-law. Father argued that his sister and brother-in-law were agents of his court appointed attorney. The attorney had specifically told Father that anything Father told his sister and brother-in-law was not privileged. The Court noted that the person who asserts the privilege has the burden of showing the following by the preponderance of the evidence: (1) the existence of an attorney/client relationship, and (2) that a confidential communication was involved. Id. at 215. Additionally, statements made within the presence of hearing of a disinterested third person are not protected by the privilege. Id. at 216. Statements to an attorney's agent are protected under IC 34-46-3-1(1) so long as: (1) the communication involves the subject matter about which the attorney was consulted; and (2) the agent was retained by the attorney for the purposes of assisting the attorney in rendering legal advice to or conducting litigation on behalf of the client. Id. The evidence showed that the sister and brother-in-law merely met with Father to convince him to enter a guilty plea to avoid the death penalty, which fell short of rendering them agents of the attorney. Id.

I. C. 9. Privileged Communication to Clergy

IC 34-46-3-1 states, except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications:

(4) Clergymen, as to the following confessions, admissions, or confidential communications:
(A) Confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church.
(B) A confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor.

The statute makes it clear that not all communications to clergy are covered by this privilege statute. See **Mullins v. State**, 721 N.E.2d 335, 338 (Ind. Ct. App. 1999) (church member's apology to priest that he had committed theft did not qualify as confession); **Bonham v. State**, 644 N.E.2d 1223, 1225 (Ind. 1994) (no course of discipline in that church required a formal confession of sins).

Although IC 34-46-3-1 technically only bars communications for purposes of testimony in court, it has sometimes been used to support the position that clergy should not report information on child abuse or neglect that arises from a confidential clergy-church member communication. Note that IC 31-32-11-1 does not include clergy communications as one of the protected relationships which is overridden by the duty to report child abuse or neglect.

In **Shanabarger v. State**, 798 N.E.2d 210 (Ind. Ct. App. 2003), *trans. denied*, the Court found that Father's statements to the police chaplain regarding Father's murder of his child were not confidential communications under the clergy privilege statute because the chaplain expressly told Father on both occasions that anything Father said would not be confidential. Id. at 217. The chaplain further explained that anything Father said to him would be shared with the police. The Court opined that the trial court did not error in permitting the police chaplain to testify. Id.

In **In Re Commitment of J.B.**, 766 N.E.2d 795 (Ind. Ct. App. 2002), an involuntary mental health commitment case, the adult patient argued on appeal that the statements he had made to a deacon of the Church of Jehovah's Witnesses regarding wanting to kill his ex-wife triggered the priest-penitent privilege. The Court noted that the clergy privilege must be strictly construed. Id. at 800. The Court opined that the patient's unsupported argument could not prevail because the patient: (1) presented no evidence of the deacon's particular role or the role of a deacon generally within the Church of Jehovah's witneses; and (2) neglected to set forth any evidence explaining the nature or circumstances of his communication with the deacon, other than his conclusion that it fell under the priest-penitent privilege. Id. at 801.

I. D. Immunity From Liability in Reporting Child Abuse and Neglect

IC 31-33-6-1 states that a person who makes a report of child abuse or neglect, detains a child for the purpose of causing photographs, x-rays, or a medical examination to be made under IC 31-33-10, or who participates in a court hearing resulting from a report of child abuse or neglect, is immune from civil or criminal liability. Immunity does not apply if a person acted maliciously or in bad faith (IC 31-33-6-2). The law presumes that the person making the report acted in good faith (IC 31-33-6-3). Immunity does not apply to persons accused of child abuse or neglect. IC 31-33-6-1.

Practice Note: In **Gresk Estate of VanWinkle v. Demetris**, 81 N.E.3d 645 (Inc. Ct. App. 2017), Parents sued their younger child's physician for medical malpractice. Dr. Demetris, who is board certified in pediatrics and child abuse pediatrics, had observed the child during a hospitalization which included covert video surveillance of the child's hospital room and had consulted with

other physicians before concluding the child was a victim of medical child abuse. Dr. Demetris caused a child abuse report to be made to the DCS hotline by the hospital social worker. DCS filed a CHINS petition for both of Parents' children, but later voluntarily dismissed the petition. Within the context of Parents' medical malpractice claim, Dr. Demetris sought a preliminary determination of law and a motion to dismiss in the trial court on the basis that she was protected by the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, IC 34-7-7. The trial court granted Dr. Demetris's motion to dismiss based on the anti-SLAPP statute, but the Court of Appeals reversed the trial court's order. Id. at 655. The Court of Appeals explained that anti-SLAPP statutes are designed to "reduce the number of lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Id. at 650. The Court opined that Dr. Demetris was not entitled to anti-SLAPP protection with regard to her report to DCS about medical child abuse. Id. at 655. The Court held that, while child abuse detection and prevention, on a macro level, are of great interest to the general public, the more narrow issues addressed by Dr. Demetris's report to DCS were not significant. Id. at 654. Noting the confidentiality statutes on reporting child abuse and neglect, the DCS reports generated as a result of assessments, and juvenile court proceedings, the Court opined there generally cannot be widespread public interest in individual child abuse cases because Indiana's statutes and rules are designed to limit such interest. Id. The Court concluded that Dr. Demetris did not make any statements in furtherance of any free speech or petitioning rights, but reported her suspicions of child abuse to DCS primarily because of her duty to report imposed by IC 31-33-5. Id. The Court remanded to the trial court for consideration of the issues that were stayed by agreement of the parties; namely: (1) immunity for reporters of child abuse and neglect; and (2) the lack of a physician-patient relationship between Dr. Demetris and Parents' older child. Id. *The Indiana Supreme Court accepted transfer of this case on November 9, 2017, thereby vacating the Court of Appeals opinion pursuant to Ind. Appellate Rule 58(A). Attorneys should anticipate an Indiana Supreme Court opinion on this issue of first impression in the context of child abuse reporting.*

In **F.D. v. Indiana Dept. of Child Services**, 1 N.E.2d 131 (Ind. 2013), Parents filed suit alleging negligence in the handling of child abuse reports regarding their two-year-old daughter (Daughter) by DCS, Evansville Police Department (EPD), and Vanderburgh County Prosecutor's Office. The trial court granted summary judgment to all defendants on the grounds of immunity, and Parents appealed the grant of summary judgment in favor of DCS and EPD. The Indiana Supreme Court affirmed summary judgment in favor of EPD, but reversed summary judgment in favor of DCS, concluding that DCS was not immune under either the Indiana Tort Claims Act or the child abuse reporting statute. Id. at 140. Mother had informed DCS that her then four-year-old son (Son) had been molested by her then twelve-year-old nephew (Nephew). During the course of the investigations by DCS and EPD, Nephew admitted that he had molested Son and Daughter. Neither DCS nor EPD informed Mother that Nephew had molested Daughter. Nephew was adjudicated a delinquent for molesting Son and placed on probation for nine months. Over one year after Mother made her initial report to DCS, she learned from a third party that Nephew had admitted molesting Daughter, and DCS then confirmed this fact.

Parents contended in their suit that DCS was negligent in failing to perform its statutory duty, pursuant to IC 31-33-18-4, to notify them of Nephew's molestation of Daughter. Parents also argued that EPD was negligent in failing to notify them and for not pursuing separate charges against Nephew for molesting Daughter. DCS asserted that it was immune under IC 31-33-6-1(4) of the child abuse reporting statute "for allegations that arise out of its participation in any proceeding resulting from the report of child abuse," but the Court disagreed. Id. at 139. The Court said that IC 31-33-6-1 unambiguously provides immunity from any civil liability "that

might otherwise be imposed *because of such actions*" (emphasis in opinion). Id. The Court observed that DCS sought to extend that immunity to its inaction on a separate report of abuse "because it learned of the information that it allegedly failed to reveal to [the plaintiffs] through its participation in the investigation" of the original child abuse report. Id. The Court found that DCS's contention failed as a matter of law. Id. at 140. The Court said that IC 31-33-6-1 provides immunity from liability "that might otherwise be imposed *because of* participation in a judicial proceeding resulting from or relating to a report of child abuse (emphasis in opinion). Id. The Court noted that Parents did not allege that DCS's actions in the juvenile delinquency proceedings against Nephew caused them harm. Id. The Court said that Parents' suit was founded upon DCS's statutorily delineated duty under IC 31-33-8-1(a) to "initiate an immediate and appropriately thorough child protection investigation of every report," and to "give verbal and written notice to each parent, guardian, or custodian of the child that: 1) the reports and information...relating to the child abuse or neglect investigation...are available upon the request of the parent" pursuant to IC 31-33-18-4(a). Id. The Court noted that Parents contend DCS's *inaction* with respect to the *separate report* of abuse to Daughter hindered Parents' ability to obtain proper treatment for her (emphasis in opinion). Id. The Court said that the facts, which must be construed in favor of Parents as the non-moving party on summary judgment, did not fall within the circumstances granting immunity under the plain words of the statute. Id. The Court observed that the statute was in derogation of the common law and must be narrowly construed against immunity. Id. The Court opined that summary judgment was not proper as to this issue, and remanded to the trial court for further proceedings. Id.

In **Anonymous Hosp. v. A.K.**, 920 N.E.2d 704 (Ind. Ct. App. 2010), an interlocutory appeal on a medical malpractice case, the Court reversed the trial court's denials of Hospital's petition for a preliminary determination of law and motion for summary judgment on Parents' malpractice claim. Id. at 711. Hospital contacted Child Protection Services and law enforcement when lab analyses of an eighteen-month-old girl's urine were found to contain semen. Parents had brought their daughter to Hospital due to an unexplained fever. The child was admitted to the hospital and during her hospitalization, a third urine sample was obtained and analyzed, but no sperm was found to be present in the sample. Two days after the child's hospital admission, Child Protective Services came to Hospital, investigated, and gave permission to discharge the child from Hospital. During the investigation, a detective spoke with the child's twelve-year-old step-brother, who admitted that he had masturbated, had not cleaned himself, and had held the child while she was unclothed. Hospital's pathologist told the detective that there were no signs of penetration, and the findings were most compatible with external contamination by semen. Parents filed a complaint against the Hospital, alleging medical malpractice.

The Court determined that Hospital was immune from liability for reporting suspected child abuse and there was no evidence to rebut presumption that Hospital acted in good faith. Id. at 708. The Court noted IC 31-33-5-1, -2, and -4 which require an individual who has reason to believe that a child is a victim of child abuse or neglect to immediately make a report to either the Department of Child Services or the local law enforcement agency. Id. at 706. The Court observed that a person who makes such a report is immune from both civil and criminal liability for doing so; however, immunity will not attach if the person making the report has acted maliciously or in bad faith. IC 31-33-6-1 and –2. Id. at 707. The Court noted that the person making the report is presumed to have acted in good faith. IC 31-33-6-3. Id. Parents complained of four examples of purported bad faith, which they maintained destroyed Hospital's statutory immunity. Parents' examples of bad faith on the part of Hospital were: (1) Hospital reported suspected abuse before a managing care doctor became involved in the case; (2) there was a question whether the second urine sample was collected and/or tested prior to authorities

becoming involved in the case; (3) a "wet specimen" was not obtained until after the authorities were notified; (4) Father's request to independently test the specimens was denied. The Court was DCSnot persuaded by Parents' arguments of purported bad faith, stating: (1) the fact that Hospital reported possible child abuse without delay suggested that Hospital had a good faith belief that the child was in immediate danger; (2) there is no requirement that a managing care doctor must be involved in a decision to report suspect child abuse or neglect, and the statute makes it clear that time is of the essence in such a situation by requiring that abuse or neglect "shall *immediately*" be reported; (3) two different analyses of the child's urine showed sperm and either one of them would trigger the duty to report; there was no requirement that a reporter wait for confirmation from a second test; (4) Father's request for independent testing was made one month after the visit to Hospital; therefore, Hospital's response to Father's request to obtain the samples had no bearing on Hospital's good faith in reporting at the time of the incident (emphasis in opinion). Id. at 707-08.

The Court also concluded that Hospital's immunity extended to the underlying examination, tests, and diagnosis that triggered the report of suspected child abuse. Id. at 710. The Court stated that: (1) the legislature's stated goals are better met when individuals attempting to comply with the reporting statute can do so without fear of civil liability; (2) to decide otherwise would have a chilling effect on the reporting of child abuse; (3) health care providers would be placed in a "Catch 22" – report suspected abuse and be subject to civil liability, or fail to report suspected abuse and be subject to criminal liability; this illogical result cannot be what our legislature intended. Id. The Court determined that, having found no evidence of bad faith, the immunity provided to Hospital pursuant to IC 31-33-6-1 included immunity not only for the report of suspected abuse, but also for the underlying examination, tests, and diagnosis that triggered such report. Id. at 710. In so holding, the Court joined the ranks of several higher courts across the country, which have determined that statutory immunity applies not only to the report of suspected child abuse, but also to the underlying diagnosis.

I. E. Access to DCS Records and Confidentiality of Reporter's Identity

IC 31-33-18-1 provides that reports of child abuse or neglect, and other information obtained, including photographs, are confidential, but there are many exceptions. For example, IC 31-33-18-2(8) states that DCS reports and records are available to "a parent, guardian, custodian, or other person responsible for the welfare of a child named in a report or record and an attorney of the person described under this subdivision, with protection for the identity of reporters and other appropriate individuals." IC 31-33-18-2(13) gives access to DCS reports and records to any person "about whom a report has been made," but protects the identity of the reporter and "any other person if the person or agency making the information available finds that disclosure of the information would be likely to endanger the life or safety of the person." See this Chapter at I.G. with regard to access to identity of persons making false reports of child abuse or neglect.

IC 31-33-18-2 lists the persons and entities that may have access to child abuse and neglect records. The list includes:

- persons authorized by IC 31-33 (IC 31-33-18-2(1);
- a legally mandated child protective agency (IC 31-33-18-2(2));
- police, a prosecutor, or a coroner (IC 31-33-18-2(3));
- a physician who reasonably suspects that a child before the physician has been a victim (IC 31-33-18-2(4));
- an individual legally authorized to place a child in protective custody (IC 31-33-18-2(5));
- an agency with legal responsibility or authorization to care for, treat, or supervise, the child (IC 31-33-18-2(6));

- an individual named as a victim, or their guardian ad litem or court appointed special advocate (IC 31-33-18-2(7));
- a parent, guardian, or custodian with reporter identity protection (IC 31-33-18-2(8);
- a court, for purposes of redaction (IC 31-33-18-2(9));
- a grand jury, for its official purposes (IC 31-33-18-2(10));
- an appropriate state or local official (IC 31-33-18-2(11));
- the community child protection team under IC 31-33-3 (IC 31-33-18-2(12));
- a person about whom a report has been made, with certain information redacted (IC 31-33-18-2(13));
- a DCS employee, caseworker, or juvenile probation officer (IC 31-33-18-2(14));
- a local child fatality review team (IC 31-33-18-2(15));
- the statewide child fatality review committee (IC 31-33-18-2(16));
- DCS (IC 31-33-18-2(17);
- the division of family resources if the report is substantiated and concerns an applicant, an operator, an employee, or a volunteer at a licensed child care home or center (IC 31-33-18-2(18);
- a citizen review panel established under IC 31-25-2-20.4 (IC 31-33-18-2(19));
- the office of DCS ombudsman (IC 31-33-18-2(20));
- the state department of public instruction (IC 31-33-18-2(21);
- the state child fatality review coordinator employed by the state department of public health pursuant to IC 16-49-5-1 (IC 31-33-18-2(22)).
- the operator of a licensed child caring institution, group home, or secure private facility if the report concerns an employee, a volunteer, or a child placed at the institution, group home, or private facility, and the allegation occurred there (IC 31-33-18-2(23));
- the operator of a licensed child placing agency if the report concerns a child placed in a foster home licensed by the agency, an employee or volunteer of the agency or foster home licensed by the agency, and the allegations occurred in the foster home or in the course of employment or volunteering at the agency or foster home (IC 31-33-18-2(24));
- the National Center for Missing and exploited Children (IC 31-33-18-2(25));
- a local domestic violence fatality review team established under IC 12-18-8 (IC 31-33-18-2(26)); and
- the statewide domestic violence fatality review committee established under IC 12-18-9-3 (IC 31-33-18-2(27)).

Practice Note: There are exceptions and qualifications to the above list, so practitioners should read IC 31-33-18-2 very carefully to determine whether a person or agency is allowed to receive confidential DCS records.

IC 31-33-18-1.5 requires the juvenile court exercising jurisdiction in the county where a child's death or near fatality that may have been the result of abuse, abandonment or neglect occurred to release redacted records of DCS, the DCS local office, or the DCS ombudsman to a person who requests the records. IC 31-33-18-1.5(d)(5) provides that "near fatality" means a severe childhood injury or condition that is certified by a physician as being life threatening. IC 31-33-18-1.5(d)(4) defines "life threatening" as an injury or condition categorized as "serious" or "critical" in patient records. IC 31-33-18-1.5(b) defines the following circumstances under which a child's death or near fatality is the result of abuse, abandonment, or neglect: (1) DCS, the DCS local office, or DCS ombudsman determines that a child's death or near fatality is the result of abuse, abandonment, or neglect; or (2) the prosecutor files an indictment or information or a complaint alleging delinquency that, if proven, would cause a reasonable person to believe the child's death

or near fatality may have been the result of abuse, abandonment or neglect. IC 31-33-18-1.5(b) further provides that, upon the request of any person, or upon its own motion, the court exercising juvenile jurisdiction in the county in which the child's death or near fatality occurred shall determine whether the allegations contained in the indictment, information, or the delinquency complaint, if proven, would cause a reasonable person to believe the child's death or near fatality, may have been the result of abuse, abandonment, or neglect. If the court finds that the death or near fatality was the result of abuse, abandonment, or neglect, IC 31-33-18-1.5(c) states that the court shall make written findings and provide a copy of the findings and the indictment, information, or the delinquency complaint to DCS.

When a person requests a record, IC 31-33-18-1.5(f) requires that the entity having control of the record shall immediately transmit a copy of the record (or the original if the court so orders) to the court exercising juvenile jurisdiction in the county where the child's death or near fatality occurred. The court shall redact the following information within thirty days pursuant to IC 31-33-18-1.5(g): (1) all identifying information described in IC 31-33-18-1.5(d)(3)(B) through (d)(3)(F) of a person, and (2) all identifying information of a child less than eighteen years of age. "Identifying information," defined at IC 31-33-18.5(d)(3), means information that identifies an individual, including: (A) name, address, date of birth, occupation, place of employment, and telephone number; (B) employer identification number, mother's maiden name, Social Security number or a governmental entity issued identification number; (C) unique biometric data, including a person's fingerprint, voice print, or retina or iris image; (D) unique electronic identification number, address, or routing code; (E) telecommunication identifying information; or (F) telecommunication access device.

After redaction by the court, the record is not confidential, and IC 31-33-18-1.5(h) provides that the information may be disclosed to any person requesting the record if the person has paid copying costs to the entity and to the court. IC 31-33-18-1.5(i) requires that the disclosed record contain the following: (1) a summary of the report of abuse or neglect and a factual description of the contents of the report; (2) the child's age and gender; (3) the cause of the fatality or near fatality if the cause has been determined; (4) whether DCS had any contact with the child or the perpetrator before the fatality or near fatality, the frequency of any contact, and the date of the last contact; (5) a summary of the status of the child's case at the time of the fatality or near fatality including whether the child's case was closed before the fatality or near fatality, the date of closure, and the reasons that the case was closed. IC 31-33-18-1.5(j) provides that the court's determination that certain identifying information or other information is not relevant to establishing the facts and circumstances leading to the death or near fatality of a child is not admissible in a criminal proceeding or civil action. See this Chapter at II.E. and II.F. for additional discussion of local child fatality review team and statewide child fatality review committee.

In **Doe #1 v. Indiana Department of Child Services**, 81 N.E.3d 199 (Ind. 2017), DCS told Doe, a child abuse/neglect reporter, that his report to the hotline was confidential, but then released the report to the victims' parents without redacting his identity. Doe lived in a small southern Indiana town, and he and his family were threatened and harassed because Doe made the report. Doe's daughter required counselling because of bullying at school, and his sons hesitated to go outside of the house. The Does sued DCS for negligently releasing Doe's identity, claiming that IC 31-33-18-2 required DCS to protect reporter identity and that the hotline worker's statement created a common-law duty of confidentiality. DCS moved for summary judgment, which the trial court granted. The Court of Appeals reversed in Doe v. Ind. Dep't of Child Servs., 53 N.E.3d 613 (Ind. Ct. App. 2016), finding that DCS owed the Does a common-law "private duty" based on the

hotline worker's "promise" of confidentiality. The Indiana Supreme Court "denounced DCS's thoughtlessness," but found no basis for DCS liability under either theory. Id. at 200. The Court opined that IC 31-33-18-2 does not create a private right of action, and the Court declined to judicially infer one, leaving the decision to the legislature. Id. at 204. The Court also found that none of the three theories for a common-law duty argument; namely, the "private duty" doctrine, the assumed-duty doctrine, and the three-part test for new duties in Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991), created a common-law duty by DCS to the Does. Id. at 204-07. The Court affirmed the trial court's summary judgment for DCS. Id. at 207.

In **In Re Paternity of K.D.**, 929 N.E.2d 863 (Ind. Ct. App. 2010), the Court held that the trial court's order prohibiting Mother from discussing her child's paternity custody and parenting time case in any fashion with anyone was overbroad and an improper restraint on Mother's right to free speech. Id. at 874. The Court observed that IC 31-39-1-1 and -2 protect confidentiality of certain legal records including petitions, orders, motions, and decrees in juvenile proceedings. Id. at 873. The Court found Mother could not be prevented or prohibited from discussing matters about the case of which she had independent knowledge. Id. at 874. The Court held that such restraint was an invalid prior restraint and contrary to Mother's rights of free speech. Id.

In **In Re T.B.**, 895 N.E.2d 321 (Ind. Ct. App. 2008), the Court held that the juvenile court did not err in releasing redacted records of Indiana DCS and Marion County DCS regarding a child who was the subject of a CHINS proceeding at the time of her death, which was allegedly caused by multiple blunt force injuries. Id. at 353. The Court concluded that Mother's argument disregarded the plain language of IC 31-33-18-1.5, which provides that a properly redacted DCS record "regarding a child whose death or near fatality may have been the result of abuse, abandonment, or neglect" and that is otherwise not confidential under state or federal law "may be disclosed to any person who requests the record." Id. at 352-53. The Court noted that Mother wisely did not contend that the child's death was anything other than the result of abuse, abandonment, or neglect, and did not claim that the records were otherwise confidential under state or federal law. Id. at 353.

In **In Re K.B.**, 894 N.E.2d 1013 (Ind. Ct. App. 2008), the Court reversed the trial court's order granting the media access to the CHINS records of Mother's two children. Id. at 1017. The children's three-year-old brother died, and the State filed criminal charges against Mother and Father for the brother's death and battery and neglect of the two living children. CHINS petitions were filed for the two children, and on the same day they were determined to be CHINS. Shortly after the CHINS determination, the trial court, relying on IC 31-39-2-10, apparently sua sponte and without notice or a hearing, issued an order granting the media access to the CHINS records of the two children. Mother filed a motion to correct error. The trial court denied Mother's motion to correct error and Mother appealed. The Court held that because there was not a specific ongoing threat to the safety or welfare of the community, the trial court abused its discretion in disclosing the CHINS records of the two children. Id. The Court stated that its decision was based on the limited record in the case and noted that: (1) the record in the case was not well-developed; (2) the trial court issued its order without notice to the parties and without conducting a hearing; (3) there was no indication that any person actually requested access to the children's records; (4) DCS echoed Mother's concerns about releasing the records; (5) the order was issued less than two weeks after the investigation and resulting CHINS determination; (6) the heart of Mother's complaint appeared to be the release of the "caseworker's report of preliminary inquiry & investigation," which was very detailed; and (7) a local newspaper article filed with Mother's motion to correct error appeared to quote the caseworker's investigatory report at length. Id. at 1014-15. Beginning its analysis with the issue of whether the caseworker's investigatory report

should have been released, the Court concluded that the report was confidential and should not have been made available to the public. Id. at 1015-16. In reaching this finding, the Court: (1) looked to IC 31-33-18-1(a) "which specifically controls the investigation of child abuse and neglect," and concluded that the investigatory report and any other information obtained during the investigation was confidential; (2) then looked to IC 31-33-18-2, which governs the release of an investigatory report and does not include media representatives in its list of persons to whom an investigatory report may be made available; and (3) found that, given the specific language of IC 31-33-18-2, "it is clear that the legislature intended to limit the persons who had access to these confidential reports." Id. at 1015.

The Court then analyzed IC 31-39-2-10, which the trial court had relied on in releasing the records, and stated:

> We agree it is unclear under what circumstances the legislature intended any interested person to be able to access juvenile court records. We invite the legislature to clarify this ambiguity so as to ensure the confidentiality of legal records involving children. Nevertheless, we need not determine this issue today because even assuming that [IC] 31-39-2-10 applies to CHINS proceedings, we conclude that the trial court abused its discretion in disclosing [the children's] CHINS records.

Id. at 1016-17. Noting that the trial court indicated in its order that it was granting access to the records to educate the public, address the community's interest in the welfare of the children, and to give the public new insight into the workings of the trial court and DCS, the Court stated that these goals are laudable, but they need not be achieved at the expense of the children's privacy interests. Id. at 1017. The Court opined that: (1) the children were entitled to the same privacy and confidentiality offered to other children involved in less notorious CHINS proceedings, and (2) public awareness about either child abuse, our court system, or DCS did not warrant the disclosure of the children's CHINS records because awareness can be achieved by a variety of less intrusive measures. Id.

I. F. Civil and Criminal Liability for Failure to Report

Indiana statutes define two separate offenses, both of which are Class B misdemeanors, for failure to report child abuse or neglect. IC 31-33-22-1(a) provides that a person who knowingly fails to report child abuse or neglect as required by IC 31-33-5-1 commits a Class B misdemeanor. IC 31-33-22-1(b) states that a person who knowingly fails to make a report required by IC 31-33-5-2 or IC 31-33-5-2.5 [member of hospital staff] commits a Class B misdemeanor, and that this penalty is in addition to the penalty imposed by IC 31-33-22-1(a).

See Chapter 2 at III.A.2. and at VII. for additional discussion on liability for failure to report or investigate child abuse or neglect.

Sprunger v. Egli, 44 N.E.3d 690 (Ind. Ct. App. 2015), is a medical malpractice case in which the Court affirmed the trial court's entry of summary judgment in favor of the child's physician. Id. at 695. The child's mother (Mother) had left her children in the care of her cousin (Cousin). When the child was just over one year old, a CHINS petition was filed, and the juvenile court ordered that the child remain in the care of Cousin under DCS supervision. The child was adjudicated a CHINS due to Mother's substance abuse, and the court ordered the child to remain in Cousin's care. During the child's placement with Cousin, Dr. Egli examined the child several times. Dr. Egli's examination revealed that the child was within normal limits, but in the following months, the child experienced lacerations, bruising, hair loss, and a fractured arm.

Dr. Egli informed DCS of the child's condition, but also stated that he did not suspect abuse. Dr. Egli was concerned that there might be a medical reason for the child's bruising, and referred the child to a pediatric oncologist at Riley Hospital. The oncologist ordered tests for coagulation disorders and leukemia, but all of the test results were normal. The oncologist believed the child's injuries were likely caused by the banging of her head against the crib while she was asleep. Less than two weeks after the CHINS adjudication, the sixteen-month-old child was found dead at Cousin's home. Post-mortem pictures showed the child had extensive facial bruising, the autopsy revealed injuries consistent with blunt force trauma to the head, and the coroner ruled that her death was a homicide.

Mother filed a medical malpractice action against Dr. Egli, alleging that he had failed to diagnose and report child abuse. The medical malpractice review panel issued its opinion, unanimously deciding that the evidence submitted did not support the conclusion that Dr. Egli failed to meet the appropriate standard of care. Mother then filed a complaint for medical malpractice. Dr. Egli moved for summary judgment, asserting that Mother's theory of liability was that Dr. Egli allegedly failed to report child abuse, but Indiana law does not recognize a private, civil action for failure to report child abuse. Mother responded that her claim was not premised on a failure to report abuse, but rather on a failure to make a correct diagnosis. The trial court concluded that Mother was essentially alleging a failure to report child abuse, a cause of action not recognized in Indiana. The trial court granted summary judgment in favor of Dr. Egli, and Mother appealed. The Court observed that, when a civil tort action is premised upon violation of a duty imposed by statute, the initial question is whether the statute confers a private right of action. Id. at 693. Citing Borne ex rel. Borne v. Northwest Allen County School Corp., 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989), *trans. denied*, the Court said that Indiana's reporting statutes do not explicitly provide a private right of action, and the Court has previously held that the legislature did not intend that a private right of action be implied. Sprunger at 693. The Court disagreed with Mother's contention that predicating the claim on medical malpractice transformed the claim into something other than an attempt to assert a private right of action for failure to report abuse. Id. at 694. The Court addressed a similar claim in C.T. v. Gammon, 928 N.E.2d 847 (Ind. Ct. App. 2010), which held that Indiana does not recognize a private right of action for failure to report child abuse, and affirmed the trial court's entry of summary judgment in favor of the doctor. Sprunger at 694. The Court found that Mother's claim rested on more than a misdiagnosis of the child's injuries, but inescapably rested on the additional premise that, had the misdiagnosis not occurred, Dr. Egli would have reported child abuse. Id. The Court concluded that Dr. Egli's alleged failure to report abuse was logically inseparable from his alleged failure to diagnose it. Id.

In **Smith v. State**, 8 N.E.3d 668 (Ind. 2014), the Indiana Supreme Court affirmed the conviction of a high school principal (Principal) for failure to immediately report child abuse or neglect, a class B misdemeanor. Note that at the time of the incident, the statutory definition of "victim of child abuse" (IC 31-9-2-133) included the requirement that "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." The definition of "victim of child abuse" was amended effective July 1, 2012, eliminating the need for care, treatment, or rehabilitation and the coercive intervention of the court. See this Chapter at I.A.1. The victim of child abuse in this case was a sixteen-year-old female student who had previously been found to be a CHINS and placed in Youth Opportunity Center (YOC), a residential treatment center, prior to the circumstances of this appeal. Between 12:20 and 12:25 p.m. on a day when school was in session, the female student reported to the assistant principal that she been raped by a male sixteen-year-old student in the boys' bathroom. Principal spoke to the female student, called the school nurse to meet with

her, asked the female student to write down the events to the best of her recollection, and questioned the alleged perpetrator, who denied the female student's allegations. Principal instructed the associate principal to call YOC at approximately 12:40 or 12:45 p.m. YOC staff transported the female student to the emergency room for a rape kit examination at 2:00 p.m. The hospital's staff contacted the police to report the possible sexual assault, and police officers arrived at the hospital just before 4:00 p.m. At approximately 4:34 p.m. on the same day the female student reported the rape, Principal called the DCS Hotline. Principal was told by the DCS Hotline staff person that it looked as though the report would be screened out but referred to law enforcement and asked if Principal would call law enforcement. The school district chief of security drove to the hospital and met with police. Principal arrived at the hospital at about 5:30 p.m. Principal, the high school, and the school district never directly contacted the police to report the rape. The male student confessed to raping the female student, and subsequently pled guilty and was incarcerated.

The Court concluded: (1) IC 31-34-1-3, one of the CHINS categories, applied because the female student was under the age of eighteen and was the victim of rape, a sex offense under IC 35-42-4-1; (2) IC 31-33-5-4, the child abuse reporting law, was not unconstitutionally vague as applied to Principal; (3) due to the female student's demeanor and clear, detailed statement, there was sufficient and substantial evidence of probative value to support the trial court's determination that Principal had reason to believe she was the victim of rape; (4) because he knew that the female student was living at YOC, a reasonable factfinder could have found beyond a reasonable doubt that Principal had reason to believe she needed care, treatment, or rehabilitation that could only be provided through the coercive intervention of a court. Id. at 679-87. The Court also found that Principal's phone call to YOC could not, and did not, satisfy his responsibility under the reporting statute; therefore, his argument that DCS had received actual notice from YOC within forty minutes failed. Id. at 688. The Court rejected Principal's belief that the reporting statutes permit a citizen to delay reporting in order to "assess and reflect" before facing criminal liability and professional censure. Id. at 689. The Court emphasized that the statutes *require* immediate reporting of suspected child abuse or neglect, and, in furtherance of that aim, immunize from criminal and civil liability those who immediately report conduct that turns out after later assessment *by DCS or law enforcement* to have been innocent (emphasis in opinion). Id.

The Court rejected Principal's argument that the phone call he made to the DCS Hotline about four hours after he became aware of the female student's rape allegation was sufficiently immediate to relieve Principal of criminal liability. Id. at 688. The Court believed that under the definition of "immediately", the length of the delay is not the only thing that matters. Id. at 691. The Court opined that the urgency with which the person files the report, the primacy of the action, and the absence of an unrelated and intervening cause for delay also matter. Id. The Court noted that Principal ignored repeated opportunities to contact the police, several of whom were in his building, or to call DCS, and proceeded to instead conduct several hours of job interviews for open administrator positions. Id. at 691. The Court opined that, when time was of the essence, Principal dawdled, delayed, and did seemingly everything he could to *not* contact DCS or the police (emphasis in opinion). Id. at 692. The Court found it was a reasonable inference to draw from this evidence that Principal knowingly failed to "immediately" report the child abuse as he was obligated to do by statute. Id. The Court concluded that Principal failed in his duty to help protect one of his trusted charges. Id.

In **Gilliland v. State**, 979 N.E.2d 1049 (Ind. Ct. App. 2012), a case arising out of the same circumstances as Lebo v. State, 977 N.E.2d 1031 (Ind. Ct. App. 2012), which is discussed immediately below, the defendant high school athletic director (Director) was charged with

failure to report suspected child abuse or neglect of a student by Ashcraft, the high school girls' junior volleyball coach. Director had received reports from some of the team members' parents that Ashcraft had engaged in activities with team members, including "foot rubs, lotion being rubbed on backs, some textings, hanging out with the girls – specifically [the student victim] – before school." Director documented this inappropriate behavior in Ashcraft's personnel file. At some point, Ashcraft committed several sex offenses with a student, age fifteen or sixteen years old. Ashcraft was prosecuted and convicted. Director did not report suspected child abuse or neglect by Ashcraft. Director was criminally charged with failure to report child abuse or neglect three years after Ashcraft's alleged sex offense against the student were committed. The Court concluded that Director concealed his offenses from the very beginning, thereby tolling the statute of limitations, which is two years for misdemeanors. Id. at 1052. The Court also responded to Director's contention that the facts alleged in the charging information and the testimony from the probable cause hearing failed to establish that he had reason to believe that the student was abused or neglected. The Court opined that, contrary to Director's suggestion, knowledge of a "sexual relationship" between Ashcraft and the student was not required to trigger Director's duty to report child abuse or neglect. Id. at 1062. The Court said that an adult may commit either sexual misconduct with a minor or child seduction by fondling or touching a child (between fourteen and fifteen or sixteen and seventeen year old, respectively) with the intent to arouse or satisfy the sexual desires of either the child or the adult; IC 35-42-4-9; IC 35-42-4-7. Id. at 1062-63. The Court said that, contrary to Director's suggestion, those statutes do not require the fondling or touching of a sexual organ. Id. at 1063. The Court said that, pursuant to IC 35-42-4-7, rubbing lotion on a child's back *would* be a crime if the person did so with the intent to arouse or satisfy his or the child's sexual desires (emphasis in opinion). Id. at 1063 n.15. The Court concluded that the charging information and the testimony from the probable cause hearing, when taken together and accepted as true, contained facts sufficient to constitute the charged offenses, IC 31-33-22-1(a) and (b), based on failing to report child abuse or neglect as required by IC 31-33-5-1 and failing by an individual in charge of a school to report child abuse or neglect as required by IC 31-33-5-2. Id. at 1063. The Court also said that the charging information and testimony from the probable cause hearing contained facts sufficient to apprise Director of the charges against him and to allow him to prepare a defense. Id. The Court said that it was for a jury to determine whether Director had reason to believe that the student was a victim of child abuse or neglect based on his knowledge that Ashcraft had given foot rubs to the student and rubbed lotion on her back. Id.

In **Lebo v. State**, 977 N.E.2d 1031 (Ind. Ct. App. 2012), the defendant high school varsity volleyball coach (Coach) was charged with failure to report suspected child abuse or neglect of a student by Ashcraft, the high school girls' junior volleyball coach. Coach appealed the trial court's denial of her motion to dismiss the charges, and the Court affirmed. The Court concluded that Indiana's failure to report child abuse or neglect statutes (IC 31-33-5-1 and IC 31-33-5-2) contemplate the crime as a continuing offense. Id. at 1037. The Court said that the failure to report statute does not require that an individual have actual knowledge of child abuse or neglect; rather, a duty to report is imposed on an individual who merely has "reason to believe" a child is a victim. Id. at 1038-39. The Court, quoting IC 31-33-1-1(1), which states that one of the purposes of a duty to report is "to encourage effective reporting of *suspected* or known incidents of children abuse or neglect", said that the conduct allegedly observed by Coach need not satisfy the elements of sexual misconduct with a minor or those of child seduction (emphasis in opinion). Id. at 1039.

C.T. v. Gammon, 928 N.E.2d 847 (Ind. Ct. App. 2010) is a medical malpractice case, in which the trial court entered summary judgment in favor of the child's physician, against whom Father

filed a negligence complain due to the physician's failure to report alleged child abuse or neglect by Mother. The child was diagnosed with bronchopulmonary dysplasia at birth and suffered from respiratory illnesses. Although the physician recommended that the child should be in a smoke-free environment, Mother exposed the child to second-hand smoke. The Court affirmed the trial court's summary judgment in favor of Physician because there is not a private right of action for failure to report child abuse or neglect in Indiana. Id. at 854-55. The Court considered IC 31-33 regarding the duty to report child abuse or neglect, noting that: (1) Indiana law requires an individual who has reason to believe that a child is a victim of child abuse or neglect to make an immediate oral report to either DCS or local law enforcement (IC 31-33-5-1,-4); (2) a person who knowingly fails to make a report commits a Class B misdemeanor (IC 31-33-22-1); (3) a person who makes such a report is immune from any civil or criminal liability because of doing so; however, immunity will not attach if the person acted maliciously or in bad faith (IC 31-33-6-1,-2); (4) a person making a report that a child may be a victim of child abuse or neglect is presumed to have acted in good faith (IC 31-33-6-3). Id. at 853. The Court said that, when a civil action is premised upon violation of a duty imposed by statute, the question to be determined is whether the statute confers a private right of action. Id. The Court stated that the issue of whether Indiana child abuse reporting statutes create a private right of action was addressed in Borne ex rel. Borne v. Northwest Allen County School Corp., 532 N.E.2d 1196 (Ind. Ct. App. 1989), *trans. denied*. C.T. at 854. In Borne, a special education student was involved in several incidents of sexual exploration with male classmates over a three-year period culminating in an incident on a field trip in sixth grade. The student's parents sued, among others, the school's principal, alleging that he failed to report the prior incidents of child abuse to child protection services or law enforcement pursuant to the reporting statutes. The parents' apparent theory was that if the principal had reported the previous incidents, the incident in sixth grade never would have happened. The Court specifically held in Borne at 532 N.E.2d 1203 that an examination of the relevant statutes persuaded the Court that the legislature did not intend to confer a private right of action for any breach of duty imposed by the reporting statutes. C.T. at 853. The Court noted that the vast majority of states have reached the same conclusion under their reporting statutes. Id. at 854.

In **Fisher v. State**, 548 N.E. 2d 1177 (Ind. Ct. App. 1990), the Court affirmed the defendant's conviction for failure to report child abuse, but reversed the defendant's conviction for criminal neglect of a dependent. In Fisher, the defendant allowed a child and the child's mother to live in his home. The Court found that the defendant voluntarily assumed some of the care of the child and that the defendant knew the child was being abused, but it also found that the defendant did not have the authority to stop Mother's abuse of the child. The Court stated: "Because the abusing party [mother] in the case before us was the custodial parent, Fisher's [defendant's] only course of action was to report the abuse." Id. at 1180. Thus, the Court ruled that the neglect of dependent conviction against the defendant could not stand, but affirmed the conviction for failure to report abuse under IC 31-33-22-1, a Class B misdemeanor.

I. G. Knowing False Reporting, Obtaining Information Under False Pretenses, Obstructing Assessment

IC 31-33-22-3(a) states that a person who intentionally communicates to a law enforcement agency or to DCS a report of child abuse or neglect knowing the report to be false commits a Class A misdemeanor. The offense of knowing, false reporting is a Level 6 felony if the person has a previous unrelated conviction for knowing false reporting. IC 31-33-22-2(a) states that a person who knowingly requests, obtains, or seeks to obtain child abuse or neglect information under false pretenses commits a Class B misdemeanor. IC 31-33-22-2(b) states that a person who knowingly or intentionally: (1) falsifies child abuse or neglect information or records; or (2) obstructs or interferes with a child abuse assessment, including an assessment conducted by

a local child fatality review team or the statewide child fatality review committee; commits obstruction of a child abuse assessment, a Class A misdemeanor. IC 31-33-22-3(d) provides that a person may file a complaint with the prosecutor if: (1) he has reason to believe he has been falsely accused in a report of child abuse or neglect; and (2) he is not under a pending criminal charge or under assessment regarding the report. Upon the filing of the complaint, the prosecutor shall review the relevant DCS records and other relevant evidence. Although the statute only obligates the prosecutor to review the records, presumably a review that indicates the child abuse or neglect report was false may result in a criminal charge of false reporting under IC 31-33-22-3(a).

IC 31-33-22-5 authorizes a court to grant a person falsely accused of child abuse or neglect access to reports relevant to the accusation. The court may grant access when it finds that the abuse or neglect report was unsubstantiated and was intentionally communicated to DCS or law enforcement agency by a person who knew the report was false. It is important to note that persons accused of child abuse or neglect already have access to reports under IC 31-33-18-2(13), without seeking court approval. The access available under IC 31-33-18-2(13) protects the identity of the reporter and other significant persons; however, IC 31-33-22-5 may allow access to the identity of the reporter. See also **Kinder v. Doe**, 540 N.E.2d 111 (Ind. Ct. App. 1989) (identity of reporter can be obtained in civil suit for malicious reporting, if plaintiff makes preliminary presentation of evidence to rebut presumption of reporter's good faith).

In **In Re V.C.**, 867 N.E.2d 167 (Ind. Ct. App. 2007) the Court held that the juvenile court did not err in awarding Father compensatory damages of $51,867.39 and punitive damages of $50,000. Id. at 183. Mother indirectly communicated an abuse allegation to DCS through the child's therapist by coaching and encouraging the child to report sexual abuse allegations that Mother knew to be false, and which Mother knew the therapist would be required to report. Father filed a petition to establish the child's paternity when the child was ten months old. The court issued an order granting Father's petition, establishing the child's paternity, and granting Father parenting time with the child. Over the next three years, usually just before or just after Father exercised overnight or extended visitation, Mother made numerous reports to DCS (then CPS) regarding Father's alleged sexual abuse of the child. The parties executed an Agreed Entry and Order in the paternity case, which provided that, if there were further allegations of sexual abuse, Mother would take the child to an emergency room, physician, psychologist, or therapist before contacting DCS. When the child was five years old, Mother took the child to the therapist whom the child had been seeing for more than a year. Mother told the therapist that the child had something to tell her. The child told the therapist that Father had molested her. The therapist contacted DCS and reported the alleged molestation. Later that month, following additional reports to DCS alleging neglect of the child, DCS filed a petition alleging that the child was a CHINS. The petition stated, among other things, that DCS determined the child to be a CHINS because Mother had failed to protect the child from being molested by her Father. At the initial hearing on the petition, Father asked DCS to amend the CHINS petition to add the allegation that the child was a CHINS because Mother was endangering the child's mental health. DCS said it could add the allegation regarding Mother but it did not want to amend anything about Father. The trial court said it would not tell DCS what to put in the petition, but DCS was free to amend it. The petition was never amended. Father then filed a petition in paternity court to modify custody of the child. The petition alleged that Mother was coaching the child to fabricate the molestation accusations, and requested damages due to the alleged willfulness of Mother's actions. Father subsequently filed a motion to consolidate the paternity and CHINS cases and requested that one fact-finding hearing be held on all issues related to the care of the child. The juvenile court granted Father's motion, and held a hearing on all matters pertaining to the child.

The trial court orally granted Father's petition for a custody modification, but ordered that the child temporarily be placed with her paternal grandmother pending issuance of the trial court's findings. Three weeks later, the trial court entered its judgment, which adjudicated the child a CHINS as to Mother, but not as to Father.

On appeal, Mother argued that it was the therapist rather than Mother who reported the abuse to DCS. The Court noted that (1) the juvenile court awarded the damages pursuant to IC 31-33-22-3 which imposes liability on one who intentionally communicates an abuse report knowing the report to be false; and (2) communication can be either direct or indirect, citing Quality Foods, Inc. v. Holloway Assocs. Prof'l Eng'rs and Land Surveyors, Inc., 852 N.E.2d 27, 32 (Ind. Ct. App. 2006) which states that a principal's direct or indirect communication can install a reasonable belief in the mind of a third party that another individual is his agent. V.C. at 182. The Court also found that an affidavit completed by Father's attorney detailing the costs (totaling $51,867.39) accrued from the date of the filing of the CHINS petition through trial, which was admitted into evidence without objection, was sufficient evidence to support the $51,867.39 damages award. Id. at 182-83.

I. H. Duty of DCS to Advise Certain Reporters of Status of Assessment

IC 31-33-7-8 provides that when a hospital, community mental health center, managed care provider, referring physician, dentist, licensed psychologist, school, child caring institution, group home, secure private facility, or child placing agency makes a report of child abuse or neglect, DCS shall, within thirty days after DCS initiates an assessment, send a report containing the information listed at IC 31-33-7-8(d) to that reporter. The information listed at IC 31-33-7-8(d) includes the victim's and alleged perpetrator's names, the alleged perpetrator's relationship to the victim, whether DCS has made an assessment and has not taken any further action, whether the assessment is closed, the caseworker's name and telephone number, and the date the report is prepared.

I. I. Reporting and Investigating Missing Children

The CHINS category of missing child at IC 31-34-1-8 is not included within the definition of "victim of child abuse or neglect" at IC 31-9-1-133; therefore, there is no technical duty to report a missing child under the child abuse reporting requirement of IC 31-33-5-1. There are several other reporting and investigation statutes that apply to missing children which affect DCS, law enforcement, schools, and health departments. IC 31-36-1-3.5(a) states that if DCS receives a missing child report on a child described in 42 U.S.C.§ 671(a)(9)(C)(i)(I) [the child is a ward of DCS, and DCS has reasonable cause to believe the child is, or is at risk of being a sex trafficking victim, including a child who has run away from foster care], DCS shall send a copy of the missing child report and other relevant information on the child's location within twenty-four hours to the National Center for Missing and Exploited Children. See also IC 31-36-1-3.5(b) and IC 31-36-1-3.5(c).

IC 35-44.1-2-3(d) states that a person commits false informing, a Class B misdemeanor offense when the person "gives a false report concerning a missing child...or gives false information in the official investigation of a missing child... knowing the report or information to be false."

I. I. 1. Law Enforcement

All law enforcement agencies are required by IC 31-36-1-1 through IC 31-36-1-3 to prepare a missing child report within five hours of notification that a child is missing, although in specified situations, including when law enforcement has reason to believe the child has committed a delinquent act, the report need not be prepared for twenty-four hours. The report

shall be sent to law enforcement agencies where the child resides and/or was last seen, law enforcement agencies designated by the reporter (if reasonable), the Indiana Clearinghouse on Missing Children and Missing Endangered Adults, and the Indiana Data and Communication System (IDACS) and the National Crime Information Center's Missing Persons File. IC 31-36-1-4 requires law enforcement to send a copy of the missing child report to the last child care center, child care home, or school the child attended in Indiana, when the missing child is under the age of thirteen. IC 10-13-3-35 requires law enforcement to enter missing children information into IDACS, including information concerning the release of a missing child to a parent or guardian. See IC 10-13-5-3 regarding the Clearinghouse.

IC 31-36-2-1 requires that a law enforcement agency "shall begin an investigation concerning the missing child not later than twenty-four (24) hours after receiving notification that the child is missing." IC 31-36-2-2 provides that the law enforcement agency shall search the National Crime Information Center's Wanted Person File for reports of arrest warrants issued for persons who allegedly abducted or unlawfully retained children and compare these reports to the missing child's National Crime Information Center's Missing Person File. IC 31-36-2-3 provides that upon the request of law enforcement, and with the consent of the missing child's parent or guardian, a dentist is required to provide dental records to law enforcement on a missing child who has not been located within thirty days of the filing of the missing person report. A government agency and a public or private organization are required under IC 31-36-2-4 to release fingerprints on a missing child upon written consent of the parent or guardian and a request from law enforcement.

I. I. 2. Schools

IC 31-36-1-5 requires that a school which receives a missing child report prepared by law enforcement shall attach a notice to the child's school record indicating that the child is missing. If a school record is requested for a missing child, the school shall record specific information about the person seeking the school record and shall immediately provide the information to the Indiana Clearinghouse on Missing Children and Missing Endangered Adults. The child's school record shall not be released without permission from the clearinghouse and the school shall not notify the person requesting the record that a notice the child is missing has been attached to the child's records.

IC 20-33-2-10 provides that public schools shall and private schools may require each student to furnish a copy of his/her birth certificate or other "reliable proof of the student's date of birth" to the school. The school shall give notice to the clearinghouse if the identification documentation is not provided or appears inaccurate or fraudulent.

I. I. 3. Local Health Departments

IC 10-13-5-11 provides that when a local health department or hospital corporation is notified that a missing child report has been filed, it shall attach a notice to the child's birth certificate that the child has been reported missing. If a birth certificate is requested for a child whose certificate contains a missing persons notice, the health department or hospital shall record specific information about the person seeking the certificate and shall immediately provide the information to the Clearinghouse.

I. I. 4. Clearinghouse on Missing Children and Missing Endangered Adults

The Indiana Clearinghouse on Missing Children and Missing Endangered Adults, codified at IC 10-13-5, is under the authority of the Indiana State Police and serves as the state's

central repository for all information on missing children and missing endangered adults. The clearinghouse provides information to Indiana citizens and cooperates with other states regarding missing children. The Clearinghouse operates a toll free number twenty-four hours a day, seven days a week (1-800-831-8953) for immediate sightings, leads, or other recovery information on a missing child and to receive requests for assistance.

I. I. 5. Amber Alert Program

IC 10-13-5-1 defines the "Amber alert program" as "a program under which the clearinghouse transmits information about a recently abducted child to broadcasters who: (1) have agreed to participate in the program; and (2) immediately and repeatedly broadcast the information to the general public." IC 10-13-5-8 covers the operation of the Amber alert program and IC 10-13-5-8.5 provides immunity from civil liability to broadcasters and others who enter into an agreement with the state police department to establish or maintain an Amber alert website. DCS could request an Amber alert for a child in need of services who is abducted from a court ordered placement.

II. DEPARTMENT OF CHILD SERVICES

II. A. Establishment of Department

The department of child services (DCS) was established in 2005 at IC 31-33-1.5-1 through 12 and recodified at IC 31-25-1-1 in 2006. The director of DCS is appointed by the governor and serves at the governor's pleasure. IC 31-25-1-1(b).

II. A. 1. Definition, Personnel, and Maximum Caseload Standards

IC 31-25-2-1 states that "department" refers to the "department of child services" (DCS) established by IC 31-25-1-1. The DCS director is empowered to employ necessary personnel to carry out DCS's responsibilities subject to budget agency approval and IC 4-15-2.2 [state civil service system]. IC 31-25-2-2. The director shall determine the best manner of organizing DCS to provide necessary services throughout the state. IC 31-25-2-3. The term "caseworker" is defined at IC 31-9-2-11, which states, "[c]aseworker, for purposes of the juvenile law, means an employee of DCS who is classified as a family case manager."

IC 31-25-2-5 establishes the maximum caseload standards for DCS family case managers. IC 31-25-2-5 states DCS shall ensure that case managers have no more than twelve assessment cases or seventeen children who are being monitored and supervised. In **Price v. Indiana Dept. of Child Services**, 80 N.E.3d 170 (Ind. 2017), the Indiana Supreme Court affirmed the trial court's dismissal of a family case manager's claim that DCS should be mandated to comply with the caseload standards. Id. at 178. Price filed a proposed class-action lawsuit alleging that her caseload had ballooned to forty-three children. The Court held the statute is not amenable to judicial mandate. Id.

II. A. 2. Powers and Duties

IC 31-25-2-7(a) lists the following powers and duties DCS: (1) providing child protection services; (2) providing and administering child abuse and neglect prevention services; (3) providing and administering child services; (4) providing and administering family services; (5) providing family preservation services under IC 31-26-5; (6) regulating and licensing child caring institutions, foster family homes, group homes, and child placing agencies under IC 31-27; (7) administering the state's plan for administration of Title IV-D services [child support bureau under IC 31-25-3 and IC 31-25-4]; (8) administering foster care services; (9) administering successful adulthood services; (10) administering adoption

and guardianship services; (11) certifying and providing grants to youth services bureaus under IC 31-26-1; (12) administering the project safe program; (13) paying for programs and services as provided by IC 31-40; (14) obtaining an annual consumer report for each child who is in state foster care and is at least fourteen years old. IC 31-25-2-7(b) provides that this chapter does not authorize or require DCS to investigate, report, or monitor child custody or visitation in dissolution cases relating to a child who is not the subject of an open CHINS case. IC 31-25-2-7(c) provides that this chapter does not authorize or require DCS to conduct home studies or otherwise participate in guardianship proceedings other than those over which the juvenile court has jurisdiction under IC 29-3-2-1(c) or IC 31-30-1-1(10) [guardianships of CHINS for whom juvenile court has approved guardianship as a permanency plan]. But see IC 29-3-8-9, which requires the probate court to refer petitions to modify, remove, or for the resignation of a guardian and for termination of guardianship to DCS to determine the child's placement in accordance with the child's best interests if the child was the subject of a CHINS petition or was participating in a program of informal adjustment. Pursuant to IC 29-3-8-9(e), the court shall consider the position of DCS and allow DCS to present evidence on whether the guardianship should be modified or terminated; the fitness of the parent to provide for the care and supervision of the child at the time of the hearing; the appropriate care and placement of the child; and the child's best interests.

Practice Note: Although IC 31-25-2-7(c) does not address DCS's role in paternity proceedings, IC 31-14-10-1 and 2 and IC 31-14-13-5, which previously authorized the paternity court to order a caseworker to prepare a custody report in a paternity case and authorized the court to order supervision of paternity custody decrees by the county office of family and children, were amended effective January 1, 2009, deleting these roles for DCS. The dissolution of marriage statutes, which previously authorized the dissolution court to order the county office of family and children to prepare custody reports and to supervise dissolution decrees, IC 31-17-2-12 and IC 31-17-2-18, were also amended. Effective January 1, 2009, the home study and supervision roles for DCS in dissolution cases were deleted from IC 31-17-2-12 and IC 31-17-2-18.

IC 31-25-2-8 provides that DCS is the single state agency for administering the following: (1) Title IV-B and Title IV-E of the federal social security act; (2) the federal Child Abuse Prevention and Treatment Act; (3) the federal Social Services Block grant; (4) any other federal program that provides funds to states for services related to the prevention of child abuse and neglect, child welfare services, foster care, successful adulthood services, or adoption services; and (5) beginning October 1, 2009, DCS shall negotiate with any Indian tribe, tribal organization or tribal consortium in the state that requests to develop an agreement to administer Title IV-E on behalf of Indian children who are under the authority of the tribe, tribal organization, or tribal consortium. IC 31-25-2-23(a) states that DCS shall establish a permanency roundtable (defined at IC 31-9-2-88.7), which shall review a child's permanency plan if the child is placed in a child caring institution, group home, or private secure facility and make recommendations to the court. IC 31-25-2-23(b)(1) states that DCS shall establish a residential placement committee (defined at IC 31-9-2-109.5), which shall, before a case plan is approved by the local office or court, review a child's placement in a child caring institution, group home, or private secure facility under IC 31-34-15-2 [CHINS case plan completion] and make recommendations to the court. IC 31-2-23(b)(2) states that the residential placement committee shall, before a case plan is approved by the local office or court, review the child's placement under IC 31-37-19-1.5 [case plan for delinquent child's placement in out-of-home residence or facility that is not a secure detention facility] if the

placement is contrary to DCS's recommendation under IC 31-37-17-1.4 [referral of delinquency predispositional report to DCS] and make recommendations to the court.

IC 31-9-2-17.8 defines child services as: (1) services other than the costs of secure detention, provided by or for DCS for or on behalf of children who are CHINS or delinquents, either before or after adjudication; (2) services for children who are subject to the temporary care or supervision of DCS; (3) services to recipients or beneficiaries of an approved informal adjustment; (4) services to recipients or beneficiaries of adoption assistance, adoption subsidies, kinship or guardianship assistance, and assistance under Title IV-A of the federal Social Security Act, including emergency assistance; (5) costs of using an institution or facility for providing educational services to children who are adjudicated CHINS or delinquents; and (6) other financial assistance provided for a child who was previously adjudicated CHINS or delinquent, including a legal guardianship established as a permanency plan.

IC 31-26-3.5-1 through 7 addresses child welfare programs which are designed to serve groups or categories of children or families in a community. IC 31-26-3.5-2 lists the purposes of a child welfare program which may be established and funded by DCS. Purposes include: (1) protecting children who are, or are likely to be, at risk of becoming homeless, neglected or abused; (2) preventing remedying and assisting in solution of problems that may result in neglect, abuse, exploitation, or delinquency; (3) preventing unnecessary separation of children from families; (4) providing services for developmentally or physically disabled children to prevent abuse, neglect, or abandonment and enabling children to become self-supporting; (5) providing family preservation or family support services for children who are not currently receiving individually designed services through a CHINS or delinquency case. IC 31-26-3.5-3 provides for applications to establish, continue, or modify child welfare programs to be submitted to the regional services council for the region to be served and that the DCS director must approve the program in the case of a statewide program. IC 31-26-3.5-4 provides for approval of child welfare programs by the director or his designee. IC 31-26-3.5-5 requires DCS to establish policies and procedures for evaluation of approved programs.

IC 31-9-2-44.8 defines "family preservation services" as short term, highly intensive services designed to protect, treat, and support: (1) a family with a child at risk of placement by enabling the family to remain intact and care for the child at home; and (2) a family that adopts or plans to adopt an abused or neglected child who is at risk of placement or adoption disruption by assisting the family to achieve or maintain a stable, successful adoption of the child. IC 31-26-5-3(a) states that family preservation services may provide:
(1) comprehensive, coordinated, flexible, and accessible services; (2) intervention as early as possible with emphasis on establishing a safe and nurturing environment; (3) services to families who have members placed in care settings outside the nuclear family; and
(4) planning options for temporary placement outside the family if it would endanger the child to remain in the home. IC 31-26-5-3(c) states that a criminal history check (defined at IC 31-9-2-22.5) by DCS is required for each person residing in a temporary out-of-home placement before a child can be placed in the home, unless it is a licensed home or facility. IC 31-26-5-3(b) states that family preservation services may not include a temporary out-of-home placement if a person residing in the placement has committed an act resulting in substantiated abuse or neglect or has a juvenile adjudication or conviction for a nonwaivable offense, defined in IC31-9-2-84.8, unless authorized by the juvenile court. IC 31-26-5-5(a) states that family preservation services must include: (1) twenty-four hour crisis intervention service; (2) risk assessment, case management and monitoring; (3) intensive in-home skill

building and counseling; (4) after-care linkage. IC 31-26-5-5(b) states that emergency respite care and pre-adoption and post-adoption services may be available as needed to families receiving family preservation services.

DCS may contract to provide or provide family preservation services to families with a "child at imminent risk of placement." IC 31-26-5-2. IC 31-26-5-1 defines "child at imminent risk of placement" as a child under the age of eighteen who reasonably may be expected to face out-of-home placement in the near future as a result of: (1) dependency, abuse, or neglect; (2) emotional disturbance; (3) family conflict so extensive that reasonable control of the child is not exercised; (4) delinquency adjudication. IC 31-26-5-6 states that a caseworker who provides family preservation services may retain a maximum caseload of twelve families.

IC 31-25-2-24 requires DCS to prepare an annual report concerning Indiana child fatalities that are the result of child abuse or neglect. The report shall be posted on the DCS website. See this Chapter at II.E. for information on the local child fatality review team, which, pursuant to IC 16-49-3-11, shall give data to DCS to assist DCS in preparing this report.

II. A. 3. Staff, Training, and Liability

IC 31-25-2-7 and IC 31-25-2-8 list the duties of DCS. IC 31-25-2-10 addresses staff, organization and training, and requires that DCS representatives be given training regarding: (1) the legal duties of representatives in carrying out DCS responsibility "to protect the legal rights and safety of children and families from the initial time of contact during the investigation through treatment" (IC 31-25-2-10(b)(3)); and (2) "regarding the constitutional rights of the child's family, including a child's guardian or custodian, that is the subject of an assessment of child abuse or neglect consistent with the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Constitution of the State of Indiana." IC 31-25-2-10(b)(4)). In addition, IC 31-25-2-10(b)(1) mandates compliance with the maximum caseload ratio set forth at IC 31-25-2-5. IC 31-25-2-2.5 provides that the DCS director, officers, and employees are not personally liable, except to the State, for an official act done or omitted in connection with performance of duties under Title 31.

II. A. 4. Selected Neglect of Dependent Cases on Fourth Amendment

Case law on the Fourth Amendment is provided due to the requirement for training caseworkers on Fourth Amendment issues which is discussed at IC 31-25-2-10. Indiana criminal neglect of dependant cases have discussed situations where warrantless searches by law enforcement were justified under the Fourth Amendment when officers reasonably believe that a person within is in need of immediate aid.

In **Jones v. State**, 54 N.E.3d 1033 (Ind. Ct. App. 2016), *trans. denied*, Mother had left her three children, ages six, nine, and twelve, alone in the house and was arrested following a traffic stop after 1:00 a.m. A police officer noticed an extremely strong odor of marijuana emitting from Mother's vehicle, and found marijuana and a controlled substance in the vehicle. When Mother was arrested, she told the police that her children were home alone, and the police were sent to Mother's house to conduct a welfare check on the children. The police were unable to make contact with the children in the house and Mother was unable to reach them by telephone, so the police used Mother's house keys to enter the house. Upon entering the house, a police officer smelled an extremely strong odor of marijuana. The sleeping children were located in two of the bedrooms. The officers found a glass jar containing marijuana in a bedroom and marijuana plants and lighting equipment in the basement. Mother was charged with drug offenses and neglect of a dependent. Mother filed a

motion to suppress the evidence of the marijuana and lighting equipment, which the trial court denied after hearing evidence. Mother filed an interlocutory appeal, contending that the trial court erred in denying her motion to suppress the evidence found as a result of the warrantless search. The Court observed that a well-recognized exception to the Fourth Amendment is the existence of exigent circumstances. Id. at 1036. The Court found that the reasonable belief that children were without adult supervision in a residence was an exigent circumstance that authorized police entry to help those believed to be in need of immediate aid. Id. at 1038. The Court could not find "many situations more urgent than three children left alone in their home in the middle of the night without any certainty as to when a responsible adult might next enter the house." Id. at 1039. The Court also noted that: (1) Mother expressed concern for the children's welfare more than once; and (2) the lateness of the hour and the lack of knowledge as to the conditions inside the home increased the exigency of the situation. Id. The Court concluded that the State established both exigency and an objectively reasonable belief that the children were in need of aid; therefore, the officers' warrantless entry of Mother's residence did not violate the Fourth Amendment. Id.

In **Holder v. State**, 847 N.E.2d 930 (Ind. 2006), the defendant, who was charged with multiple methamphetamine offenses and neglect of his three-year-old granddaughter, filed a motion to suppress the evidence found by police officers who conducted a warrantless search of his house. The trial court denied defendant's motion to suppress. The defendant appealed, asserting that the evidence should be suppressed because it violated the unreasonable search and seizures provisions of the Indiana Constitution and the Fourth Amendment to the United States Constitution. A police officer noticed the strong odor of ether in the defendant's neighborhood, and determined that the odor emanated from defendant's house. The Indiana Supreme Court noted that the officers' decision to enter the house without a warrant was based in part on the defendant's statement that his three-year-old granddaughter was in the house. Id. at 939. The Court held that, because the officer's reasons for the warrantless entry included their concern for substantial risk of immediate danger to an occupant from the highly flammable and explosive atmosphere in the house, their entry was justified by exigent circumstances. Id. The Court affirmed the trial court's denial of the defendant's motion to suppress the evidence of a methamphetamine manufacturing operation conducted in his home. Id. at 941. The Court opined that the police conduct did not violate the Fourth Amendment or the Indian Constitution. Id.

In **State v. Crabb**, 835 N.E.2d 1068 (Ind. Ct. App. 2005), *trans. denied*, State Police officers were dispatched on a complaint of a strong smell emanating from the apartment in which a small child resided. The officers detected the odor of ether, which they knew was associated with the production of methamphetamine. The officers also saw a closed cooler on the front porch containing a jar and hoses, which are also consistent with methamphetamine manufacture. The officers entered the apartment through a window without a search warrant when no one answered their knock. The female occupant, her young son, and the defendant were ordered out of the apartment. The officers found precursors and materials for methamphetamine manufacture in the apartment. The defendant was charged with possession and dealing of methamphetamine and neglect of a dependant. The defendant's motion to suppress the evidence from the warrantless search was granted by the trial court. The Court reversed the trial court's orders, finding that the smell of ether, confirmed by neighbors, and the presence of people, including a small child in the apartment who was being exposed to both risks from explosions and negative effects on the respiratory system, caused the officers to believe that a person inside the apartment was in immediate need of aid. Id. at 1071. The

Court opined that the specific facts of the case justified the warrantless entry under the exigent circumstance exception to the warrant requirements. Id.

In **Weis v. State**, 800 N.E.2d 209 (Ind. Ct. App. 2003), a criminal neglect of a dependant case, the Court opined that the State failed to carry its burden to demonstrate that the warrantless entry of the home where Parents and their children, ages seven years and two years, resided was justified "to aid a person in need of assistance" or "to prevent further injury or to aid those who had been injured". Id. at 213. The Court found that the trial court had erred in partially denying Parents' motion to suppress the evidence of the filthy house with dog urine, dog feces, overflowing bags of trash, and gun cases on the kitchen table. Id. at 215. The trial court had excluded photographs of the home but permitted testimony of the family case manager, police officer, and parent aide. Law enforcement and Gibson County CPS had received a report alleging child endangerment. Mother had met with CPS and had signed an informal adjustment, which was not filed with the court. A parent aide was assigned to discuss parenting and housekeeping issues with Parents. When the parent aide became concerned that she had been unable to get into the house for three weeks and had been informed by the school nurse of hygiene issues regarding the older child, the parent aide contacted the family case manager. The case manager contacted the police, told the police officer she had authority to see inside the house, and met the police officer and parent aide at city hall before returning to Parents' residence. The case manager intended to remove the children and asked the police officer to accompany her and the parent aide due to the presence of guns in the home. The case manager and officer knocked on the door, which was not locked or shut all the way. The case manager pushed the door open, and she and the police officer entered the home to check on the welfare of the children without the consent of the occupants of the residence. The informal adjustment signed by Mother did not contain a provision that allowed Child Protection Services to enter the home without permission. The Court opined that the police and government agents had not acted with a sense of urgency and it was "patently obvious" that there was time to present facts to an independent magistrate in order to request a warrant.

II. A. 5. Reports to Budget Committee and Legislative Council

IC 31-25-2-4 requires DCS to submit a report in an electronic format regarding caseloads of family case managers every twelve months to the budget committee and to the legislative council. IC 31-25-2-6 states that the report must do the following:

> (1) Indicate the department's progress in recruiting, training, and retaining family case managers.
> (2) Describe the methodology used to compute caseloads for each family case manager.
> (3) Indicate whether the statewide average caseloads for family case managers exceed the caseload standards established by the department.
> (4) If the report indicates that average caseloads exceed caseload standards, include a written plan that indicates the steps that are being taken to reduce caseloads.
> (5) Identify, describe, and, if appropriate, recommend best management practices and resources required to achieve effective and efficient delivery of child protection services.

II. A. 6. Regional Services Councils and Strategic Plans

IC 31-26-6-1 through 16 established regional services councils which shall develop biennial regional services strategic plans required by IC 31-26-6-5 for alleged and adjudicated CHINS

and delinquents and other children identified by DCS as substantially at risk of becoming CHINS or delinquent children. DCS shall determine the county or counties that comprise each service region. IC 31-26-6-4(b). IC 31-26-6-7 lists the membership of regional services councils. IC 31-26-6-6(a) requires regional services councils to evaluate local child welfare service needs and determine appropriate delivery mechanisms including providing an opportunity for local service providers to be represented in the evaluation. IC 31-26-6-6(b) requires regional services councils to recommend the allocation and distribution of department funds used to pay for child welfare programs and child services administered within the region. IC 31-26-6-11 requires each regional services council to transmit its plan to the director of DCS for approval, amendments, or return of the plan with directions.

II. B. General Statutes Concerning Abuse and Neglect Reports

IC 31-25-2-11(a) states that, except in cases involving a child who may be a victim of institutional abuse or cases in which police investigation also appears appropriate, DCS is the primary public agency responsible for (1) receiving; (2) assessing or arranging for assessment of; and (3) coordinating the assessment of; all reports of a child who may be a victim of known or suspected child abuse or neglect. IC 31-25-2-11(b) states that, in accordance with a local plan for child protective services, DCS shall, by juvenile court order: (1) provide protection services to prevent cases where a child may be a victim of further abuse or neglect; and (2) provide for or arrange for and coordinate and monitor the provision of the services necessary to ensure the safety of children. IC 31-25-2-11(c) provides that reasonable efforts must be made to provide family services to prevent a child's removal from the child's parent, guardian, or custodian. "Family services", defined IC 31-9-2-45, are services provided to: (1) prevent a child from being removed from a parent, guardian, or custodian; (2) reunite the child with a parent, guardian, or custodian; or (3) implement a permanent plan of adoption, guardianship, or emancipation of a child.

IC 31-25-2-12 and IC 31-25-2-13 address photographs, x-rays, and physical medical examination reports of children whom DCS is assessing for child abuse and neglect. IC 31-25-2-12 requires DCS to give notice of the existence and location of photographs, x-rays, and physical medical examination reports to the appropriate prosecuting attorney and law enforcement agency. IC 31-25-2-13 states that photographs, x-rays, or physical medical examination reports shall be made available to the law enforcement agency having jurisdiction, DCS, the prosecuting attorney, and the guardian ad litem/court appointed special advocate for use in any judicial proceeding relating to the subject matter of a report of child abuse or neglect. IC 31-25-2-13 also states that photographs, x-rays, or physical medical examination reports shall be made available to the adverse party in any proceeding arising under this article, to the extent permissible under the Indiana Rules of Trial Procedure.

IC 31-25-2-14(a) states that DCS shall cooperate with, seek, and receive the cooperation of appropriate public and private agencies, the courts, and organizations, groups, and programs providing or concerned with services related to the prevention, identification, or treatment of a child who may be the victim of child abuse or neglect.

II. C. Centralized Child Protection Index

The child protection index statutes are found at IC 31-33-26-1 through 18. IC 31-33-26-2 requires DCS to establish and maintain a centralized computerized child protection index to organize and access data. IC 31-33-26-3 includes the following requirements of the system: automated risk assessment including review of prior substantiated reports; online supervisor case review; and automated production of standard reports to compile results of abuse and neglect cases; capability

of same day notification and transfer of statistical information to DCS; enabling supervisor review of abuse or neglect determination; and word processing capability to allow notes to be recorded with each substantiated case. IC 31-33-26-4 requires the index to have the capability to search for reports that match the name of the perpetrator, victim, or person responsible for the victim's welfare and transfer previous substantiated reports to the county where the new report originated within twenty-four hours of receipt of the new report. IC 31-33-26-5 provides for security for confidentiality of the index. The office of DCS ombudsman has read-only access to the index concerning children who are the subject of complaints filed with, or cases being investigated by the ombudsman. IC 31-33-26-5(b). See this Chapter at V. for further discussion of the child protection index statutes.

II. D. Community Child Protection Team

IC 31-33-3-1 through 8 provide that the community child protection team is a countywide, multi-disciplinary group consisting of appointed community professionals and lay persons who meet monthly, provide diagnostic and prognostic services to DCS, and who may review DCS cases and recommend the appropriateness of filing a CHINS petition. The team may also receive and review any case in which DCS has been involved, and complaints regarding child abuse and neglect cases. The team serves as an advisory board with no force of law or authority over the office of family and children or the court. The coordinator of the team shall supply the team with copies of reports of child abuse or neglect and other information or reports the coordinator considers essential to the team's deliberations. IC 31-33-3-1 specifies the persons who shall serve on the team, which include two designees of the juvenile court judge. The team shall assist the office of DCS ombudsman upon the ombudsman's request by investigating and making recommendations on a matter. If a local team was involved in an initial investigation, a different local team may assist in the ombudsman's investigation. IC 4-13-19-5(c).

See **Stivers v. Knox County Dept. of Pub. Welf.**, 482 N.E.2d 748 (Ind. Ct. App. 1985) (trial judge who served on child protection team should have recused himself or granted Mother's motion for change of venue from the judge in CHINS and subsequent termination of parental rights case).

II. E. Local Child Fatality Review Team

The statutes on the local child fatality review team are found at IC 16-49-2-1 through 7 and IC 16-49-3-1 through 13. The prosecuting attorney shall arrange for the first meeting of the local child fatality review team. IC 16-49-3-1. IC 16-49-2-4 lists the members of the team; a representative from DCS is included as a member of the team. The local child fatality review team shall review the death of a child that occurred in the area served by the team if the death is sudden, unexpected, unexplained, assessed by DCS for alleged abuse or neglect, or the coroner has found that the cause of the child's death is either undetermined or the result of homicide, suicide, or accident. IC 16-49-3-3(a)(1). The local child fatality review team may, in its discretion, review the near fatality of a child whose injury occurred in the area served by the team. IC 16-49-3-3(a)(2). In reviewing the death of a child, IC 16-49-3-6 states that the team shall: (1) identify factors that surrounded or contributed to the death; (2) determine whether similar deaths could be prevented in the future; (3) identify agencies, entities, and resources that should be used to prevent future deaths; and (4) identify solutions to improve practice and policy and enhance coordination. The team shall also prepare and release a report that may include a summary of data collected regarding the team's reviews, actions recommended to prevent injuries to children and child deaths in the area served by the team, and solutions proposed for system inadequacies. IC 16-49-3-7(a). The report may not contain identifying information. IC 16-49-3-

7(b). IC 16-49-3-11 states that DCS shall have access to all data submitted by a local team to assist DCS in preparing its report as required by IC 31-25-2-24.

II. F. Statewide Child Fatality Review Committee

Statutes on the statewide child fatality review committee are found at IC 16-49-4-1 through 15. The DCS director or a representative of DCS are among the fifteen members of the statewide committee, which is appointed by the governor. IC 16-49-4-2. The purpose of the statewide committee is to indentify similarities, trends, and fact patterns concerning child deaths; provide expertise, consultation, guidance, and training to local child fatality review teams; create strategies and make recommendations for the prevention of injuries to and deaths of children, and advise and educate the legislature, governor, and public on the status of child fatalities in Indiana. IC 16-49-4-1. Upon request by a local child fatality review team or the DCS ombudsman, the statewide committee shall assist a local team or conduct a review of a child death. IC 16-49-4-5. The statewide committee shall prepare an annual report, and make it available on the website of the state department of health, that includes a summary of the data collected and reviewed, identified trends and patterns, and recommended actions or resources to prevent future child fatalities. IC 16-49-4-11.

IC 16-49-5-1 through 3 established the position of state child fatality review coordinator, employed by the state department of health. Among the child fatality review coordinator's duties are to assist the statewide review committee and the local teams, coordinate local or statewide training on child fatality review, and develop data collection and confidentiality forms for use by the statewide committee and the local teams. IC 16-49-5-1 and 2.

II. G. Citizen Review Panels

IC 31-25-2-20.4 established three volunteer citizen review panels in accordance with the federal Child Abuse Prevention and Treatment Act. The three panels must be (1) a community child protection team [established under IC 31-33-3-1]; (2) the statewide child fatality review committee [established under IC 16-49-4] or a local child fatality review team [established under IC 16-49-2]; and (3) a foster care advisory panel, which includes licensed foster parents and employees of a licensed child placement agency who provide services to foster parents and children. IC 31-25-2-20.4(d) requires a citizen review panel to evaluate the effectiveness of a child welfare agency's discharge of its child protection responsibilities. Each citizen review panel shall issue an annual report summarizing its activities to DCS and the public, to which DCS shall submit a written response indicating whether and how DCS will incorporate the panel's recommendations. IC 31-25-2-20.4(e). A member of a citizen review panel may not disclose any identifying information about a child or other person which is in confidential reports. IC 31-25-20.4(h).

II. H. Office of Department of Child Services Ombudsman

II. H. 1. Powers and Duties

The statutes on the office of DCS ombudsman are found at IC 4-13-19. The governor appoints the ombudsman, who serves at the pleasure of the governor. IC 4-13-19-4(a). The ombudsman "may receive, investigate, and attempt to resolve a complaint alleging that DCS, by an action or omission occurring on or after January 11, 2005, failed to protect the physical or mental health or safety of any child or failed to follow specific laws, rules or written policies." IC 4-13-19-5(a). At the end of the investigation, the ombudsman shall provide a report to the complainant and DCS. IC 4-13-19-5(d),(e). If, after review or conducting an investigation, the ombudsman determines that the complaint has merit or the investigation

reveals a problem, the ombudsman may make recommendations, including that the agency, facility, or program modify or cancel its actions or alter a rule, order or internal policy. IC 4-13-19-5(f). If the complaint concerns a matter that is the current subject of an administrative review, the ombudsman's investigation shall be stayed until the administrative remedies have been exhausted. IC 4-13-19-5(h)(2). If the administrative process has not been completed within six months of being initiated, the ombudsman may proceed with the investigation. IC 4-13-19-5(h)(2). If the ombudsman does not investigate a complaint, the ombudsman shall notify the complainant of the decision not to investigate and the reasons for the decision. IC 4-13-19-5(i).

IC 4-13-19-10 requires the ombudsman to provide an annual report on the operations of the office, including the ombudsman's activities and the general status of Indiana children, including children's health and education and the administration or implementation of programs for children. The report shall be provided to the governor, legislative council, department of administration, and DCS and shall be posted on the DCS internet website. IC 4-13-19-10(b),(c),(d).

IC 4-13-19-5(b) provides that the ombudsman may also: (1) take action, including establishing a program of public education, to secure and ensure the legal rights of children; (2) periodically review relevant policies and procedures with a view toward children's safety and welfare; (3) refer a person making a report of abuse or neglect to DCS and to an appropriate law enforcement agency; (4) recommend changes in procedures for investigating child abuse and neglect and overseeing the welfare of children who are under juvenile court jurisdiction; (5) make the public aware of ombudsman services; (6) examine policies and procedures and evaluate the effectiveness of the child protection system; (7) review and make recommendations concerning investigative procedures and emergency responses.

II. H. 2. Confidentiality and Immunity

The ombudsman shall be given access to DCS records of a child who is the subject of a complaint and access to relevant records of a state or local government agency or entity. IC 4-13-19-6(a) and (b). Unless the release of records constitutes gross negligence or willful or wanton misconduct, a person is immune from: (1) civil or criminal liability; and (2) actions taken under a professional disciplinary procedure; or procedures related to termination or penalties under a contract dealing with an employee or contractor of DCS for release or disclosure of records to the ombudsman. IC 4-13-19-6(c). The ombudsman may not disclose any information that DCS could not by law reveal to the complainant, parent, guardian, custodian, person, court, guardian ad litem or court appointed special advocate. IC 4-13-19-5(e). The ombudsman may not disclose information or records of a state or local government agency provided to the ombudsman if the information or records are confidential under laws, rules, or regulations governing the state or local government agency. IC 4-13-19-6(d). The ombudsman must also insure that the identity of a complainant will not be disclosed without the complainant's written consent or a court order, except as necessary to investigate and resolve a complaint. IC 4-13-19-7.

II. H. 3. Criminal Penalty for Interference with Ombudsman

IC 4-13-19-11 states that a person who interferes with the DCS ombudsman is subject to criminal prosecution under IC 35-44.2-1-5. IC 35-44.2-1-5(a) states that a person who knowingly or intentionally:

(1) interferes with or prevents the completion of the work of a department of child services ombudsman;
(2) offers compensation to a department of child sevices ombudsman in an effort to affect the outcome of an investigation or a potential investigation;
(3) retaliates against another person who provides information to a department of child services ombudsman; or
(4) threatens a department of child services ombudsman, a person who has filed a complaint, or a person who provides information to a department of child services ombudsman, because of an investigation or potential investigation;
commits interference with the department of child services ombudsman, a Class A misdemeanor.

IC 35-44.2-1-5(b) states that it is a defense to prosecution under subsection (a) if the conduct is the expungement of DCS records that occurs by statutory mandate, judicial order, administrative review, automatic operation of the DCS computer system, or in the normal course of business.

III. ASSESSMENT OF ABUSE AND NEGLECT

IC 31-25-2-11 provides that DCS is the primary public agency responsible for receiving and assessing reports of child abuse or neglect, except in cases of institutional abuse or cases in which police investigation would also be appropriate. "Assessment" at IC 31-9-2-9.6 for purposes of IC 31-25 and IC 31-33 is defined as:

an initial and ongoing investigation or evaluation that includes:
(1) a review and determination of the safety issues that affect a child and:
(A) a child's parents, guardians, or custodians; or
(B) another individual residing in the residence where the child resides or is likely to reside;
(2) an identification of the underlying causes of the safety issues described in subdivision (1);
(3) a determination whether child abuse, neglect, or maltreatment occurred; and
(4) a determination of the needs of a child's family in order for the child to:
(A) remain in the home safely;
(B) returned to the home safely; or
(C) be placed in an alternative living arrangement.

IC 31-33-8-1(a) requires DCS to initiate an "appropriately thorough" child protection assessment of every report of known or suspected child abuse or neglect. IC 31-33-8-1(b) states that if a report of known or suspected abuse or neglect is received from a judge or prosecutor, DCS shall initiate an assessment. IC 31-33-1-2 states that a judge who wishes to contact DCS about a potential case of child abuse or neglect, shall first use the child abuse hotline to make the report. The judge may contact the local (DCS) office directly to report suspected abuse or neglect if the judge does not obtain a response from the hotline or the response obtained will not, in the judge's opinion, serve the best interests of the child. IC 31-33-8-1(c) states that DCS shall forward reports made to the hotline from medical personnel, school personnel, a social worker, law enforcement officials or personnel, judiciary personnel, or prosecuting attorney personnel to the local DCS office to determine if a DCS assessment will be initiated.

III. A. Role of Law Enforcement in Assessment

IC 31-33-7-5 requires that DCS shall make available to law enforcement and the prosecutor all written reports of child abuse or neglect. IC 31-33-7-7 and IC 31-33-8-2(b) mandate that a law enforcement agency which receives a report of child abuse or neglect shall conduct an immediate, onsite investigation of the report whenever the law enforcement agency has reason to believe that an offense has been committed. IC 31-33-8-2(b) requires that law enforcement investigate reports of child abuse or neglect "in the same manner that the law enforcement agency conducts any other criminal investigation." When law enforcement participates in an investigation, it shall cause color photos to be taken. IC 31-33-8-3(b). Law enforcement shall make a "complete, written report of the assessment" (IC 31-33-8-8(c)), forward any information regarding the incident of abuse to the prosecutor's office (IC 31-33-8-10), and release information regarding the incident to DCS (IC 31-33-8-11 and IC 31-33-7-7(a)(1)).

IC 31-33-8-1(i) provides that:

> If a report [of known or suspected child abuse or neglect received by the department] alleges abuse or neglect and involves a child care ministry that is exempt from licensure under IC 12-17.2-6, the department and the appropriate law enforcement agency shall jointly conduct an investigation. The investigation shall be conducted under the requirements of this section and section 2(b) of this chapter.

III. B. Role of Health Care Providers in Assessment and Statutes on Hospitalized Children

Under IC 31-33-10-1, health care providers and persons in charge of hospitals or other medical institutions are required to have photographs taken of the areas of trauma visible on a child who is the subject of a report of child abuse or neglect. If medically indicated, a physician may cause a radiological examination or physical medical examination of the child to be performed. IC 31-33-10-3 requires that all photographs and a summary of x-rays and other medical care shall be sent to DCS, and upon request, to law enforcement.

IC 31-33-11-1(a) requires that when a child is a hospital patient, and the hospital is advised that the child is the subject of an abuse or neglect report and DCS assessment, the hospital may not release the child to his parent, guardian, custodian or to a court approved placement until the hospital receives an authorization or a copy of a court order indicating that the child may be released. A verbal authorization shall be confirmed by a letter from DCS to the hospital stating that DCS has granted authorization for the child's release. IC-31-33-11-1(b). IC 31-33-11-1(c) provides that the individual or third party payor who is financially responsible for the child's hospital stay remains responsible for the cost of any extended hospitalization. If there no one is responsible, payment will be made by DCS.

For a discussion of the state's role in filing a CHINS petition alleging neglect of a hospitalized child whose parents preferred to treat the child by prayer rather than medical care, and who had not consented to medical care, see **Schmidt v. Mutual Hosp. Services, Inc.**, 832 N.E.2d 977, 982-83 (Ind. Ct. App. 2005).

III. C. Written Reports of Abuse or Neglect Allegations and Missing Child Allegations

IC 31-33-7-4(a) requires DCS to prepare a written report on the oral reports it receives alleging child abuse or neglect. This written report contains preliminary information on the alleged incident of child abuse or neglect, including the following information: the nature of the

child's injury, neglect or abuse; the names and addresses of the child and the parents, guardian, or custodian; the child's caretaker and siblings; the alleged perpetrator; the name and location of the reporter; and other specified information. The written report must be completed within forty-eight hours of receipt of the complaint of child abuse or neglect. The report "shall immediately be made available to" the prosecutor and appropriate law enforcement agencies, and to the coroner in cases of a child's death. IC 31-33-7-5.

IC 31-33-7-4(b) requires DCS to make a written report of a missing child (as defined in IC 10-13-5-4) not later than twenty-four hours after receipt of the report. IC 31-33-7-4(c)(9)states that the missing child report must include any information concerning the time and circumstances related to the child becoming a missing child, including the child's last known location.

III. D. Time Requirements for Initiating Assessments

IC 31-33-8-1 provides that an assessment shall be initiated as follows: (1) when the report alleges neglect, the assessment shall be initiated within a reasonably prompt period, but not later than five days; (2) when the report alleges abuse, the assessment shall be initiated immediately, but not later than twenty-four hours; (3) when DCS has reason to believe the child is in imminent danger of serious bodily harm, an immediate onsite investigation shall be initiated in one hour; (4) when the immediate well-being or safety of the child is endangered, an investigation shall be initiated regardless of the time of day.

IC 31-33-8-1(g) states if the report alleges that a child lives with a parent, guardian, or custodian who is married to or lives with a person who:

(1) has been convicted of:
  (A) neglect of a dependent under IC 35-46-1-4; or
  (B) a battery offense under IC 35-42-4; or
(2) is required to register as a sex or violent offender under IC 11-8-8;

the department shall initiate an assessment within a reasonably prompt time, but not later than five (5) days after the department receives the report, with the primary consideration being the well-being of the child who is the subject of the report.

Practice Note: If a child lives with an offender, the child could be a Child in Need of Services as defined by IC 31-34-1-1 (neglect) or IC 31-34-1-3(b) or (d) (child lives in same household with an adjudicated or criminally charged adult perpetrator of a sex offense or human trafficking offense) if the offender has been required to register as a sex or violent offender. IC 31-33-8-1(g) does not create a new Child in Need of Services definition.

III. E. Substance of Assessment

IC 31-33-8-7(a) states that the scope of the assessment, to the extent that it is "reasonably possible" to obtain such information, should include the following:

(1) The nature, extent, and cause of the known or suspected child abuse or neglect.
(2) The identity of the person allegedly responsible for the child abuse or neglect.
(3) The names and conditions of other children in the home.
(4) An evaluation of the parent, guardian, custodian, or person responsible for the care of the child.
(5) The home environment and the relationship of the child to the parent, guardian, or custodian, or other persons responsible for the child's care.

(6) All other data considered pertinent.

Pursuant to IC 31-33-8-7(b), the assessment may include a visit to the child's home, an interview with the subject child, and a physical, psychological, or psychiatric examination of any child in the home.

IC 31-33-8-3(a) states that DCS shall cause color photographs to be taken of the areas of trauma visible on a child who is the subject of a report of abuse or neglect, and that DCS shall cause a radiological examination to be performed on the child if medically indicated.

III. F. Miranda Warnings by Caseworkers

IC 31-34-4-6 requires the caseworker to give a written notification of rights to a parent when a child is removed from the parent's custody, including a notification that the parent has the right not to make incriminating statements and that incriminating statements can be used in a CHINS proceeding. There has been significant case law on the voluntariness of statements given to caseworkers in child abuse investigations for the purpose of the admissibility of those statements into evidence in criminal proceedings. Whether caseworkers should give Miranda warnings in order to insure that statements made in their assessments will be admissible in future criminal cases is an issue that has been raised in criminal cases. The case law indicates that such warnings are not required of caseworkers since they do not place a person in custody or otherwise limit a person's ability to leave during questioning.

In **Clephane v. State**, 719 N.E.2d 840 (Ind. Ct. App. 1999), the Court ruled that the defendant's statements to a case manager were voluntary. Id. at 842. The Court affirmed the defendant's conviction for sexual misconduct with a fifteen-year-old girl and three counts of contributing to the delinquency of a minor. Id. at 843. The State did not contest that the case manager was acting as an "agent of the state" in taking a statement from the defendant, but the Court found that the defendant's statement was voluntary based upon evidence that the case manager had not ordered the defendant to cooperate with her lest he risk termination of his parental rights, and the defendant's cooperation with the case manager was not mandated by statute or by court order. Id. at 842. Further, the Court ruled that Miranda warnings were not required because the defendant was aware that he was "free to leave" at all times, noting that an agent of the State is not required to give Miranda warnings "unless the defendant is both in custody and subject to interrogation." Id. at 842-43.

In **Thomas v. State**, 612 N.E.2d 604 (Ind. Ct. App. 1993), the Court affirmed Father's convictions for molesting his three teenage daughters. Id. at 609. On appeal, Father claimed that the trial court erroneously admitted an Agreed Entry in the CHINS case into evidence in the criminal case. In the CHINS case, Father and Mother, with the advice of counsel, signed an Agreed Entry stipulating that the daughters were CHINS because they were victims of a sex offense. Father also agreed to participate in an incest program. Father argued that the Agreed Entry was an involuntary confession, stating that he: (1) was never warned that it could be used against him in a criminal proceeding; (2) was never given Miranda warnings; and (3) did not know what the document contained. The Court reviewed the Agreed Entry and noted: (1) it specifically indicated that Father was aware of the contents and had voluntarily entered into the agreement; (2) Father was represented by counsel; and (3) the Agreed Entry was clear and unambiguous. Id. at 606-07. The Court concluded that Father knowingly signed the Agreed Entry. Id. at 607. The Court considered Father's claimed Miranda violation, and observed that Father was not in custody at the time he signed the Agreed Entry and was represented by

counsel, which is one of the points of Miranda warnings. Id. The Court concluded that the trial court correctly admitted the CHINS Agreed Entry. Id.

In **Hastings v. State**, 560 N.E.2d 664 (Ind. Ct. App. 1990), the Court ruled that the criminal court erred in admitting the caseworker's testimony about Mother's comments concerning her suspicions that Boyfriend had injured her child. Id. at 671. A CHINS petition had been filed based on an incident when the child's legs were broken, and the child was placed in foster care. Mother was required by the trial court in the CHINS case to meet and cooperate with the caseworker as part of the case plan to regain custody of her child. Mother told the caseworker that she was suspicious that Boyfriend had broken her child's legs, but she "didn't want to think that he had done it," and that Boyfriend had the "opportunity" to have injured the child because he was alone with the child on the day when the injury occurred. The caseworker testified about Mother's statement in Mother's criminal trial for neglect of a dependent. Mother argued on appeal of her conviction that the caseworker should not have been permitted to testify about Mother's statements during the CHINS proceeding because the caseworker's testimony violated Mother's constitutionally protected right against self-incrimination. The Court addressed two questions; namely (1) whether the caseworker who questioned Mother pursuant to the CHINS proceeding was acting as an agent of the government in the course of securing a conviction; and (2) whether Mother's statement was given voluntarily. Id. at 668. The Court found that, "while not expressly given law enforcement status, the level of cooperation between the Department of Public Welfare in a CHINS proceeding and the police and prosecutor's office in a related criminal proceeding is such that any effort to deny a caseworker's status as an agent of the state in these cases would be ludicrous." Id. With regard to the second question, the Court noted the vital interest in the preservation of a parent's parental rights, as enunciated in Lassiter v. Department of Social Services, (1981) 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640. Hastings at 669. The Court found in reviewing the record that Mother was under a CHINS court order to do "any and all necessary things" to carry out the recommended case plan. Id. The Court presumed that the court in the CHINS case carried out its statutory duty to advise Mother that her failure to cooperate with the case plans could result in termination of her parental rights. Id. Given this great mental pressure on Mother, the Court concluded that Mother's capacity for self-determination was "critically impaired," and the State failed to prove beyond a reasonable doubt that Mother's statement to the caseworker constituted a voluntary confession. Id. The Court opined that the admission into evidence of an involuntary confession constituted fundamental error and required reversal of Mother's neglect conviction. Id.

III. G. Court Orders Necessary to the Assessment

DCS may need a court order to complete an assessment of a report of child abuse or neglect, if the child's caretaker will not provide access to the child or will not consent to a necessary examination of the child. The juvenile court can use the procedures at IC 31-32-13-1 through 9 and/or IC 31-33-8-7(c) for this purpose. IC 31-33-8-7(c) provides that the juvenile court can issue an order (on a showing of good cause) so DCS can obtain admission to the home, the school, or any place where the child is located or obtain an examination of a child as part of an assessment of a report of child abuse or neglect. Under IC 31-32-13-1, DCS can petition the juvenile court for an emergency order "to control the conduct of any person in relation to the child." IC 31-32-13-1(1) may include any person (school, day care provider, relative, parent, guardian, or custodian) who refuses DCS access to the child for the purpose of conducting an assessment. See Chapter 5 at VII.B. for using a protective order to obtain access to a child, and Chapter 5 at VIII. for obtaining court ordered examination and treatment of a child.

III. G. 1. Access to the Child and Examination of the Child

IC 31-33-8-7(d) states that, if a custodial parent, guardian, or custodian of a child refuses to allow the DCS caseworker to interview the child after the caseworker has attempted to obtain the consent of the custodial parent, guardian, or custodian to the interview, DCS may petition a court to order the custodial parent, guardian, or custodian to make the child available to be interviewed by the caseworker. IC 31-33-8-7(e) states that, if the court finds that a custodial parent, guardian, or custodian has been informed of the hearing on the DCS petition, and DCS has made reasonable and unsuccessful efforts to obtain consent to interview the child, the court may grant DCS's motion to interview the child, either with or without the presence of the custodial parent, guardian, or custodian.

In **In Re F.S.**, 53 N.E.3d 582 (Ind. Ct. App. 2016), the Court reversed the trial court's order requiring Mother to allow DCS to interview her two oldest children as part of a child abuse and neglect assessment. Id. at 585. The Court concluded that the statutes on which DCS based its request to control Mother's conduct by compelling her to submit the children to DCS interviews require DCS to show some evidence suggesting abuse or neglect before the trial court may issue such an order. Id. at 599. DCS received four reports in a one month period alleging that Mother and Father of the two youngest children were using drugs, dealing in drugs in the home, and engaging in domestic violence and the oldest child had multiple school absences. The children's prior CHINS case had been closed two months before the receipt of the new reports. Mother was on probation for theft, and her probation officer learned that Mother had purchased the maximum allowable amount of pseudophedrine for the most recent two months. Two DCS case managers, Mother's probation officer, and a police officer visited Mother's home on three occasions during as a result of the reports, but no evidence of abuse or neglect was observed. Mother refused to take a drug test when requested to do so by the case managers, but passed a drug test requested by her probation officer. Mother refused to allow the DCS case manager to interview her children, so DCS filed a Motion to Control the Conduct of Mother and Father pursuant to IC 31-33-8-7, and requested that the court order Mother to comply with an interview in order to complete a thorough assessment. The trial court heard evidence from Mother, the two case managers, and Mother's probation officer, but neither the probation officer nor the caseworkers observed evidence of drug use or domestic violence, and the caseworkers were satisfied that the children were safe. The court issued an order granting DCS's request to interview the children, but stayed the order, granting Mother five days to file a Notice of Appeal.

On review, the Court observed that a petition seeking to order a parent to make a child available for an interview by DCS is also governed by IC 31-32-13, "which addresses juvenile court procedures generally and the issuance of orders specifically." Id. at 589. The Court noted IC 31-32-13-4 [statute on issuance of orders to control conduct of a person in relation to a child] allows the court to issue orders after a hearing "if the court finds good cause to issue the order is shown upon the record." Id. The Court concluded that the statutes on which DCS based its request to control Mother's conduct by compelling her to submit the children to interviews require that DCS show some evidence of abuse or neglect before the trial court may issue such an order. Id. at 599. The Court said that good cause is an admittedly imprecise standard. Id. at 597. Quoting Newton v. Yates, 353 N.E.2d 485, 492 (Ind. Ct. App. 1976), the Court observed that"[w]hile an exact definition of good cause is somewhat elusive, it is clear that a mere allegation of need and a summary statement alleging that the information cannot be obtained from another source will not be sufficient to surmount a 'good cause' hurdle." F.S. at 597. The Court opined that DCS cannot merely allege it "needs" to interview a child to "complete its assessment" and thereby show good cause. Id. The Court

held that "DCS must show the trial court some evidence beyond a report from an undisclosed source that abuse or neglect is occurring." Id. at 598. The Court clarified that the report alone does not allow DCS to conduct an interview with the child. Id. The Court held that if, in gathering information about the items required to be included in the assessment, DCS finds some evidence supporting the allegations of the report and determines as a result of the circumstances of the specific case being investigated that an interview is necessary to complete "an appropriately thorough" assessment, DCS may ask the trial court to order an interview if the parent does not consent. Id. The Court found that there was no such evidence in this case. Id. The Court observed that it is important to consider the nature of the allegations. Id. at 599. The Court noted that in the F.S. case: (1) the primary allegations concerned drug use, external signs of which would likely be apparent to the trained eye, and domestic violence between Mother and Father, yet no official saw evidence of either; (2) there was no drug paraphernalia in or around the house; (3) there were no visible marks from drug use or bruises from physical altercations; (4) neither Mother nor Father ever appeared intoxicated or under the influence of drugs, and both consistently passed drug screens. Id. The Court concluded that no probative evidence supporting the allegations was shown on the record, and accordingly, there was no good cause to compel interviews with the children. Id. The Court agreed with the decision in In Re A.H. 992 N.E.2d 960 (Ind. Ct. App. 2013), discussed immediately below, that the procedure selected by the Indiana legislature for assessing reports and compelling interviews with children does not necessarily violate due process. F.S. at 599. The Court opined that, when the procedure is not observed, such as in the F.S. case, "where DCS did not demonstrate by *any* evidence that an interview was necessary for DCS to carry out its obligation to investigate reports of child abuse or neglect, the law impermissibly infringes upon the parent's fundamental right to raise her children without undue interference by the State." (Emphasis in opinion.) Id.

In **In Re A.H.**, 992 N.E.2d 960 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's order granting DCS's Petitions to Interview Children filed pursuant to IC 31-33-8-7(d) and (e). Id. at 968. DCS had requested the court to require Mother to make her two children, ages six and eight, available for an interview as part of a DCS assessment of a report that Mother was using methamphetamine and heroin on a daily basis in the presence of her children, that Mother was selling prescription drugs and heroin, and that there were syringes all around the house. The DCS family case manager had visited Mother at her home, explained to Mother the nature of the report, observed Mother's home and her four-year-old child, and interviewed Mother. Mother stated that she was not using drugs, heroin, or methamphetamine, and that she had no history of drug abuse. Mother stated that she had prescription drugs that she was using for health conditions, submitted to a drug test, and the test results were that she was negative for all drugs except those that she was prescribed. The case manager did not observe any indication of illicit drug use or sales in Mother's home and did not observe any indication that Mother was impaired or under the influence of drugs. Mother told the case manager that the father of her eight-year-old child had made a false allegation to DCS about her in the past and that she believed that he had also made the current report. The DCS case manager told Mother that, as part of the assessment, she needed to speak with Mother's six-year-old child and eight-year-old child, but Mother indicated that she did not want the children to be interviewed. At some point, the family case manager spoke to the father of Mother's six-year-old child, who informed the case manager that Mother had a history of drug abuse, that he was not sure if Mother was currently abusing drugs, and that he had not seen Mother for six to nine months. DCS filed petitions to interview the two children, and the court held a hearing on the petitions. At the hearing, Mother argued that IC 31-33-8-7 is unconstitutional pursuant to the Due Process Clause of

the Fourteenth Amendment. The trial court entered an order granting DCS's request to interview the children, required Mother to produce the two children for interviews within ten days of the order, and permitted Mother to be present for the interviews. Mother filed a motion to stay the interviews pending appeal, which DCS opposed and the court denied. Mother appealed, arguing that IC 31-33-8-7 interferes with her right to raise and protect her children and that due process requires the presence of additional procedural protections prior to compelling the interview of a child.

The Court recognized the fundamental right of a parent to raise her child without undue interference by the state. Id. at 966. The Court could not say that due process requires DCS to conduct an assessment or a portion of an assessment in order to obtain information to provide a factual basis supporting the accuracy of the report prior to interviewing the child or children. Id. at 967. The Court also could not say that legislation allowing DCS the ability to interview a child as part of the initial assessment and after obtaining a court order if necessary violates due process. Id. The Court cited In Re G.W., 977 N.E.2d 381, 386 (Ind. Ct. App. 2013), *trans. denied*, in which the Court of Appeals noted that it was aware of no constitutional prohibition against the proposed interview arrangements. A.H. at 967. The Court also noted that the state's interest in protecting the welfare of children is substantial. Id. The Court could not say that the risk of error created by the legislature's chosen procedure in IC 31-33-8-7 or the actions of DCS or the trial court in this case was substantial or favored reversal. Id. The Court also could not say Mother was not afforded notice of the hearing on the petitions to interview or an opportunity to be heard with respect to the petitions at a meaningful time and in a meaningful manner. Id. at 968.

In **In Re G.W.**, 977 N.E.2d 381 (Ind. Ct. App. 2012), *trans. denied*, the Court affirmed the trial court's order requiring Mother to make her nine-year-old daughter (Daughter) available for an interview requested by DCS. Id. at 387. DCS wished to assess Daughter's "condition" as part of a DCS child abuse and neglect assessment. Daughter's twelve-year-old sister (Sister) had made allegations of inappropriate touching by Stepfather. DCS also received copies of diary entries typed on a computer owned by Sister's paternal grandmother, but stored under Sister's password, that described sexual intercourse between Sister and Stepfather. Sister recanted the allegations during a DCS interview. Despite Sister's recantation, DCS requested an interview with Daughter, but Mother refused. DCS then filed an amended verified emergency petition pursuant to IC 31-33-8-7(d) and (e) and IC 31-32-13-1 to compel Mother and Stepfather to make Daughter available for an interview. DCS alleged that there was good cause to believe that Daughter might be at risk due to Sister's allegations and that access to Daughter by DCS was necessary to ensure Daughter's safety and to complete the investigation. The trial court held a hearing on the petition. The DCS family case manager testified that: (1) she wanted to interview Daughter "to make sure that she's safe and also to discuss the inconsistencies" regarding how Mother learned about the alleged abuse; (2) that "recantation is a part of [the] disclosure process"; and (3) that the police were still analyzing the computer on which the incriminating diary entries were typed to determine whether Sister had actually written them. Id. at 384, 387. The trial court issued an order granting the petition. The trial court found that, although IC 31-33-8-7 does not specifically address an interview of a child other than the subject child, IC 31-33-8-7(a) does require the assessment to include the name *and condition* of other children in the home (emphasis in opinion). The trial court found that this provision, combined with IC 31-32-13-1[which allows the juvenile court upon motion to issue an order to control the conduct of any person in relation to the child] provided authority for the order. The trial court also found good cause for the order based on: (1) Sister's initial allegations of molestation and the

reported diary entries, despite Sister's subsequent recantation of the allegations and denial of being the author of the diary entries; (2) the serious nature of the original allegations; and (3) Daughter's relatively close age to Sister. The court also found that DCS had made reasonable efforts to obtain the consent of the custodial parent for the interview, and ordered Mother to permit the girl be interviewed by DCS at Susie's Place in Bloomington. The trial court stayed its order pending Mother's appeal.

The Court found that Mother failed to establish that the trial court erred in granting DCS's petition to compel the interview of the child as part of the DCS assessment pursuant to IC 31-33-8-7. Id. at 387. The Court observed that IC 31-33-8-7(a)(3) provides that a DCS assessment, "to the extent that is reasonably possible, *must include*…[t]he names and conditions of other children in the home" (emphasis in opinion). Id. at 385. The Court also noted that IC 31-33-8-7(d) specifically contemplates that DCS may interview those "other children" to determine their conditions and obtain a court order if necessary to facilitate such interviews. Id. Although Mother argued that IC 31-33-8-7(a)(3) refers only to a child's physical condition, the Court disagreed, stating that the statute contains no such limitation, and the Court may not read one into it. Id. at 386. Although Mother complained about the proposed interview arrangements, the Court observed that she cited no statutory or constitutional prohibitions against them and the Court was aware of none. Id. The Court noted that IC 31-33-8-7(e) specifically provides that the court "may grant the motion to interview the child, either with or without the custodial parent…being present" and that nothing prohibits DCS from designating a third party to interview the child outside the home. Id.

In **Baltimore City Dept. of S.S. v. Bouknight**, 493 U.S. 549, 110 S. Ct. 900 (1990), the U.S. Supreme Court affirmed a juvenile court order requiring Mother to produce her child for inspection, despite Mother's objection that production might incriminate her in future criminal proceedings regarding the child. The Court reasoned that a non-criminal, regulatory scheme for the protection of children could not be avoided by Mother's invocation of the Fifth Amendment privilege against self-incrimination.

III. G. 2. Examination of Parent, Guardian, or Custodian

IC 31-33-8-7(a)(4) provides that the DCS assessment shall include, when reasonably possible, an "evaluation" of the child's parent, guardian or custodian. However, the juvenile code does not contain any specific authority for a professional examination in the absence of parental consent. Possibly the examination could be obtained under the protective order statute, IC 31-32-13-1(1), on the theory that an examination is a way of controlling the conduct of a person in relation to the child and the examination of the parent is necessary to investigate the allegations of child abuse or neglect. See **In Re F.S.**, 53 N.E.3d 582 (Ind. Ct. App. 2016), discussed in this chapter at III.G.I., in which the Court opined that the trial court must find good cause to issue such an order.

III. G. 3. Access to Records Needed for Assessment

Obtaining the mental health records of the child and of the child's parent, guardian, or custodian may be crucial to a child abuse or neglect assessment. IC 16-39-3-8 creates a special provision for obtaining mental health records in preparing the preliminary inquiry. DCS may file a verified petition which sets forth facts DCS alleges constitute an emergency and request an emergency hearing. After notice to all persons who are entitled to receive notice pursuant to IC 16-39-3-4, the juvenile court may hold a hearing and order the release of a parent's mental health records if it finds that other methods of obtaining the information are

not available or effective and the need for disclosure in the child's best interest outweighs the harm to the patient caused by unnecessary disclosure. Possibly IC 31-32-13-1(1) could be used to gain access to school, treatment, or other records of the child or the child's parent, guardian, or custodian which are relevant to the assessment, if DCS is otherwise unable to get those records during the assessment.

III. G. 4. Removal of the Child From Home

IC 31-33-8-8(a) provides that DCS can seek a protective order to remove the child from the home during the assessment. Subsection (a) states, in pertinent part:

> If, before the assessment is complete, the opinion of the law enforcement agency or the department [DCS] is that immediate removal is necessary to protect the child from further abuse or neglect, the juvenile court may issue an order under IC 31-32-13.

See Chapter 5 at II.E.2. for procedures under the protective order statute, IC 31-32-13, to remove a child from home. See Chapter 5 at II.F. for the emergency custody statute, IC 31-34-2-3, to remove a child from the home.

III. H. Written Report and Assessment of Substantiated or Unsubstantiated

IC 31-33-8-8(b) requires that DCS make a written report on the assessment. IC 31-33-8-12 requires DCS to classify all reports of child abuse or neglect as substantiated or unsubstantiated. "Substantiated", defined at IC 31-9-2-123 is a "determination regarding the status of a report whenever facts obtained during an assessment of the report provide a preponderance of evidence that child abuse or neglect has occurred." IC 31-9-2-132 states that a report is "unsubstantiated" when "facts obtained during an assessment of the report provide credible evidence that child abuse or neglect has not occurred."

IC 31-34-12-7 provides that, in the event of a child's death, DCS may use the failure of a parent, guardian, or custodian to submit to a drug or alcohol screen test for the purpose of making a determination as to whether abuse or neglect is substantiated or unsubstantiated. IC 31-34-12-7(a) specifies the following conditions which may be used to determine that the parent, guardian, or custodian was intoxicated or under the influence of alcohol or drugs at the time of a child's death: (1) the parent, guardian, or custodian had care, custody, and control of the child immediately before the child died; (2) a law enforcement officer or DCS employee had probable cause to believe the parent, guardian, or custodian was impaired, intoxicated, or under the influence of drugs or alcohol immediately before or at the time of the child's death; (3) a law enforcement officer or DCS employee requested the parent, guardian, or custodian to submit to a drug or alcohol screen test not later than three hours after the child's death; (4) the parent, guardian, or custodian did not submit to a drug or alcohol screen test within three hours after the request by law enforcement or DCS to submit to the test. IC 31-34-12-7(b) provides that evidence from a drug or alcohol screen test administered under this section is not admissible as evidence in a criminal proceeding. IC 31-9-2-42.3 defines drug or alcohol screen test as "a test used to determine the presence or use of alcohol, a controlled substance, or a drug in a person's bodily substance."

III. I. Notice of Assessment and Availability of Assessment Report

IC 31-33-18-4 requires DCS to give verbal and written notice to "each" parent, guardian or custodian of a child assessed for abuse or neglect. The notice shall advise the person that he may request the reports of child abuse or neglect and confidential information outlined in IC 31-33-18-1, which includes any other information obtained, reports written, or photographs taken

concerning the reports in the possession of: (A) the division of family resources; (B) the local office of DCS; (C) DCS; or (D) the DCS ombudsman. The person may also request juvenile court records arising from the report or investigation of child abuse or neglect. A parent, guardian or custodian can access the report and investigation information by signing a written release form that delineates what information is requested. The requesting person may be charged reasonable copying costs. Parents, guardians, custodians, and other persons about whom a report is made can also have access to DCS records as authorized by IC 31-33-18-2(8), and the child's guardian ad litem/court appointed special advocate has access to this information through IC 31-33-18-2(7).

IC 31-33-8-9(a) states that DCS shall make the assessment report available upon request to the appropriate court, prosecuting attorney, appropriate law enforcement agency, and the United States Department of Defense Family Advocacy Program (if a parent, guardian, or custodian of the child who is the subject of the substantiated report is an active duty member of the military). DCS is specifically required by IC 31-33-8-9(b) and (c) to send reports of substantiated cases of child abuse or neglect to the prosecuting attorney having jurisdiction in the county where the alleged child abuse or neglect occurred, and to the coordinator of the community child protection team.

IC 31-33-7-8 does not grant all reporters of child abuse or neglect access to the assessment reports. The statute does require DCS to send written reports advising of the action on the child abuse or neglect report to the following abuse and neglect reporters: hospital, community mental health center, managed care provider, referring physician, dentist, licensed psychologist, a school, group home, child caring institution, secure private facility, or child placing agency. See this Chapter at I.H. for information on the duty to advise certain reporters of status of child abuse or neglect investigation.

In **F.D. v. Indiana Dept. of Family Services**, 1 N.E.3d 131(Ind. 2013), Parents filed suit against DCS, the Evansville Police Department, and the Vigo County Prosecutor's Office for failure to notify them that their Nephew had admitted molesting their two-year-old daughter (Daughter). The molestation of Daughter was disclosed to Police by Nephew in the course of a DCS assessment and a Police juvenile delinquency investigation that Nephew had molested Parents' four year-old son (Son). Police informed the DCS case manager of Nephew's admission that he had molested Daughter as well as Son, but the case manager did not inform Parents that Nephew had admitted molesting Daughter. The trial court granted summary judgment to DCS on the grounds of statutory immunity. The Indiana Supreme Court found that summary judgment was not proper and remanded to the trial court for further proceedings. Id. at 140. The Court observed that Parents' suit is founded upon DCS' statutorily mandated duty under IC 31-33-18-4 to give verbal and written notice to parents that the reports and information relating to the child abuse or neglect investigation are available upon the request of the parent. Id. The Court said that the facts, which must be construed in favor of Parents as the non-moving party on summary judgment, do not fall within the circumstances that grant immunity under the plain words of the child abuse reporting law, IC 31-33-6-1(4) "for allegations that arise out of its participation in any proceedings resulting from the report of child abuse". Id.

See this Chapter at V.A. for statutes allowing an identified perpetrator to request an administrative hearing concerning the substantiation of a report.

III. J. Assessment of Institutional Abuse or Neglect

IC 31-33-9 discusses the assessment of child abuse and neglect of a child who is under the care of a public or private institution. IC 31-33-9-1(a) states that DCS shall designate the public or

private agencies which are primarily responsible for investigating institutional child abuse or neglect. IC 31-33-9-1(b) states that the designated agency "must be different from and separately administered from the agency involved in the alleged act or omission." IC 31-33-9-1(c) states that, subject to this limitation, the agency may be DCS or a law enforcement agency but may not be the office of the prosecuting attorney. DCS has an Institutional Child Protection Service Unit, which conducts assessments of child abuse and neglect that occurred while the child was in the care of a residential facility, school, hospital, juvenile correctional facility, group home certified by the Bureau of Developmental Disabilities, licensed or unlicensed registered child care home or center, or an unlicensed registered childcare ministry. According to DCS policy, the local DCS office assesses child abuse and neglect reports on foster homes.

III. K. Expungement of Juvenile Court Records

IC 31-39-8-2 provides that any person may petition the juvenile court to remove "records pertaining to the person's involvement in juvenile court proceedings" from the court files, files of law enforcement, and files of any other person who has provided services to a child under a court order. IC 31-39-8-1.5 states that the juvenile court in the county of the original action has exclusive original jurisdiction over expungement petitions for CHINS or delinquency cases. IC 31-39-8-3 lists the requirements of what should be included in the verified petition and the factors to be considered on an expungement petition. IC 31-39-8-4(b) provides that child abuse or neglect information shall be expunged if the information is determined to be unsubstantiated after an assessment or a court proceeding. The information may be expunged if "the probative value of the information is so doubtful as to outweigh the information's validity." IC 31-39-8-4(a). See Chapter 8 at XII. for further information on expungement of juvenile court records.

In **Dubois County Office of Family and Children v. Adams**, 671 N.E.2d 202 (Ind. Ct. App. 1996), the Court of Appeals ruled that the juvenile court was without jurisdiction to grant a petition for expungement of the investigative records of the office of family and children involving a particular allegation of child molestation, because there was no juvenile court proceeding involving that investigation or situation. The Court stated that the juvenile court's jurisdiction to order expungement was limited to records relating to the person's involvement in juvenile court proceedings. Id. at 203. The Court noted that the petitioner could use the administrative procedures in the Child Abuse Registry (now at IC 31-33-26) to have reports expunged. Id. at 203 n.3.

IC 31-33-27-5 allows an identified perpetrator of child abuse or neglect to petition the court to order DCS to expunge the substantiated assessment report. See this Chapter at V.B.

IV. ACTION ON THE ASSESSMENT

A. Informal State Intervention

Based on the assessment, DCS must determine the appropriate action to take regarding the child, the parents, guardian, or custodian, and the alleged perpetrator. The options are detailed below. IC 31-33-14-3 addresses the situation when DCS determines that the best interests of the child require DCS intervention or action in the juvenile or criminal court and a parent, guardian, or custodian is an active duty member of the military. In these situations, IC 31-33-14-3 states that DCS may seek the assistance of the United States Department of Defense Family Advocacy Program in determining and providing appropriate services for the child and family when the parent, guardian, or custodian is an active duty member of the U.S. military.

IV. A. 1. Informal Referrals Without Court Action

When the DCS assessment reveals that the child will be safe if left in the home and the parents are willing to receive services to remedy the neglect or abuse situation, then DCS may choose not to initiate a CHINS petition. Instead, DCS may make referrals to the parent, guardian, or custodian. IC 31-33-8-15(a), (b), (d), and (e) discuss situations when DCS classifies an assessment as substantiated. IC 31-33-8-15(a) states that DCS "may provide information about community service programs that provide respite care, voluntary guardianship, or other support services for families in crisis" to the parent or guardian of the child who is the subject of the assessment. IC 31-33-8-15(b) provides that, if DCS provides information to a parent or guardian, DCS may not initiate an investigation or assessment or substantiate an assessment of abuse or neglect based solely on the provision of the information. IC 31-33-8-15(d) states that the provision of information by DCS does not result in any obligation on the part of DCS. IC 31-33-8-15(e) states that DCS is not liable for any action arising out of having furnished the information, including any delegation of powers executed under IC 29-3-9-1 [delegation of parent's or guardian's powers to another person under a power of attorney].

IC 31-33-8-15(c) states that if DCS classifies the assessment as substantiated, DCS may refer the parent or guardian to a community service program that provides respite care, voluntary guardianship, or other support services for families in crisis as appropriate to meet the needs of the family.

The obvious advantage of informal state action (over formal judicial action) is the limited intervention into the family and the lessened use of state resources. However, a major concern of informal action is that it may neither adequately protect the child nor fully resolve a neglect or abuse situation. DCS can initiate a CHINS petition in juvenile court if the parents, guardian, or custodian do not comply with the requirements of the informal actions or if DCS determines that the safety and well-being of the child requires formal court action.

IV. A. 2. Requirements and Procedures for Informal Adjustment

The requirements for the informal adjustment program are found at IC 31-34-8-1 through 3, IC 31-34-8-6, and IC 31-34-8-7. IC 31-40-1-3(a) provides that a participant in the program of informal adjustment is financially responsible for services provided by DCS. The requirements are summarized below:

- The caseworker must complete a preliminary inquiry, have probable cause to believe the child is a child in need of services, and may implement a program of informal adjustment upon court approval. IC 31-34-8-1(a).
- If the juvenile court denies a program of informal adjustment, the court shall state its reasons for denial, which may include that the court does not find probable cause to believe the child is a child in need of services or that the coercive intervention of the court is required. IC 31-34-8-1(b).
- The informal adjustment program is considered approved if the juvenile court does not do one of the following: (1) act to either approve or deny the informal adjustment program or set a hearing within ten days of the submission of the informal adjustment to the court; or (2) after setting a hearing, act to approve or deny the informal adjustment within thirty days of the submission to the court. IC 31-34-8-1(c) and (d).

- The child and the child's parent, guardian, custodian or attorney must consent to a program of informal adjustment. IC 31-34-8-2.
- The program of informal adjustment may not exceed six months unless the juvenile court approves extension of the informal adjustment for an additional three months. IC 31-34-8-6.
- Not later than five months after the implementation of a program of informal adjustment, DCS shall file a compliance report with the court. If the informal adjustment is extended, a supplemental report shall be filed by DCS not later than eight months after the informal adjustment program is implemented. IC 31-34-8-7.
- DCS may file a petition for compliance with the informal adjustment. After notice and hearing on the petition, the juvenile court may order the parent, guardian or custodian to participate in the informal adjustment program. IC 31-34-8-3(a).
- After the juvenile court orders participation in the informal adjustment program, a parent who fails to participate may be found in contempt of court. IC 31-34-8-3(b). To comply with Indiana law on contempt proceedings, DCS is required to file a petition to show cause and provide notice to the parent, guardian, or custodian, and a court hearing is required before a contempt finding could be made. See Chapter 8 at XI.D. for indirect civil contempt procedures.
- A participant in a program of informal adjustment is financially responsible for any services provided by or through DCS and shall furnish the court and DCS with a current child support worksheet before a hearing concerning payment or reimbursement of costs. The juvenile court shall order payment or reimbursement to DCS by the child's parent or guardian of the child's estate unless the court makes a specific finding that the parent or guardian is unable to pay or that justice would not be served by ordering payment. Parental reimbursement shall be paid directly to DCS. IC 31-40-1-3(c). See Chapter 8 at IX.D. and E. for reimbursement issues.

In **K.B. v. Indiana Dept. of Child Services**, 24 N.E.3d 997 (Ind. Ct. App. 2015), the Court affirmed the trial court's order adjudicating Father's two children to be CHINS. Id. at 999. DCS began working on the report of child abuse or neglect due to domestic violence allegations. Police officers and the DCS case manager visited the home of Father and his girlfriend (Girlfriend). Both Father and Girlfriend seemed impaired, were pacing back and forth, and had enlarged pupils and bloodshot eyes. The case manager asked Father and Girlfriend to take a drug screen, but both declined. Father and Girlfriend entered into an Informal Adjustment, which required them to allow DCS visits and supervision, and required them to maintain a stable home for the children, to participate in home-based counseling, and to submit to random drug screens. Father's and Girlfriend's participation with the Informal Adjustment was sporadic. About two months later, the trial court authorized DCS to file CHINS petitions. Father's children were found to be CHINS after the factfinding hearing, and Father appealed the CHINS adjudication. Among the issues raised by Father on appeal was the necessity of the trial court's coercive intervention. Although Father claimed that no family is obligated to participate in an Informal Adjustment without consenting, the Court said that Father was incorrect. Id. at 1005. The Court noted that an informal adjustment is an agreement between DCS and a family where the family agrees to participate in services in an effort to prevent the children from being formally declared CHINS. Id. The Court, citing IC 31-34-8-1, said that, in contemplating whether to approve an entry of an informal adjustment, a trial court has to find the intake officer has probable cause to believe that the

child is a Child in Need of Services. Id. The Court observed that the Informal Adjustment required Father and Girlfriend to follow through with certain services, but they did not do so, even after the CHINS petition was filed, and with a contempt order in place instructing them to allow the DCS workers to visit the children at home or at school. Id. The Court found the trial court's conclusion that the coercive intervention of the court was necessary was not clearly erroneous. Id. at 1007.

IV. A. 3. Special Procedures for Court Ordered Services

IC 31-34-4-7 applies to programs and services provided to or on behalf of a child who is alleged to be a child in need of services before the court's entry of a dispositional decree or the court's approval of a program of informal adjustment. IC 31-34-4-7(b) requires the juvenile court, before ordering or approving a service, program, or out-of-home placement for a child that has not been recommended by DCS, to submit the proposed service, program, or placement to DCS for consideration. DCS shall submit a report to the court stating its approval or disapproval of the court's proposed service, program, or placement within three business days after receipt of the court's proposal. If DCS approves the court's proposal, the court may enter an appropriate order to implement the proposal. IC 31-34-4-7(c). If DCS does not approve the court's proposal, DCS may recommend an alternative service, program, or placement for the child. IC 31-34-4-7(c). IC 31-34-4-7(d) requires the court to accept DCS's recommendations for any predispositional service, program, or placement unless the court finds that the recommendation is: (1) unreasonable, based on the facts and circumstances of the case; or (2) contrary to the welfare and best interests of the child. If the juvenile court does not accept DCS's recommendations, IC 31-34-4-7(e) allows the court to order DCS to provide a specified service, program or placement until the entry of the dispositional decree or until the order is modified or terminated. The court's order should specifically: (1) state the reasons why the court is not accepting DCS's recommendations, (2) make the findings that a recommendation is unreasonable or contrary to the child's welfare and best interests, and (3) for an out-of-home placement, include whether the placement is an emergency required to protect the health and welfare of the child. IC 31-34-4-7(e), (g).

IC 31-34-4-7(f) allows DCS to initiate an expedited appeal of court orders which are contrary to DCS's recommendations. The appeal procedure is described at Ind. Appellate Rule 14.1. See Chapter 8 at XIII.C.1. for information on appeals pursuant to Ind. Appellate Rule 14.1. IC 31-34-4-7(g) states that, if DCS prevails on appeal, DCS shall pay the following costs incurred before the date of the final decision: (1) any programs or services implemented during the appeal other than the cost of out-of-home placements, and (2) any out-of-home placement if the juvenile court order includes written findings that the placement is an emergency required to protect the health and welfare of the child. If the juvenile court has not made findings that the placement is an emergency, IC 31-34-4-7(g) states that DCS shall file a notice with the Indiana judicial center. IC 31-40-1-2 addresses the obligation of DCS to pay for services, programs, and placement for children. See Chapter 8 at IX.A. for discussion of IC 31-40-1-2, which limits DCS's obligation to pay for services in three listed sets of circumstances, namely the costs of secure detention; costs for a child's placement in an institution that does not have an executed contract with DCS unless the DCS director or the director's designee approved the placement in writing; or placement in a home or facility outside Indiana unless recommended or approved by the DCS director or the director's designee.

IV. B. Removal of the Child From the Home and Emergency Exam or Care of Child

The court can order a child taken into protective custody. See Chapter 5 at II.E. for further discussion on court orders for removal of child from home. A caseworker can take a child into custody without a court order if she/he has probable cause to believe the child is a CHINS and all of the conditions stated in the emergency custody statute, IC 31-34-2-3(a), are met. See Chapter 5 at II.F. for further discussion on removal of child from home without court order. IC 31-32-13-1 and IC 31-32-12-1 provide that DCS may seek a judicial order for the mental or physical examination and/or treatment of a child prior to the filing of the CHINS petition. See Chapter 5 at VIII.A. on pre-petition examination and treatment.

IV. B 1. Removal of Child

See Chapter 5 at IV.H., I., and J. for discussion of court findings required by IC 31-34-5-3 when a child is removed from home with or without a court order due to an emergency.

IV. B. 2. Child Protective Orders for Removal of Alleged Perpetrators

IC 31-34-2.3-1 through 8 authorize the juvenile court to order an alleged perpetrator to be removed from the home of a child victim of abuse or neglect. IC 31-34-2.3-7 and IC 31-34-2.3-8 impose criminal penalties for an alleged perpetrator who returns to the child's residence and for parents or other adults with whom the child resides who fail to monitor the residence and fail to report the alleged perpetrator's attempted return to the child's residence. See Chapter 5 at II.B. for detailed discussion.

IV. C. Initiating a CHINS Case

When the safety of the child requires the formality of a court proceeding, DCS can initiate a CHINS case. The case is initiated by the case manager's completion of an intake and preliminary inquiry as outlined in IC 31-34-7-1 and IC 31-34-7-2. DCS or the prosecuting attorney will also request the court's authorization to file the CHINS petition

IC 31-34-9-2 states the court shall authorize the filing of the CHINS petition if the court finds probable cause to believe the child is a CHINS. If the filing of the CHINS petition is authorized, the person who filed the petition may request in writing that the child be taken into custody. IC 31-34-9-5. Either the DCS attorney or the prosecuting attorney may file the CHINS petition. IC 31-34-5-1(c) requires that a CHINS petition be filed before the detention hearing is held.

IV. D. Referral to Criminal Court

DCS must determine whether it is in the best interest of the child to refer a report of child abuse or neglect to the juvenile or criminal court. IC 31-33-14-1. The initial consideration is whether the alleged act or omission constitutes a criminal charge and/or fits within one of the CHINS categories. With the exception of a few CHINS categories, most of the acts, omissions, or conditions that qualify the child as a CHINS also give rise to criminal liability for the parent, guardian, custodian, or other person responsible for the acts or omissions against the child. The second consideration is whether criminal or juvenile court action is in the best interest of the child. DCS shall assist whichever court assumes jurisdiction of the child abuse or neglect case. IC 31-33-14-2.

The prosecutor may choose to pursue criminal action even if DCS does not make a formal referral. The prosecutor has independent knowledge of an abuse or neglect incident since DCS is required to give the prosecutor notice of all written reports of child abuse and neglect under

IC 31-33-7-5, and DCS must also make the final investigation report available to the prosecutor under IC 31-33-8-9. Any child abuse investigations undertaken by law enforcement must also be forwarded to the prosecutor pursuant to IC 31-33-8-10.

IV. D. 1. Differences between CHINS and Criminal Litigation

The major differences between addressing an incident of child abuse or neglect as a CHINS case rather than as a criminal case, are purpose, procedure, and dispositional alternatives.

IV. D. 1. a. Purpose

A criminal case is instituted to prosecute an offender for the protection of the child victim and society as a whole. The child victim may or may not be related to the perpetrator. CHINS cases, on the other hand, usually involve children who are abused or neglected in the context of their families. CHINS cases are geared toward maintaining the family as a unit when consistent with the safety and well-being of the child, and otherwise locating an alternative permanent family for the child. IC 31-10-2-1 identifies the policies of the State of Indiana in CHINS proceedings as strengthening families by assisting parents to fulfill their parental obligations, providing a continuum of services, removing children from their homes only when necessary to their best interests, and providing adoption as a viable option for children who cannot be reunited with their parents. The purpose of a CHINS case is to protect and obtain permanency for the child, not to punish or incarcerate the child's abusive or neglectful parent.

IV. D. 1. b. Procedure and Evidence

CHINS litigation, as opposed to criminal litigation, follows the civil trial rules of procedure (IC 31-32-1-3), the law of discovery for civil cases (IC 31-32-10-3), and the preponderance of the evidence standard (IC 31-34-12-3). The constitutional protections regarding self incrimination and search and seizure for criminal cases have not been applied to CHINS cases in Indiana. See **Wardship of Bender** (1976) 170 Ind. App. 274, 352 N.E.2d 797; see also IC 31-34-4-6 (advisement of rights that incriminating statements may be used against parents in CHINS proceeding has not been interpreted as implicating the Constitutional right to remain silent in CHINS proceedings). The standard of proof in a criminal case is "proof beyond a reasonable doubt," whereas the standard in a CHINS factfinding hearing is "preponderance of the evidence."

In **Matter of Jordan**, 616 N.E.2d 388 (Ind. Ct. App. 1993), the Court discussed the differences between CHINS and criminal proceedings in ruling that the constitutional due process protections involved in a warrantless arrest in a criminal context do not apply to a CHINS detention hearing. The Court stated:

> The concerns in a CHINS situation and a criminal proceeding are vastly different. While a person's liberty interest is at stake in a criminal detention, the taking of a child into custody pursuant to a CHINS petition involves the protection of the child. The statute provides for the child's needs to be met during the period of custody and he or she is not exposed to the risk of possible parental abuse or neglect. Any further legal action that may be required is pursued in the nature of a civil matter.

Id. at 392.

See also **Baltimore City Dept. of S. S. v. Bouknight**, 493 U.S. 549, 110 S. Ct. 900 (1990) (child protection proceeding under Maryland law was not a criminal proceeding); **Matter of Relationship of M.B.**, 638 N.E.2d 804, 811 (Ind. Ct. App. 1994) (the juvenile

code clearly distinguishes between proceedings which are criminal and the CHINS and termination proceedings, which are not).

Both criminal (IC 35-37-4-6) and CHINS (IC 31-34-13) statutes provide that the hearsay statements and videotapes of children under the age of fourteen are admissible in certain situations. The statute abrogating the husband-wife privilege and health care provider-patient privilege as a ground for excluding evidence in child abuse and neglect proceedings (IC 31-32-11-1) applies to the CHINS factfinding hearing (IC 31-34-12-6) and was also applied to the husband-wife privilege in **Baggett v. State**, 514 N.E.2d 1244, 1245 (Ind. 1987) a child molesting case. Evidence that a prior or subsequent act or omission by a parent, guardian, or custodian injured or neglected a child may be admitted in a CHINS case under IC 31-34-12-5(2) and Indiana Evidence Rules 404(b) and 405(b). See Chapter 7 at X.A. for admission of prior and subsequent acts.

In **In Re A.G.**, 6 N.E.3d 952 (Ind. Ct. App. 2014), the trial court adjudicated Mother's two children to be CHINS based on a clinical psychiatrist's evidence that: (1) Mother suffered from Factitious Disorder by Proxy; (2) the risk of failing to protect the older child, who had suffered cyanotic episodes while in Mother's care, from Mother would be "life-threatening"; and (3) any "sibling would [also] be at risk of harm when in Mother's custody." Id. at 954-55. The trial court also drew a negative inference from Mother's refusal to testify in DCS's case in chief, inferring that Mother had refused to testify because she was concerned about incriminating herself. Id. at 955-56. The trial court concluded that, although the refusal to testify in a civil case cannot be used against a person asserting the privilege in a subsequent criminal proceeding, the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify, citing Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985). On appeal, Mother acknowledged that a CHINS proceeding is a civil matter, but contended that the negative inference should not be available in a CHINS proceeding due to her right to raise her children, which has a constitutional dimension that distinguishes a CHINS proceeding from other civil proceedings. The Court found that Mother had not supported her contention with cogent argument or citations to the record; therefore, the issue was waived. Id. at 958. The Court found that, even disregarding the trial court's negative inference, the court's findings supported the remaining conclusions and the conclusions supported the CHINS judgment. Id.

In his appeal of the trial court's judgment terminating his parental rights, Father argued that he had been deprived of his right to due process by the use of his invocation of his right against self-incrimination during counseling sessions in **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225 (Ind. Ct. App. 2002), *trans. denied*. A CHINS petition had been filed due to alleged child physical abuse by Father. Father had several counseling sessions with a social worker while he was incarcerated pending action on criminal charges arising from physical abuse. During the sessions, Father discussed his own plight but did not discuss the abuse events upon advice of his counsel and instead invoked the Fifth Amendment. Father was concerned that any statements made to the social worker concerning abuse would be used against him in the criminal proceedings. Later, Father pleaded guilty to Aggravated Battery as a Class B felony and to Neglect of a Dependent as a Class D felony and was sentenced to fourteen years of incarceration. At the termination hearing the OFC offered into evidence, through the testimony of the social worker, the fact that counseling was limited to issues not pertaining to the abuse.

The OFC appeared to use the testimony to show that counseling was limited in scope and that the social worker did not have all facts necessary to determine whether Father could be rehabilitated. The Court agreed that the social worker could have disclosed any information revealed by Father which would have indicated his guilt in child physical abuse pursuant to IC 25-23.6-6-1(2), and that Father's only recourse to protect himself was to invoke the Fifth Amendment. Id. at 1231. The Court also found that, contrary to Father's assertion, the OFC did not maintain that the petition to terminate the parent-child relationship was sought because Father refused to discuss the abuse incidents. Instead the OFC case manager listed the following reasons why termination was being sought: (1) the children's safety; (2) the children's need for permanency; (3) the parents' divorce which made Father a single parent; (4) bonding issues between Father and children; (5) Father's criminal conviction. The Court opined that, although Father's lack of communication about abuse during counseling played a minor role in the filing of the termination petition, several other factors were considered, including the requirement that a hearing be held because of the length of time the children had been out of the home. Id. at 1232. The Court held that any violation of due process which Father may have suffered by the discussion of his invocation of his Fifth Amendment right against self-incrimination was harmless. Id.

IV. D. 1. c. Dispositional Alternatives

The juvenile code authorizes orders for the care, treatment, and protection of the child and for the rehabilitation of the family. IC 31-34-20-1. The most powerful dispositional alternatives of the juvenile code are the permanent placement of the child outside of the home under the permanency planning requirements of the review statute (IC 31-34-21-7) and the involuntary termination of the parent-child relationship proceedings (IC 31-35-2 and IC 31-35-3). The juvenile code permits incarceration of the parent, guardian, or custodian only for contempt of court. The criminal court, in contrast, has the authority to incarcerate the perpetrator for any criminal acts against the child.

IV. D. 2. Dual Criminal and CHINS Litigation: Admissibility of CHINS Evidence in Criminal Case

Nothing precludes DCS from referring a child abuse or neglect assessment for prosecution of the alleged perpetrator, and at the same time, initiating a CHINS action in the juvenile court to provide services for the child and the parent, guardian, or custodian. No double jeopardy problem arises with dual CHINS and criminal litigation of the same act of child abuse or neglect, since the CHINS action is civil in nature.

There are three different situations in which information generated by an incident of child abuse or neglect has been offered into evidence in criminal cases: (1) statements made by an accused person in a CHINS hearing or written agreement; (2) statements made by an accused person to a caseworker during the assessment or CHINS proceeding, or other evidence obtained by the caseworker in the child abuse or neglect assessment; and (3) statements about child abuse or neglect made by an accused person who is participating in therapy.

IV. D. 2. a. Admissibility of Statements Made in CHINS Agreement or CHINS Hearing

In **Thomas v. State**, 612 N.E.2d 604, 607 (Ind. Ct. App. 1993), the Court found that Father's statements in the CHINS agreed entry were voluntary and admissible in the criminal child molestation trial involving the same child. The Court found that the written CHINS agreed entry was clear and unambiguous, and the juvenile court had advised Father that he could not be compelled to make an admission and the court had

determined that the agreement was voluntary and not the result of coercion or outside pressure. Father was also represented by counsel in the CHINS proceeding.

In **Davidson v. State**, 558 N.E.2d 1077, 1088 (Ind. 1990), the Indiana Supreme Court ruled that Mother had not received ineffective assistance of counsel in the criminal trial for the drowning of her two children, due to counsel's advice to Mother to cooperate in the CHINS proceedings for her remaining living children. The Court found that in the CHINS hearing: (1) Mother was "informed that her testimony could be used at a subsequent trial and she acknowledged she understood," and (2) Mother was able to comprehend the proceedings intelligently enough to waive her rights freely and voluntarily. Id. at 1087.

IV. D. 2. b. Statements Made to Caseworker and Evidence Obtained by Caseworker

In **Burdine v. State**, 751 N.E.2d 260 (Ind. Ct. App. 2001), *trans. denied*, a child molestation case, the trial court admitted into evidence the three-year-old child's statements made in the hospital emergency room to a mental health center caseworker, two OFC caseworkers and a police officer. All of the above witnesses testified to the child's statement, made in response to an open ended question by the police officer, that the child's stepfather had hurt her and had put a blanket over her face while she tried to push him away. The child was bleeding and had been seriously injured. The Court held that the trial court had not abused its discretion in admitting the child's statement because it was an excited utterance, made while the child was under the stress of a startling event. Id. at 265.

In **Clephane v. State**, 719 N.E.2d 840, 843 (Ind. Ct. App. 1999), the Court ruled that Defendant's statement which was made to a case manager from the local office of family and children was voluntary and was properly admitted into evidence in Defendant's criminal trial for sexual misconduct with a fifteen year old minor and three counts of contributing to the delinquency of a minor.

In **Germaine v. State**, 718 N.E.2d 1125, 1132 (Ind. Ct. App. 1999), the Court ruled that the videotape and the photographs made by the caseworkers pursuant to the juvenile court's CHINS order were properly admitted into evidence in the criminal proceeding against Mother. The Court found there was substantial basis for the conclusion that probable cause existed to search Mother's house for evidence of criminal child neglect.

In **Hastings v. State**, 560 N.E.2d 664 (Ind. Ct. App. 1990), the Court ruled that statements made by Mother to a caseworker as part of the casework in an active CHINS case could not later be admitted in criminal proceedings against Mother, on the grounds that the caseworker was a state agent and the statements were compelled and therefore were not voluntary. Id. at 669. In determining that a caseworker was a state agent for purposes of the Fifth Amendment right to remain silent in the criminal case the Court stated:

> The Fifth Amendment guarantee against self-incrimination protects defendants from official state misconduct which results in an involuntary confession. In the present case, the caseworker testified that she understood that she was obligated to cooperate with the prosecutors and to turn over any evidence received concerning the criminal charges against Hastings. Further, IC 31-6-4-8(c) [recodified at IC 31-34-7-2] requires an intake officer in a CHINS proceeding to send to the prosecutor or

> county attorney a copy of the preliminary inquiry made by the caseworker. Additionally, IC 31-6-2-1.1(c)(1) [recodified at IC 31-30-1-3] states that "[a] juvenile court has concurrent original jurisdiction in cases involving adults charged with the crime of neglect of a dependent (IC 35-46-1-4)." While not expressly given law enforcement status, the level of cooperation between the Department of Public Welfare in a CHINS proceeding and the police and prosecutor's office in a related criminal proceeding is such that any effort to deny a caseworker's status as an agent of the state in these cases would be ludicrous. [bracketed material added]. Id. at 668.

See also this Chapter above at III. F. for discussion on Miranda warning in CHINS cases.

IV. D. 2. c. Statements Made to Therapists

The following cases dealt with admissibility in criminal cases of statements made by defendants in the course of child abuse treatment: **Kavanaugh v. State**, 695 N.E.2d 629 (Ind. Ct. App. 1998) (Defendant's admission to his attorney, made in his family therapist's office in the presence of the therapist and Defendant's wife, did not occur as part of the therapy session in the CHINS case, was outside the scope of the normal therapist-client relationship, and thus was not protected by therapist-client privilege); **Hayes v. State**, 667 N.E.2d 222 (Ind. Ct. App. 1996) (Stepfather's statements to therapist regarding his sexual molestation of his twelve-year-old stepdaughter were not protected by privilege and were admissible evidence); **Devore v. State**, 658 N.E.2d 657 (Ind. Ct. App. 1995) (Defendant's medical records from hospital regarding his treatment as a sexual perpetrator were properly admitted into evidence at his sentencing hearing since the law specifically abrogates physician-patient privilege for purpose of admitting evidence in judicial proceedings resulting from report of child abuse). But see **Daymude v. State**, 540 N.E.2d 1263 (Ind. Ct. App. 1989) (confessions of Father in therapy required by the CHINS informal adjustment were not admissible because duty to report statute had already been satisfied in the earlier initiation of CHINS proceeding).

In **Watson v. State**, 784 N.E.2d 515 (Ind. Ct. App. 2003), a felony battery case, Mother's fiancé was criminally charged with abusing Mother's three-year-old child for whom he provided care while Mother worked. Child Protection Services investigated and the fiancé was ordered to be evaluated by a psychologist, Dr. Tarr, in the course of the CHINS proceeding. The purpose of the evaluation was to determine the fiancé's capacity as a parent. The court ordered that if the fiancé did not complete the evaluation process, he would not be allowed to visit the child. Dr. Tarr administered an MMPI to the fiancé, which Dr. Tarr interpreted as showing that the fiancé was more likely to submit to authority. Dr. Tarr stated that the fiancé's score on the "over control hostility" scale was close to the clinical level. At the criminal trial, the fiancé presented the expert testimony of a different psychologist, Dr. Spencer, who also administered an MMPI and viewed a videotape of the fiancé's interview with the police detective concerning the child's injuries. Dr. Spencer testified that the fiancé's statement to the police was not voluntary and could not be relied upon. Dr. Spencer's diagnosis was that the fiancé was very mentally disturbed. In rebuttal, the State presented Dr. Tarr's testimony concerning his evaluation of the fiancé. The fiancé, claiming physician-patient privilege, argued on appeal that the trial court erred in allowing the testimony of Dr. Tarr into evidence. The Court noted that the fiancé was compelled to seek treatment from Dr. Tarr, and probably believed that the communications would be kept confidential. The Court opined that the physician-patient privilege attached to Dr. Tarr's assessment of the fiancé. Id. at 520. The Court held that, because the fiancé put his mental condition at issue voluntarily as an

affirmative defense, the State was allowed to introduce evidence to rebut his assertion that he was mentally disturbed. Id. Accordingly, the Court found that the trial court did not abuse its discretion in admitting the testimony of Dr. Tarr into evidence. Id.

V. CHILD PROTECTION INDEX

Statutes on the Child Protection Index are found at IC 31-33-26. See this Chapter at II.C. for discussion of the current child protection index statutes concerning the child protection computer system (IC 31-33-26-2 through 5). The other elements of the index are discussed immediately below.

V. A. Administrative Hearing for Identified Perpetrator

IC 31-33-8-13 provides that whenever a court finds that a child is a CHINS on the basis of a child abuse or neglect report substantiated under IC 31-34-8-12, DCS shall enter identifiable information on the court's judgment into the child protection index. DCS shall notify the child victim's parent, guardian, or custodian and any other person identified as a perpetrator of child abuse or neglect within thirty days of the entry of a substantiated report into the index. IC 31-33-26-8(b). Unless a court is in the process of making a CHINS determination, the perpetrator, including the child's parent, guardian, or custodian, may request that a substantiated report be amended or expunged at an administrative hearing. IC 31-33-26-8(c)(2). The perpetrator's request for an administrative hearing must be made within thirty days of service of notice, unless the perpetrator demonstrates that the failure to request an administrative hearing was due to excusable neglect or fraud. IC 31-33-26-8(c)(3) and (d). The administrative hearing shall be stayed if there is a pending child in need of services case or if criminal charges are filed against the perpetrator based on the same facts and circumstances on which DCS classified the report as substantiated. IC 31-33-26-11(b); IC 31-33-26-12(a). IC 31-33-26-11(d) provides that the administrative hearing shall also be stayed pending the conclusion of any program of informal adjustment entered into by the perpetrator. The perpetrator is not entitled to an administrative hearing if the juvenile court determines that the alleged abuse or neglect did not occur or the person was not a perpetrator. IC 31-33-26-11(c). If the perpetrator is convicted of the criminal charges where the facts provided the basis for the substantiated report, the perpetrator is not entitled to an administrative hearing. IC 31-33-26-12(b). IC 31-33-26-8(a) provides that a perpetrator is also not entitled to an administrative hearing if the juvenile court has already determined that the child is in need of services based on a report that names the perpetrator as the individual who committed the abuse or neglect, or DCS approved the substantiated report after the court's determination.

DCS must prove by a preponderance of evidence at the administrative hearing that the perpetrator is responsible for the child's abuse or neglect. IC 31-33-26-9(b). IC 31-33-26-9(c) states: (1) the hearing officer shall consider hearsay evidence to be competent evidence and may not exclude hearsay evidence based on the technical rules of evidence; (2) if not objected to, hearsay evidence may form the basis for an order; (3) if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence. IC 31-34-13-1 [the child hearsay statute] states that the statute also applies to an administrative hearing conducted under IC 31-33-26-9 or IC 31-27-4-23 [administrative hearing to sanction foster home license]. The administrative hearing and files shall be closed. IC 31-33-26-9(f) and (g). If DCS fails to carry the burden of proof, DCS shall amend or expunge the report as ordered by the hearing officer. IC 31-33-26-9(d). IC 31-33-26-9(h) states that DCS shall provide a copy of an administrative hearing decision to the department of education if the alleged perpetrator is licensed by the department of education or the incident

happened on school property or at a school function. IC 31-33-26-13 authorizes DCS to adopt rules for administrative hearings.

V. B. Administrative and Court Ordered Expungement of DCS Reports

IC 31-33-26-15(a) states that DCS shall expunge a substantiated report contained in the index not later than ten working days after a court in a CHINS case determines that child abuse or neglect has not occurred, or an administrative hearing officer finds that the child abuse or neglect report is unsubstantiated, or a court enters an expungement order under IC 31-33-27-5 [the expungement statutes]. IC 31-33-26-15(b) states that DCS shall amend a substantiated report in the index by deleting the name of an alleged perpetrator if the court in the CHINS case or an administrative hearing officer finds that the person was not a perpetrator of child abuse or neglect.

IC 31-33-27-1 through IC 31-33-27-6 address the expungement of DCS assessment reports. IC 31-33-27-1 defines the terms "expunge" and "expungement". These terms mean the removal or deletion of all information maintained by DCS regarding a report, assessment, or determination relating to an incident or condition of child abuse or neglect, and the destruction or delivery of that information to a person to whom the information relates. IC 31-33-27-2 provides that in this chapter, "information" includes all files and records created or maintained by DCS. The term includes original documents and copies, correspondence, messages, photographs, videotapes, audio recordings, and audiovisual recordings, and any other material contained in electronic, paper, digital form, or in other media. IC 31-33-27-3(a) provides that DCS shall expunge child abuse and neglect information when the youngest child listed in a DCS report as a victim of child abuse or neglect turns twenty-four (24) years old. This expungement shall occur only if DCS approved the assessment as unsubstantiated or the CHINS court entered a final judgment based on a finding that the child abuse or neglect did not occur. IC 31-33-27-3(b) provides that, when an interested person requests it, DCS may expunge information relating to an unsubstantiated assessment of child abuse or neglect at any time. In order to do so DCS must determine that the probative value of the information does not justify its retention in DCS records.

IC 31-33-27-3(c) applies only to information that is not expunged under (a) or (b). DCS may retain information relating to an unsubstantiated assessment of child abuse or neglect in paper, digital, or other form that is accessible only by DCS employees, with access rights established by DCS policy or rule. IC-31-33-27-3(d) provides that information that is retained in DCS records under subsection (c) may be used by DCS to facilitate its assessment of a subsequent report concerning the same child or family. IC-31-33-27-3(e) states that DCS may not solely rely on information under subsection (c) to support the substantiation of a later report, if information obtained in the assessment of the later report is otherwise insufficient to support a substantiated determination. IC 31-33-27-4(a) provides that DCS shall expunge child abuse or neglect information relating to a substantiated report no later than the time specified for expungement of the report under IC 31-33-26-15. IC 31-33-26-15(a) states that DCS shall expunge a substantiated report in the index not later than ten working days after any of the following occurs: (1) a court having jurisdiction over a CHINS case determines that child abuse or neglect has not occurred; (2) an administrative hearing officer finds the child abuse or neglect report is unsubstantiated; or (3) a court having juvenile jurisdiction enters an order for expungement of the report pursuant to IC 31-33-27-5. IC 31-33-27-4(b) provides that DCS shall amend information relating to a substantiated report by deleting the name of a person as an alleged perpetrator if a CHINS court with jurisdiction or an administrative hearing officer under IC 31-33-26-9 finds that the person was not a perpetrator of the child abuse or neglect that occurred.

IC 31-33-27-5(a) applies to information relating to substantiated reports in any DCS records.

IC 31-33-27-5(b) allows for an individual identified as a perpetrator of child abuse or neglect in a substantiated report to file a petition requesting that the court order DCS to expunge the substantiated report and related information. This petition must be filed with a court that has juvenile jurisdiction in the county where the individual resides. IC 31-33-27-5(c) requires the individual to name DCS as a respondent in the petition, and to serve DCS with the petition and a summons. IC 31-33-27-5(d) provides that the court must hold a hearing on the petition and any response filed by DCS, unless a hearing is waived by the agreement of all the parties. IC 31-33-27-5(e) provides for information the court may review when considering whether to grant a petition under IC 31-33-27-5. This information includes the factors listed under IC 31-39-8-3 [Expungement of Records Concerning Delinquent Child or Child in Need of Services; Factors Considered] in relation to the petitioner if the substantiated report was the subject of a juvenile court case, and any facts relating to the petitioner's current status, activities, employment, contacts with children, or other circumstances relevant to consideration of whether the petition should be granted. IC 31-33-27-5(f) provides that the court may grant the petition if the court finds by clear and convincing evidence that there is little likelihood that the petitioner will be a future perpetrator of child abuse or neglect, and the information has insufficient current probative value to justify its retention in DCS records for future reference. IC 31-33-27-6 provides that if DCS expunges child abuse or neglect information under IC 31-33-27, either at the request of a perpetrator named in the assessment report or at the time for expungement specified in IC 31-33-27-4(a), or under a court order under IC 31-33-27-5, then IC 31-39-8-7 [Expungement of Records Concerning Delinquent Child or Child in Need of Services; Use of Expunged Records in Civil Action] applies to any civil action brought against DCS or any other agency, entity, or individual, if the content of the expunged information may be relevant to any issue in the civil action.

In **G.E. v. Indiana Dept. of Child Services**, 29 N.E.3d 769 (Ind. Ct. App. 2015), the Court reviewed IC 31-33-27-5, the expungement statute, and found that Birth Mother had not shown by clear and convincing evidence: (1) there was little likelihood that she would be a future perpetrator of child abuse or neglect; and (2) there was insufficient probative value to justify the retention of her records by DCS for future reference. Id. at 773. The Court concluded that, because Birth Mother's burden of proof was clear and convincing evidence, which is greater than a preponderance of the evidence, it was not unreasonable for the juvenile court to deny her expungement petition where the only evidence was her testimony. Id. at 772. The Court said that Birth Mother's choice to work at a child care center made her history of child neglect and substance abuse relevant since IC 31-33-26-2 through IC 31-33-26-16 require DCS to maintain a database of perpetrators and to make that database available to child care providers. Id.

V. C. Access to Child Protection Index

IC 31-33-26-16 lists the persons and entities who may have access to information in the index. Those having access to the index include all persons and entities listed at IC 31-33-18-2. See this Chapter at I.E. for further discussion of persons and entities who may have access to the information as provided by IC 31-33-18-2. Also included are DCS representatives, juvenile court, and any party to a child in need of services or a delinquency case in connection with a determination of an appropriate out of home placement. IC 31-33-26-16(a) states that DCS may also provide substantiated information to: (1) an authorized agency of another state who requests information on a prospective foster or adoptive parent or another adult living in the prospective foster or adoptive parent's home, (2) the national index of substantiated cases of child abuse or neglect, and (3) the Indiana Division of Family Resources determine the eligibility of a child care provider to receive a voucher payment.

VI. REASONABLE EFFORTS UNDER INDIANA LAW

VI.A. Basic Overview

The three components of the reasonable efforts concept under Indiana law are: the safety of the child is paramount; Department of Child Services (DCS) should generally exert reasonable efforts toward preservation and reunification; and DCS should exert reasonable efforts to accomplish an alternative permanency plan when reunification has been rejected as a plan.

VI.A. 1. Safety of Child Paramount in Reasonable Efforts

IC 31-34-21-5.5(a) states that: "In determining the extent to which reasonable efforts to reunify or preserve a family are appropriate under this chapter, the child's health and safety are of paramount concern." This clarifies that the requirements for reasonable efforts do not require a sacrificing of the child's health and safety for reunification of the family.

VI.A. 2. Reasonable Efforts Towards Preservation and Reunification Generally Required

IC 31-34-21-5.5(b) requires DCS to make "reasonable efforts to preserve and reunify families" in order to prevent or eliminate the need for removing a child from home or to make it possible to return a child safely to his home, unless the court makes a specific finding and order that reasonable efforts toward reunification are not required pursuant to IC 31-34-21-5.6 or IC 31-34-21-5.8. IC 31-34-21-5.5(c) and (d) provide that DCS may conduct a criminal history check of the child's parent, guardian or custodian or a member of the household of the child's parent, guardian, or custodian before reunifying the child with the parent, guardian or custodian. DCS may use the results of a criminal history check to decide whether it is safe for the child to return home.

In **M.S. v. Indiana Dept. of Child Services**, 999 N.E.2d 1036 (Ind. Ct. App. 2013), the Court concluded that DCS did not violate IC 31-34-21-5.5, and found that, in light of the circumstances, DCS's reunification efforts were reasonable. Id. at 1041. The child was adjudicated a CHINS due to Mother's drug use and neglect. At the detention hearing, the trial court placed the child in the state of Washington with Father, who was completing his last three months of military service. At the dispositional hearing, Mother was living a "transient existence" and had no permanent residence, vehicle, or phone. Because of those circumstances and Mother's drug-related issues, administration of DCS services would be hindered. At the dispositional hearing, the trial court continued the child in his placement with Father. The CHINS case was dismissed nineteen days later after a report was received from an agency in Washington, which found Father's home adequate, that the child was well-adjusted, and that the child wanted to remain with Father. Mother argued on appeal that DCS neglected its duty under IC 31-34-21-5.5 to make "reasonable efforts to reunify or preserve a family." The Court opined that the child's health and safety were satisfied through continued placement with Father, and that the child's placement with Father was a "familial reunification of sorts, albeit not of the kind Mother would have preferred." Id.

See this Chapter at II.A.2. for discussion of Indiana statutes regarding family preservation services, IC 31-26-5-1 through 6.

VI.A. 3. Reasonable Efforts Toward Adoption or Another Permanency Alternative

Although the term reasonable efforts is most frequently used in conjunction with providing services to facilitate the parent-child reunification, Indiana law clarifies that when

reunification is rejected as the permanency plan by the court, DCS is required to exert all reasonable efforts to finalize another permanency plan. IC 31-34-21-5.7; IC 31-34-21-5.8.

VI.B. Indiana Hearings and Proceedings in Which Reasonable Efforts Are an Issue

Under Indiana law, DCS must offer evidence, and the court is required to make findings on whether DCS has exerted reasonable efforts toward reunification or an alternative permanency plan at the following stages of the CHINS case: (1) at the detention hearing, IC 31-34-5-2 states the court shall make findings regarding family services available prior to removal from the home, efforts made to provide family services before removal, why the services did not prevent removal, and the reasonableness of the services; (2) at the dispositional hearing, IC 31-34-19-10 states the judge shall make findings regarding DCS's efforts to provide services to the child's parents, guardian, or custodian to prevent removal or reunite the child and parent; and (3) at the case review hearing, IC 31-34-21-5(b)(3) and IC 31-34-21-5(b)(14) provide the court shall consider DCS's efforts to offer and provide family services to preserve or reunify the child with the parents, guardian, or custodian. In addition to these hearings, IC 31-34-15-4 requires that the DCS case plan document efforts to provide family services.

IC 31-34-5-3(b) requires the juvenile court to include in any order approving or requiring detention of the child all findings and conclusions required under: (1) applicable provisions of Title IV-E of the federal Social Security Act (42 U.S.C. § 670 et seq.); or (2) any applicable federal regulation, including 45 C.F.R. § 1356.21. IC 31-34-5-3(c) states that inclusion in the juvenile court order of language approved and recommended by the judicial conference of Indiana relating to the child's removal from home or detention constitutes compliance with IC 31-34-5-3(b).

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, a termination case, the Court was not persuaded by Mother's argument that "not every reasonable effort" had been made to maintain the parent-child relationships. Id. at 1214. Mother contended that OFC failed to offer her assistance through the Wraparound program, which would have enabled her to better comply with case plans. The OFC caseworker testified that Wraparound provided essentially the same services that OFC had already been providing to Mother and the children. The Court characterized Mother's argument as a request to reweigh the evidence, which the Court would not do. Id. The Court opined that the evidence supported the trial court's determination that all reasonable efforts had been made to avoid termination of Mother's parental rights. Id.

In **T.Y.T. v. Allen County Div. of Family**, 714 N.E.2d 752, 756 (Ind. Ct. App. 1999), a CHINS case, the Court noted that findings on reasonable efforts toward reunification are required at the dispositional stage, but are not necessary to prove the CHINS case at the factfinding hearing.

VI.C. Exceptions to Reasonable Efforts Toward Reunification Requirement

IC 31-34-21-5.6 provides that a court "may" make a finding in five limited situations that reasonable efforts toward preservation and reunification are not required. A judicial finding supporting the reasonable efforts exception can be made "at any phase of the child in need of services proceeding," but the language in four of the five limited situations requires that the child first be adjudicated a CHINS.

It appears that a judge can consider the reasonable efforts exception under IC 31-34-21-5.6 on his or her own motion or the issue can be raised by DCS, the guardian ad litem or court appointed special advocate for the child, or any other party to the proceeding. Foster

parents, persons who have filed an adoption petition in certain factual situations, and other caregivers or relatives who are allowed to attend the review and permanency hearings under IC 31-34-21-4, may advise the court of a factual situation giving rise to a reasonable efforts exception.

Although IC 31-34-21-5.6 does not state a requirement for a written petition, notice, and hearing to obtain a reasonable efforts exception, it seems that these procedures are necessary to insure due process. See **Matter of S.G. v. IN Dept. of Child Services**, 67 N.E.3d 1138 (Ind. Ct. App. 2017). The three categories of reasonable efforts exceptions are discussed below.

VI.C. 1. Conviction of Parent for Specified Criminal Charges

Under IC 31-34-21-5.6(b)(1)-(3) there are three categories of crimes, committed by a parent against specified victims, for which the court can rule that reasonable efforts toward reunification are not required.

- The parent, guardian or custodian of a CHINS has been convicted of causing suicide, involuntary manslaughter, rape, criminal deviate conduct (repealed), child molesting, child exploitation, sexual misconduct with a minor, or incest (or a comparable offense in another state, territory or county), and the victim was: less than sixteen years of age and either the convicted parent's biological, adopted, or step-child, or a parent of the child.

- The parent, guardian or custodian of a CHINS has been convicted of murder or voluntary manslaughter (or a comparable offense in another state, territory, or country) or has been convicted of committing one of the following in relation to murder or voluntary manslaughter: aiding, inducing, or causing another person to commit the crime (IC 35-41-2-4); attempting to commit the crime (IC 35-41-5-1); or conspiring with another person to commit the crime (IC 35-41-5-2), and the victim was: the biological, adopted, or step-child (no age requirement for the child victim) of the convicted person, or the parent of the child.

- The parent, guardian or custodian of a CHINS has been convicted of Class A, B, or C felony (level 2, 3, 4, or 5 felony) battery; aggravated battery; Class B felony (level 1or 3 felony) neglect of a dependent; Class C felony (level 5 felony) criminal recklessness; promotion of human trafficking, promotion of human trafficking of a minor; sexual trafficking of a minor; or human trafficking (or a comparable offense in another state, territory, or country), and the victim was the biological, adopted, or step-child (no age requirement for the child victim) of the convicted person.

VI.C. 2. Rights of Parents Involuntarily Terminated as to Another Child

Under IC 31-34-21-5.6(b)(4), reasonable efforts toward reunification do not have to be provided if the rights of the parents have been involuntarily terminated to another of their children, either in Indiana or in a comparable proceeding in any other state, territory, or country.

In **Matter of S.G. v. IN Dept of Child Services**, 67 N.E.3d 1138 (Ind. Ct. App. 2017), a CHINS case, the Court affirmed the trial court's determination that DCS did not need to undertake reasonable efforts to reunify Mother with four of her children. Id. at 1147. The Court concluded that: (1) IC 31-34-21-5.6(b)(4) (the No Reasonable Efforts Statute) is not

unconstitutional as applied to Mother; and (2) the trial court did not abuse its discretion by granting DCS's request to forego reasonable reunification efforts. Id. Mother is the parent of ten children. Four of Mother's children are the subjects of the instant case. Between 1999 and 2016, DCS substantiated at least thirteen instances of child abuse or neglect against Mother, which resulted in eleven separate CHINS cases involving her children. In one of the prior CHINS cases, Mother's parental rights were involuntarily terminated to two of her children, and the two children were adopted. At the CHINS pretrial and initial hearing in the instant case for the four children, DCS indicated that it would be pursuing a No Reasonable Efforts order. The trial court conducted a CHINS factfinding hearing for the four children and a hearing on DCS's request for a No Reasonable Efforts order. The court issued an order adjudicating the children to be CHINS, and also granted DCS's request that reasonable efforts were not required to reunify Mother with the children. The Court looked to G.B. v. Dearborn Cty. Div. of Fam. & Child., 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001), *trans. denied*, and noted the conclusion that the No Reasonable Efforts Statute: (1) serves the State's compelling interest of protecting children from parental abuse and neglect; (2) is narrowly tailored to meet the compelling interest it is intended to serve; and (3) "is not more intrusive than necessary to protect the welfare of children" because it "include[s] only those parents who have had at least one chance to reunify with a different child through the aid of governmental resources and have failed to do so." S.G. at 1145. Mother also claimed that the No Reasonable Efforts Statute is unconstitutionally vague. Quoting Brunton v. Porter Mem'l Hosp. Ambulance Serv., 647 N.E.2d 626, 640 (Ind. Ct. App. 1994), the Court noted "case law indicates that the 'void for vagueness' doctrine is 'applicable only to penal statues, not to non-penal civil statutes."' S.G. at 1147. The Court also found that the No Reasonable Efforts Statute does not authorize arbitrary enforcement. Id.

In **In Re R.H.**, 55 N.E.3d 304 (Ind. Ct. App. 2016), the Court affirmed the trial court's order finding that DCS need not make reasonable efforts to reunify the child with Mother Id. at 311. The child is Mother's eleventh child, and the child was taken into DCS custody immediately following her birth. After the CHINS adjudication, DCS filed a motion pursuant to IC 31-34-21-5.6 for a no reasonable efforts exception because Mother's parental rights to two of her children had previously been involuntarily terminated in two separate termination proceedings. The previous termination cases took place nine years and eight years before the child's birth. The juvenile court granted DCS's motion, and changed the child's permanency plan from reunification to adoption. Mother appealed the court's finding that reasonable efforts were not required. Mother claimed that DCS had unlawfully discriminated against her, and argued that she was entitled to reasonable accommodations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) for her undiagnosed disabilities. The Court concluded that Mother was not denied services or reasonable accommodations to participate in services because of her disability, and the juvenile court did not violate her rights by entering an order finding that DCS was not required to make reasonable reunification efforts. Id. The Court found the juvenile court's determination that DCS did not have to continue providing Mother with reunification services was not based on Mother's disability but rather was properly based on the text of IC 31-34-21-5.6(b)(4), which states that reasonable efforts to reunify a parent and child are not required if the "parental rights of a parent with respect to a biological or adoptive sibling of a child in need of services have been involuntarily terminated by a court order." Id. at 309-311.

In **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571 (Ind. Ct. App. 2008), *trans. denied*, a termination case, the Mother and Father had previously had their parental rights terminated to their four older children. In the CHINS case, on the motion of Marion County DCS (MCDCS) the juvenile court had determined, after a hearing, that reasonable efforts to reunify the child with the family were not required pursuant to IC 31-34-21-5.6. On appeal of the termination order, Mother complained that once the juvenile court had made this determination, MCDCS had failed to perform basic case management tasks. In discussing Mother's complaint, the Court quoted the following excerpt from G.B. v. Dearborn Cty. Div. of Fam. & Child., 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001):

> [E]ven if the trial court finds that reasonable efforts are not required, the court and [Department of Child Services] are still required to follow the statutory procedures in both CHINS and termination cases. For example, in a CHINS case, the trial court must hold a detention hearing, after notifying the child's parents of the time, place, and purpose of the hearing. [IC] 31-34-5-1 .... In a termination of parental rights case, the court must hold a hearing wherein the [Department of Child Services] is required to present clear and convincing evidence to establish the elements of [IC] 31-35-2-4(b)(2). [IC] 31-34-21-5.6 does not relieve [DCS] of this statutory burden.

C.T. at 583.

Although the Court found the evidence sufficient to support termination of Mother's parental rights, the Court stated its agreement with Mother that a parent's constitutionally protected right to raise her own children did not "evaporate" once a court determined that a county department of child services is no longer required to make reasonable efforts to reunify the family. Id. The Court specifically cautioned MCDCS that a juvenile court's determination that reunification services are no longer required pursuant to IC 31-34-21-5.6 neither abolishes a parent's fundamental right to family integrity, nor absolves MCDCS of its responsibility to properly oversee and manage the case. Id. at 588.

In **G.B. v. Dearborn Cty. Div. of Fam. & Child.**, 754 N.E.2d 1027 (Ind. Ct. App. 2001), a CHINS case, the newborn child was found to be a child in need of services and removed from Parents due to the presence of cannabinoids (marijuana) in his meconium stool. The court had terminated Parents' rights to three other children two years previously. At the first dispositional hearing, the OFC asked the court to make a finding that reasonable reunification or preservation efforts were not required. The court issued a dispositional order that the child was to remain a ward of OFC with placement and visitation at OFC's discretion. The court continued the case for a month for a second dispositional hearing and consideration of reunification and parent participation. At the second dispositional hearing, OFC presented evidence of the previous termination order regarding Parents' other children and the court found that reasonable efforts to reunify the child with Parents or to preserve the child's family were not required. The Court first discussed the OFC's argument that the continued dispositional order was not an appealable order. The OFC characterized the trial court's order from the second dispositional hearing as an unappealable "reasonable efforts ruling." The Court disagreed with OFC's argument, concluding that the second dispositional hearing was a continuation of the first dispositional hearing. The Court held that the trial court's order, issued after the second dispositional hearing, was an appealable final judgment, citing Matter of M.R., 452 N.E.2d 1085, 1089 (Ind. Ct. App. 1983). G.B. at 1029-30. The Court then considered Parents' argument that IC 31-34-21-5.6, which allows the court to find that reasonable efforts are not required, is unconstitutional because it infringed on their fundamental right to family integrity. The Court stated that it had previously found that a parent's fundamental right to raise his or her child without undue interference from the state is not unlimited because the state has a compelling interest in protecting the welfare of

children. Id. at 1032, citing Matter of E.M., 581 N.E.2d 948, 952 (Ind. Ct. App. 1991), *trans. denied*. The Court opined that the statute served the state's compelling interest of intervening under its parens patriae power when parents neglect, abuse, or abandon their children. G.B. at 1032. The Court found that the challenged statute was not more intrusive than necessary to protect the welfare of children. Id. The Court stated that the statute is narrowly tailored to include only those parents who have had at least one chance to reunify with a different child through the aid of governmental resources and have failed to do so. Id. The Court found that because IC 31-34-21-5.6 serves a compelling state interest and is narrowly tailored to serve that interest, it does not violate substantive due process under the Indiana and U.S. Constitutions. Id. The Court also noted that, even if the trial court finds that reasonable reunification efforts are not required, the court and OFC are still required to follow the statutory procedures in both CHINS and termination cases. Id. The Court stated that OFC must present clear and convincing evidence to establish the elements of IC 31-35-2-4(b)(2) in a termination case, and IC 31-34-21-5.6 does not relieve OFC of this statutory burden. Id. at 1033.

VI.C. 3. Abandoned Infants

Under IC 31-34-21-5.6(b)(5), reasonable efforts toward reunification do not have to be provided if the child is an abandoned infant under twelve months of age, the court appoints a guardian ad litem or court appointed special advocate who prepares a written report and recommendation, and, after a hearing, the court finds that reasonable efforts to locate the child's parents or reunify the child's family would not be in the best interests of the child. The details of this exception are discussed immediately below.

VI.D. Abandoned Infant Exception Detailed

The basic concept applicable to all children fitting into the "abandoned infant" category is that reasonable efforts toward parent-child reunification may not be required, so the court can proceed rapidly to a permanency hearing and an expedited termination of the parent-child relationship proceeding.

VI.D. 1. Abandoned Infant Defined

The definition of "abandoned infant" at IC 31-9-2-0.5 states that "abandoned infant", for purposes of IC 31-34-21-5.6 [the reasonable efforts exception statute], means: (1) a child who is less than twelve months old and whose parent, guardian, or custodian has knowingly or intentionally left the child in an environment that endangers the child's life or health or a hospital or medical facility; and has no reasonable plan to assume the care, custody, or control of the child; or (2) a child who is, or who appears to be, not more than thirty days old whose parent has knowingly or intentionally left the child with an emergency medical services provider and did not express an intent to return for the child.

VI.D. 2. Required Judicial Findings

The practitioner must consider the abandoned infant definition (IC 31-9-2-0.5) and the statutes on the reasonable efforts exception (IC 31-34-21-5.6) to determine the required proof and procedures for the reasonable efforts exception for abandoned infants. Reading the statutes together, the statutes provide that the court can rule that the child is an abandoned infant, order that reunification services are not required, and set the case for a permanency hearing in thirty days. The court must find the following at a hearing: (1) the child is within the twelve month age limitation, and the child was knowingly or intentionally left by the parent, guardian or custodian in an endangering environment or hospital or medical facility, without a reasonable plan to assume custody or without expressing an intent to return for the

child; *or* the child is or appears to be not more than thirty days old and the parent has knowingly or intentionally left the child with an emergency medical services provider without expressing an intent to return for the child; (2) a guardian ad litem or court appointed special advocate has been appointed and completed a written report and recommendation; and (3) reasonable efforts to locate the child's parent or reunify the child's family would not be in the best interests of the child.

VI.D. 3. Special Procedures for Abandoned Infants Less Than Thirty Days Old

The law provides an expedited procedure for abandoned infants who are less than thirty days of age and are left by a parent with an emergency medical services provider or in a newborn safety device described at IC 31-34-2.5(a)(1). An "emergency medical services provider" is defined at IC 16-41-10-1 as including a firefighter, law enforcement officer, paramedic, emergency medical technician, or other person who provides emergency medical services in the course of the person's employment. IC 31-34-2.5-1 though 4 outline the roles of the emergency medical provider, DCS, and the juvenile court in relation to the abandoned infant who is less than thirty days old. IC 31-34-2.5-1(a) states that an emergency medical services provider shall, without a court order, take custody of a child who is (or appears to be) not more than thirty days of age. Custody can be taken if the child is voluntarily left with the emergency medical services provider by the child's parent, and the parent does not express an intent to return for the child. IC 31-34-2.5-1(b) states that an emergency medical services provider shall perform any acts necessary to protect the child's physical health or safety. IC 31-34-2.5-2(a) states the emergency medical services provider shall contact DCS "immediately" after taking the child into custody.

IC 31-34-2.5-2(b) states DCS shall assume custody of the child without a court order immediately after receiving notice and shall contact the Indiana clearinghouse on missing children and missing endangered adults within forty-eight hours to determine if the child has been reported missing. IC 31-34-2.5-4(a) requires the attorney for DCS to request the juvenile court to: authorize the filing of a CHINS petition; hold an initial hearing no later than the next business day; and appoint a guardian ad litem or court appointed special advocate for the child. The juvenile court, in addition to the court's usual procedures: (1) shall hold the detention and initial hearing not later than forty-eight hours after the child is taken into custody by an emergency medical services provider (IC 31-34-5-1.5(b)), excluding Saturdays, Sundays, and holidays for state employees; (2) may provide an opportunity for the emergency medical services provider to be heard at the detention hearing (IC 31-34-5-1.5(c)); (3) shall appoint a guardian ad litem or court appointed special advocate; (4) may make a finding, after a hearing and receiving a written report from the guardian ad litem or court appointed special advocate, that reasonable efforts to locate the parents or reunify the child's family would be not be in the best interests of the child. (IC 31-34-21-5.6(b)(5)).

Practice Note: The criminal neglect of a dependent statute, IC 35-46-1-4(c)(1), provides that it is a defense to a prosecution that the accused person left a dependent child who was not more than thirty days old in a newborn safety device as described in IC 31-34-2.5-1(a) or with an emergency medical provider who took custody of the child under IC 31-34-2.5 if the prosecution is based solely on leaving the child in the newborn safety device or with the provider and the alleged act did not result in bodily injury or serious bodily injury to the child.

VI.E. Required Petitions and Hearings if Court Finds Reasonable Efforts Exception Applies

VI.E. 1. Permanency Plan and Hearing Required

IC 31-34-21-5.7(a) and (b) provide that, after the court enters a finding that reasonable efforts to reunify are not required, DCS shall complete a permanency plan and seek court approval of the plan at a permanency hearing. IC 31-34-21-7(a)(1) provides that a permanency hearing shall be held no later than thirty days from a reasonable efforts exception ruling. Once there is a judicial determination that reasonable efforts toward reunification are not required, DCS is no longer required to report efforts toward parental participation or delivery of reunification services. IC 31-34-21-5.7(c).

In **In Re K.F.**, 797 N.E.2d 310, 315 (Ind. Ct. App. 2003) the Court opined that a permanency plan order is not an appealable final judgment. But see Chapter 9 at II.D.6. for additional case law.

VI.E. 2. Mandatory Petition for Termination

IC 31-35-2-4.5(a)(1) and (b) require that DCS or the guardian ad litem or court appointed special advocate for the child file a petition for involuntary termination of the parent-child relationship whenever the court makes a ruling under IC 31-34-21-5.6 that reasonable efforts toward reunification are not required. Whenever a termination hearing is requested, the court shall commence a hearing on the petition not more than ninety days after the petition is filed. IC 31-35-2-6(a)(1). But see **A.D. v. Clark**, 737 N.E. 2d 1214 (Ind. Ct. App. 2000) (agreement of office of family and children and guardian ad litem to continuances invited error and waived issue of ninety day hearing requirement for appellate review).

IC 31-35-2-6(a)(2) requires the court to complete a hearing on the termination petition not more than 180 days after the petition is filed. If the hearing is not held within 180 days, upon filing a motion with the court by a party, the court shall dismiss the termination petition without prejudice. IC 31-35-2-6(b).

VI.F. Ending Reunification Efforts When Inconsistent With Permanency Plan

IC 31-34-21-5.8(b) provides that when a court has approved a permanency plan and continuation of reasonable efforts to preserve and reunify the family is inconsistent with that plan, DCS may discontinue reunification efforts and shall make reasonable efforts to: (1) complete an out-of-home placement in accordance with the permanency plan and with court approval; and (2) complete whatever steps are necessary to finalize the permanent placement of the child. DCS is no longer required to document the delivery of reunification services in progress reports, case reviews and dispositional hearings, nor to document that the child is placed in close proximity to the parent. The law does not require that a petition for involuntary termination of the parent-child relationship must be initiated when there is a judicial determination under IC 31-34-21-5.8 to end reunification services.

See this Chapter at VI.C.2. for discussion of **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571, 583-84 (Ind. Ct. App. 2008), *trans. denied*, regarding responsibility for ongoing case management by DCS when the court has found pursuant to IC 31-34-21-5.6 that reasonable efforts are not required. See also **In Re A.D.W.**, 907 N.E.2d 533 (Ind. Ct. App. 2008), in which the trial court had changed the children's permanency plan from reunification with Mother to termination of parental rights. One year after the new permanency plan was approved by the trial court, Mother requested CHINS services and visits with the children. The trial court denied Mother's requests. In her appeal of the subsequent order terminating her parental rights, the Court

opined that, because Mother had requested services after the permanency plan was changed to termination, the trial court did not abuse its discretion in denying Mother's motion for services. Id. at 538.