CHAPTER 1

CHINS DEFINED

I. CHILDREN IN NEED OF SERVICES (CHINS)

A. Overview of CHINS Categories

Indiana law refers to abused and neglected children as Children In Need of Services (CHINS) and divides civil abuse and neglect into ten different categories. It is difficult to define each CHINS category with one word or phrase because of the broadness and overlap in the categories. It has been done in this deskbook to encourage litigants to focus on the statutory categories in proving and defending CHINS cases. The CHINS categories are listed below, but each category is discussed in detail within this chapter.

Neglect, IC 31-34-1-1
The child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision.

Abuse, IC 31-34-1-2
The child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian.

Victim of Sex Offense, IC 31-34-1-3
The child is the victim of a sex offense under IC 35-42-4-1 (rape), IC 35-42-4-2 (criminal deviate conduct), IC 35-42-4-3 (child molestation), IC 35-42-4-4 (exploitation), IC 35-42-4-7 (seduction), IC 34-42-4-9 (sexual misconduct with a minor), IC 35-45-4-1 (indecency), IC 35-45-4-2 (prostitution), or IC 35-46-1-3 (incest).

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

Parental allowance of child's participation in sex offenses, IC 31-34-1-5
The child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by IC 35-45-4 (public indecency, prostitution, or voyeurism).

Child endangerment of self or others, IC 31-34-1-6
The child substantially endangers the child's own health or the health of another.

Parental failure to participate in school disciplinary proceedings, IC 31-34-1-7
The child's parent, guardian, or custodian fails to participate in a school disciplinary proceeding in connection with the student's improper behavior, as provided for by IC 20-8.1-5.1-19, where the behavior of the student has been repeatedly disruptive in the school.

Missing child, IC 31-34-1-8
The child is a missing child (as defined in IC 10-1-7-2).

Child born with fetal alcohol syndrome or trace amounts of substance in system, IC 31- 34-1-10
The child is born with fetal alcohol syndrome, or any amount (including a trace amount) of a controlled substance or a legend drug in the child's body.

Child has injury or abnormal development or endangering condition caused by mother's use of substance during pregnancy, IC 31-34-1-11
The child has an injury, abnormal physical or psychological development, or is at a substantial risk of

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a life threatening condition, any of which arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy.

B. Mental Endangerment or Impairment

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

1. CHINS Cases on Mental Endangerment or Impairment

In Matter of E.M., 581 N.E. 2d 948 (Ind. Ct. App. 1991), the Court of Appeals reversed the juvenile court judgment that a thirteen-year-old was an emotionally abused and neglected CHINS. On the issue of emotional abuse, the Court indicated that a child could be adjudicated a CHINS under IC 31-6-4-3(a)(2) (recodified at IC 31-34-1-2), if the child was emotionally abused by the mother's boyfriend, and the mother failed to take action to stop the abuse. Id. at 955. The Court then noted that the alleged emotional abuse in this case was the boyfriend's act of telling the child that she did "stupid things" and telling her to "stop acting like a little asshole." Id. The Court could not find that these statements were emotionally abusive, and therefore the mother did not abuse the child by failing to protect her from the boyfriend. Further, the Court reviewed the testimony of the child's counselor that the child exhibited symptoms of child abuse, including lying, temper tantrums, and being argumentative. However, because the counselor also testified that these behaviors could be symptoms of a number of other problems besides emotional abuse, the Court found that the testimony of the counselor was "equivocal" and was not sufficient to support the trial court's finding that the child was emotionally abused by her mother. Id. Finally, on the issue of mental impairment and parenting styles, the Court acknowledged that punishment by confinement or "grounding" could be excessive and deprive a child of a healthy emotional development, but the type of confinement and grounding used in this case by the mother was not excessive and did not constitute neglect because there was no showing that the well being of the thirteen-year-old child was seriously impaired or endangered. Even if it was determined that the mother's methods of parenting were "inappropriate, " the Court stated that "inappropriateness" is not enough to support intervention. Id. at 954. The Court stated that the "conclusion that Anita [mother] needed to change her parenting style amounted to nothing more than the trial court improperly substituting its judgment for Anita's." Id.

In the CHINS abuse case of Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990), the Court's affirmance of the CHINS judgment was based on many incidents of physical and emotional abuse and neglect, but the Court particularly noted the following act of emotional abuse:

> Holding a child's hand over a burning flame, regardless of whether the child is injured, is emotional abuse of the highest order and speaks for itself in terms of causing psychological damage to a child.

Id. at 871.

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

The following termination of parental rights cases dealt with the emotional and mental health of the children: In Re L.S., 717 N.E. 2d 204, 207 (Ind. Ct. App. 1999) (significant and severe marital discord in children's presence endangered their emotional well-being); Stone v. Daviess Co. Div. Child. Serv., 656 N.E. 2d 824, 827 (Ind. Ct. App. 1995) (children were emotionally and psychologically harmed while in parents' care and exhibited academic and social delays, aggression, lack of response to discipline, and wild behavior); Wardship of J.C. v. Allen Cty. Office, 646 N.E. 2d 693, 696 (Ind. Ct. App. 1995) (child developed emotional problems requiring medical attention and counseling which father could not provide); In Re Children: T.C. and Parents: P.C., 630 N.E. 2d 1368, 1374 (Ind. Ct. App. 1994) (child's slight delay in verbal skills and inability of mother to provide enrichment opportunities were insufficient to support conclusion that termination was in best interests of child); J.L.L. v. Madison County DPW, 628 N.E. 2d 1223, 1227 (Ind. Ct. App. 1994) (children suffered serious speech, growth, and other developmental delays that improved "almost immediately" upon removal from parents); R.M. v.

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Tippecanoe County DPW, 582 N.E. 2d 417, 421 (Ind. Ct. App. 1991) (mentally ill mother was unable to provide stability and uninterrupted support child needed); Egly v. Blackford County DPW, 592 N.E. 2d 1232, 1235 (Ind. 1992) (children of low functioning parents suffered learning difficulties and speech problems which rapidly improved during foster care placement); S.E.S. v. Grant County Dept. of Welfare, 582 N.E. 2d 886, 887 (Ind. Ct. App. 1991), adopted and incorporated in 594 N.E. 2d 447 (Ind. 1992) (child's serious emotional problems were result of mother's alcohol related behavior problems); Matter of Y.D.R., 567 N.E. 2d 872, 874 (Ind. Ct. App. 1991) (evidence that children had suffered "extreme emotional pain," and were the "product of an emotional environment exceptionally deprived of appropriate modeling" and "devoid of most basic emotional responses"); Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956, 960 (Ind. Ct. App. 1991) (termination judgment was affirmed on evidence that parents couldn't provide stable home, "were unable to provide emotional and mental support or necessary care and supervision for their children," and refused to abandon violent and alcoholic life styles).

The child's mental condition was a major factor in the termination of parental rights case, Matter of J.H., 468 N.E. 2d 542 (Ind. Ct. App. 1984). The Court related the child's mental condition of insecurity, aggression and other emotional problems to the mother's unfitness as a parent and the mother's myriad of odd, excessive, and inappropriate behaviors in dealing with the child, including:

> ...constantly quoting Bible verses, decorating J.H.'s lunch box with Bible verses, standing in front of a closet buttoning and unbuttoning clothing, dragging J.H. out of bed in the middle of the night and making him brush his teeth and stay in the bathroom for a long period of time, and walking around in front of him completely nude.

Id. at 545.

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

In Harrison v. State, 644 N.E. 2d 888 (Ind. Ct. App. 1994), the female defendant had the care of a twelve-year-old girl, an eleven-year-old girl, and an infant. She took them to a nursing home to visit a male patient who had a reputation for exposing and touching himself in public and touching women. While in the patient's room, the defendant demonstrated fellatio to the girls using her finger as a model. The girls then performed fellatio on the patient and the defendant told them afterward not to tell anyone. The defendant was charged and convicted of criminal neglect of a dependent. On appeal, the Court concluded that the criminal neglect statute applies to the psychological, mental, and emotional injuries which are inflicted on children by deviate conduct. The Court held that the evidence was sufficient to show that the defendant knowingly placed the children in a situation that threatened their life or health. In Riffel v. State, 549 N.E. 2d 1084 (Ind. Ct. App. 1990), the Court of Appeals found that a father's bizarre sexual practices with his five-year-old son were harmful to the child's mental health. In White v. State, 547 N.E. 2d 831 (Ind. 1989), the Court accepted the state's position that a parent's exposure of a child to an illegal drug environment posed an actual and appreciable danger to the child and constituted criminal neglect. Id. at 836.

C. Statutory Elements of the CHINS Case

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

1. Age of the Child

Proving the age of the child is an element of each CHINS case, but it is also jurisdictional. The state must prove that the child is under the age of eighteen. The juvenile court loses jurisdiction to adjudicate a child a CHINS once the child reaches the age of eighteen, even though the CHINS proceeding was initiated before the child's eighteenth birthday. See In Re T.G., 726 N.E. 2d 857 (Ind. Ct. App. 2000); Mafnas v. Owen County Office of Family, 699 N.E. 2d 1210 (Ind. Ct. App. 1998). However, if the child is adjudicated a CHINS prior to the child's eighteenth birthday the court can retain jurisdiction until the child reaches the age of twenty-one. IC 31-30-2-1-(a)(1).

In the CHINS case of Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990), the father alleged error in the court's finding that the child was eighteen months old, on the grounds that the record of the

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factfinding hearing contained no evidence establishing the child's exact age. The Court rejected the argument and stated that:

> ...the record establishes that A.J. was a child young enough to require a babysitter. We can presume from this that she was among the group intended to be protected under the CHINS statutes; i.e., those under the age of 18 . . . That the trial court entered a precise age unsupported by the evidence does not render its findings clearly erroneous.

Id. at 871.

2. “Needs Care and Treatment” Element

In the case of Parker v. Dept. Of Public Welfare, 533 N.E. 2d 177 (Ind. Ct. App. 1989), the Court of Appeals addressed the "needs care and treatment" element of the CHINS case, i.e. the requirement in each of the CHINS categories that the state proves that the child needs care, treatment, or rehabilitation that the child is not receiving, and is unlikely to be provided or accepted without the coercive intervention of the court. The Court of Appeals found that even though the mother had presented evidence that she was receiving treatment, the trial court did not error in finding that the mother had not recovered from her emotional instability and that "[c]oercive influence was needed not only for the safety of the children but to retrieve Karen [mother] from the abyss of drug induced mental problems into which she had fallen." Id. at 179.

In the CHINS case of Matter of M.R., 452 N.E. 2d 1085 (Ind. Ct. App. 1983), the Court of Appeals indicated that the need for coercive intervention could be inferred from proof of the existence of the CHINS condition. The Court stated:

> Having concluded that the mother’s actions were detrimental to her children’s well being, the trial court was entitled to believe that such conduct would continue in the absence of court intervention.

Id. at 1089.

In Hallberg v. Hendricks Cty. Office, 662 N.E. 2d 639 (Ind. Ct. App. 1996), in response to the father's argument that there was insufficient evidence that his children were Children in Need of Services, the Court of Appeals stated:

> [W]e believe that the trial court's finding that K.H. [child] had been sexually abused by Glenn [father] supports a finding that the children are in need of care and treatment."

Id. at 647 n. 10.

D. Purpose and Goals in CHINS Case

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

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

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(12) provide a continuum of services developed in a cooperative effort by local governments and the state.

In Matter of Robinson, 538 N.E. 2d 1385 (Ind. 1989), a termination of the parent-child relationship case, the Indiana Supreme Court briefly reviewed the purpose, goals and process of a CHINS case. In a CHINS case, the Court stated:

> ...we consider the very nature of proceedings involving the care, attention, and protection of neglected, abused, and dependent children, or "children in need of services" (CHINS, Ind. Code 31-6-4-13.5) [recodified at IC 31-34- et. seq.]. The intervention of the juvenile court and all of the allied agencies of the county such as the prosecuting attorney, the probation office in the case of juveniles, and the welfare department in the case of children in need of services, ordinarily begins as an emergency situation requiring immediate action and continues for varying lengths of time depending upon the facts of the situation requiring care, protection, attempts at rehabilitation of the child or children, and/or the parents and the entire home environment. . . . During these proceedings many steps need to be taken and decisions made to resolve the plight of these children. The desired result would be to resolve the problems in the home which led to the children's distress and return them there. If this cannot be done, the alternative which serves the best interests of the child or children is terminating parental rights and placing the children where they will receive proper care and protection.

Id. at 1386.

The Court also noted the purpose of the CHINS proceeding in Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792 (Ind. Ct. App. 1998). The Court stated, “[U]nder the policy pronouncements inherent in the entire scheme of CHINS procedures, a primary purpose and function of the Department is to encourage and support the integrity and stability of an existing family environment and relationship.” Id. at 793.

Federal law has had a significant impact on the goals and purpose of CHINS proceedings. The Adoption and Safe Families Act, as adopted in Indiana legislation, provides that (1) the child’s health and safety are paramount; (2) the state must exert reasonable efforts to avoid removal of a child from the home, or if the child is removed, to secure parent-child reunification; and (3) if reunification cannot be obtained within a reasonable period of time, the state must exert reasonable efforts to obtain adoption or another permanent alternative for the child. See 42 U.S.C. 671 (a)(15), IC 31-34-21-5.5. See also Chapter 4 beginning at VI.

II. NEGLECT

A. Statute

IC 31-34-1-1 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
(2) the child needs care, treatment, or rehabilitation that the child:
  (A) is not receiving, and
  (B) is unlikely to be provided or accepted without the coercive intervention of the court.

B. Abandonment

Indiana does not mention “abandonment” in its CHINS neglect statute; however, abandonment of a child is certainly a form of neglect. Recent statutory law was created to expedite the litigation and facilitate permanency for abandoned infants. See Chapter 4 at VII. D. for discussion on abandoned infants.

For CHINS and termination cases involving abandoned children, see T.Y.T. v. Allen County Div. of Family, 714 N.E. 2d 752, 756 (Ind. Ct. App. 1999) (mother gave child to putative father, father left child with a childcare provider, and mother did not know where child was living and made no attempt to determine child’s location); Young v. Elkhart County Office of Family, 704 N.E. 2d 1065, 1067 (Ind. Ct. App. 1999) (mother left children with putative father’s mother and did not reclaim them).

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Child abandonment may also be charged as criminal neglect of dependent under IC 35-46-1-4(a)(2). See Jones v. State, 701 N.E. 2d 863, 869 (Ind. Ct. App. 1998) (mother's confession of leaving four-year-old in apartment for several days was sufficient evidence of knowing abandonment of child to sustain criminal conviction for neglect of dependent). The criminal neglect of dependent statute, IC 35-46-1-4(c)(1), was amended in 2000 to create a defense that the caretaker left the child with an emergency medical provider and the abandonment did not result in bodily injury to the child.

C. Neglect by Failure to Provide Necessities

The CHINS neglect category requires proof that the parent, guardian, or custodian has not provided the child with necessary food, clothing, shelter, medical care, education, or supervision. CHINS neglect is generally alleged when there is repeated failure to provide for a child as to more than one basic necessity, rather than an isolated incident of neglect, unless the isolated neglect incident is very serious. The fact situation in Matter of M.R., 452 N.E. 2d 1085 (Ind. Ct. App. 1983), illustrates this concept:

> (1) Mother did not have a place of residence and had moved frequently; (2) Mother had spent a great deal of time in a tavern and left her children with babysitters; (3) Mother sometimes did not give babysitters food, clothing, or money for the children's care, although the babysitters were either friends or relatives who did feed and clothe the children; (4) the children had some minor health problems; and (5) the two oldest of Mother's children exhibited unusual sexual behavior, and when questioned the children stated that their mother and her boyfriend permitted and participated with them in such conduct.

Id. at 1089.

The issue of the parents' inability to provide necessities because of their financial situation was raised in Lake County FCS v. Charlton, 631 N.E. 2d 526 (Ind. Ct. App. 1994). In that case, the juvenile court had adjudicated a special medical needs child a CHINS due to the inability of his parents to pay for his medical costs. Subsequently, the local office of family and children filed a motion to dismiss the wardship because the parents had obtained insurance and other needed finances to meet the expenses. The juvenile court denied the motion, but the Court of Appeals reversed on the grounds that, even though it may be difficult for the parents to financially provide for the child, they were doing so at the moment, and therefore the child was no longer a CHINS. The Court stated that:

> ...we are constrained to agree with FCS that IC 31-6-4-3(a)(1) [recodified at IC 31-34-1-1] is applicable where parents lack the *ability* to provide for their children; it does not address a situation in which the parents encounter *difficulty* in meeting a child's needs. This court must give effect to the intention of the legislature as expressed in its statutory language. Employing the terms "inability, refusal, or neglect," our legislature has determined the basis upon which a child may be adjudicated a child in need of services, entitled to receive an allocation of limited public resources.

Id. at 528 (citation omitted).

Failure to provide necessities due to poverty was raised in the termination of parental rights case, In Re B.D.J., 728 N.E. 2d 195 (Ind. Ct. App. 2000). With regard to the father's poverty and emotional disabilities, the Court of Appeals affirmed the language of the trial court:

> Poverty can be a crushing burden ... However, poverty cannot excuse child neglect or abuse. Nor can it excuse the total lack of an attempt to remedy the situation to meet even the most minimal of standards of acceptable child care.

Id. at 203.

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

   The following cases include failure to provide for the necessities of the children as evidence supporting the termination of the parental rights judgment: In Re E.E., 736 N.E. 2d 791, 795 (Ind. Ct. App. 2000) (evidence of mother's delusional thought processes and inability to appreciate child's basic needs for safety and stability supported termination judgment); In Re M.M., 733 N.E. 2d 6, 13 (Ind. Ct. App. 2000) (teenage mother who resided in foster care with her child was unable to provide food, clothing, shelter, and medical care for child); Matter of N.B., 731 N.E. 2d 492, 493 (Ind. Ct. App. 2000) (incarcerated father unable to provide necessary care and supervision for child); In Re B.D.J., 728 N.E. 2d 195, 203 (Ind. Ct. App. 2000) (father unable to provide housing and support); Matter of A.N.J., 690 N.E. 2d 716, 722 (Ind. Ct. App. 1997) (father historically and currently unable to provide adequate housing, stability,

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and supervision); In Re A.A.C., 682 N.E. 2d 542, 544-545 (Ind. Ct. App. 1997) (father did not maintain stable housing or employment or support children); Matter of M.B., 666 N.E. 2d 73, 75 (Ind. Ct. App. 1996) (CHINS petition filed due to mother's request for placement due to her inability to provide for children and father's incarceration); Ross v. Delaware County Dept. of Welfare, 661 N.E. 2d 1269, 1269 (Ind. Ct. App. 1996) (police found children dirty and alone in "unsanitary" home with no food and youngest child was injured); Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824, 826-827 (Ind. Ct. App. 1995) (CHINS petition alleged the following: health and safety risks in home including inadequate hygiene, medical care, supervision, or nutrition; irregular school attendance; excessive discipline; and sexual abuse by a grandparent); Wagner v. Grant Dept. Public Wel., 653 N.E. 2d 531, 532 (Ind. Ct. App. 1995) (child removed from home because mother did not provide adequate food, shelter, or supervision and father could not care for child due to incarceration); Wardship of J.C. v. Allen Cty. Office, 646 N.E. 2d 693, 694 (Ind. Ct. App. 1995) (child removed from father's care and adjudicated CHINS because father and child were living in car, father was anticipating arrest, and father was unemployed and was unable to provide necessities); Smith v. Marion County DPW, 635 N.E. 2d 1144, 1145 (Ind. Ct. App. 1994) (CHINS petition alleged mother was a homeless, alcoholic, drug user, who was involved in criminal activity and attempted to sell her child); In Re Termination of Parental Rights of V.A., 632 N.E. 2d 752, 754 (Ind. Ct. App. 1994) (children removed due to mother's failure to supervise and filthy living conditions); S.J.J. v. Madison Cty. Dept. of Welfare, 629 N.E. 2d 866, 869 (Ind. Ct. App. 1994) (termination judgment affirmed on evidence that conditions of inadequate and unstable housing and poor school attendance would not be remedied); J.L.L. v. Madison County DPW, 628 N.E. 2d 1223, 1224 (Ind. Ct. App. 1994) (children removed from home due to filthy living conditions including urine soaked beds, food rotting in house, broken objects and bottles in house and yard, and children had lice and vulvar dermatitis); Parent-Child Relationship of L.B. and S.C., 616 N.E. 2d 406, 407 (Ind. Ct. App. 1993) (children removed from home after caseworkers found home unsanitary and unsafe and children had head lice and were dirty, but termination judgment reversed because termination petition filed prematurely); Egly v. Blackford County DPW, 592 N.E. 2d 1232, 1233 (Ind. 1992) (children removed from home and made wards when caseworker's investigation revealed holes in trailer floor, no water, non-functioning furnace, and dangerous heater); S.E.S. v. Grant County Dept. of Welfare 582 N.E. 2d 886, 887 (Ind. Ct. App. 1991), adopted and incorporated in 594 N.E. 2d 447 (Ind. 1992) (welfare department instituted second CHINS action after mother was convicted of driving while intoxicated and mother's alcoholism was a major factor in termination); B.R.F. v. Allen County D.P.W., 570 N.E. 2d 1350, 1352 (Ind. Ct. App. 1991) (father could not provide stable home, was incarcerated, and had permanently lost his driver's license); M.B. v. Dept. of Public Welfare, 570 N.E. 2d 78, 79, 80 (Ind. Ct. App. 1991) (children suffered from failure to thrive; mother did not feed, change or nurture children appropriately; and children ate only snacks when in mother's care and were dirty, hungry, exhausted and ill with diarrhea when returned to foster care); Matter of M.J.G., 542 N.E. 2d 1385, 1386 (Ind. Ct. App. 1989) (children removed from home because they were dirty and suffering from insect and rat bites and because of the following conditions in the home: rat infestation, trash and dirty dishes, nonfunctioning toilet, and rotting foods); Matter of Dull, 521 N.E. 2d 972, 975, 976 (Ind. Ct. App. 1988) (the following evidence of parental neglect by mentally retarded parents supported termination judgment: inability to control children and provide necessary supervision and structured environment; "lack of essential parenting skills including food preparation, budgeting, and cleanliness;" and absence of skills "necessary to raise their children properly, thereby inhibiting the children's development"); In Re Wardship of M.H., 490 N.E. 2d 1119, 1120 (Ind. Ct. App. 1985) (children were removed from home due to inadequate housekeeping, unsanitary and unhealthy residence, and lack of proper parental care); J.K.C. v. Fountain County Dept. of Pub. Wel., 470 N.E. 2d 88, 93 (Ind. Ct. App. 1984) (termination affirmed on evidence of infrequent employment of the parents, constant uprooting and relocation of the residence, overcrowded housing, and inability to provide the "stability necessary for normal social development of a child"); Matter of V.M.S., 446 N.E. 2d 632, 637 (Ind. Ct. App. 1983) (children were initially removed from the parents due to " (1) appalling living conditions, (2) lack of medical attention, and (3) moral degeneracy" and subsequently removed due to educational and medical neglect, unresolved housing problems, and financial instability); In Re Wardship of B.C., 441 N.E. 2d 208, 210 (Ind. 1982) (child was removed from mentally ill mother due to her initial abandonment of child to strangers, instability of home life, and lack of job skills, and inability to find and maintain a job in order to support herself and the child); Matter of Miedl, 425 N.E. 2d 137, 139 (Ind. 1981) (mother's mental illness caused instability and total inability to give her children necessary care).

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2. Criminal Cases for Failure to Provide Necessities

a. Neglect of Dependent Cases
Germaine v. State, 718 N.E. 2d 1125, 1132, 1133 (Ind. Ct. App. 1999) (neglect of dependent conviction upheld on evidence that house was full of rotting garbage, infested by vermin and children were exposed to dangers posed by disease and fire); Ricketts v. State, 598 N.E. 2d 597, 601 (Ind. Ct. App. 1992) (evidence of children's malnutrition, by itself, was not sufficient to show children were not provided essential, indispensable, or absolutely required food within meaning of criminal neglect statute, but Court noted at footnote 5 that CHINS neglect statute might not require such a stringent interpretation of what constitutes necessary care of child); Rinker v. State, 565 N.E. 2d 344, 346 (Ind. Ct. App. 1991) (mother's neglect conviction was upheld on following evidence: infant didn’t gain weight, appeared nutritionally deficient, and was only strong enough to emit a weak cry; mother didn't seek prompt medical attention for infant; mother didn’t provide adequate nutrition and reasonably clean living conditions); McClaskey v. State, 540 N.E. 2d 41, 45 (Ind. 1989) (mother's conviction for neglect of dependent was affirmed on evidence of filthy living conditions, Shaken Infant Syndrome, and mother's failure to get medical attention for child).

b. Non-Support Cases
Boss v. State, 702 N.E. 2d 782, 785 (Ind. Ct. App. 1998) (father can be charged with failure to support multiple times regarding the same child); State v. Taylor, 625 N.E. 2d 1334, 1336 (Ind. Ct. App. 1993) (Court affirmed nonresident father's conviction in Indiana for failure to support (IC 35-46-1-5(a)) children living in Indiana in compliance with a dissolution child support order issued by a Michigan court); Geans v. State, 623 N.E. 2d 435, 437 (Ind. Ct. App. 1993) (criminal failure to support requires showing of failure to provide food, clothing, shelter or medical care, and evidence was sufficient to show that father's "token amount of support" was inadequate to avoid criminal liability).

D. Neglect of Education
The Compulsory Attendance law at IC 20-8.1-3-17 sets the basic requirements for school attendance. The law requires that a child attend school from the earlier of the date on which the child officially enrolls in a school, or the beginning of the fall school term for the school year in which the child becomes seven years of age. A child enrolling in the year before he will become age seven is not subject to the compulsory attendance law that year if he is properly withdrawn from school. A child must attend school until one of the following occurs: (1) the child graduates from high school; (2) the child reaches eighteen years of age; or (3) the child is sixteen or seventeen years of age and is given written consent to withdraw by his parents and his principal at an exit interview. Exceptions to the Compulsory Attendance law are stated below at II. D. 3.

The law does not clearly define what constitutes educational neglect or truancy. The Compulsory Attendance law requires each child to attend school for the “number of days public schools are in session in the school corporation” where the child resides. IC 20-8.1-3-17(d)(1). The misdemeanor failure to ensure attendance law at IC 20-8.1-3-34 states that it is unlawful for a parent to fail, neglect or refuse to send his child to school for the “full term” as required by the Compulsory Attendance law. IC 20-8.1-3-17.2 requires each school corporation to establish a definition of “habitual truant” in its rules of discipline and the department of education “shall” develop guidelines concerning criteria for defining habitual truant. All of these laws, as well as school created definitions, should be consulted in determining what constitutes neglect of education within a particular school system.

In addition to other disciplinary procedures, the school maintains some leverage in controlling truancy through IC 20-8.1-3-17.2(f) and IC 20-8.1-5.1-26 which require the school to submit to the Bureau of Motor Vehicles a list of students who have been designated as “habitually truant.” The bureau may not issue learner’s permits or driver’s licenses to these students until the school later reviews the school attendance records and recommends issuance to the bureau. IC 20-8.1-3-17.2(f).

CHINS, delinquency, and/or criminal proceedings can be initiated when a child does not attend school regularly. All of these actions can be tried in the juvenile court which has concurrent jurisdiction with the criminal court for violation of the compulsory school attendance law and criminal neglect of a dependent charges. See IC 31-30-1-3 (jurisdiction of the juvenile court). Nothing prohibits simultaneous criminal and CHINS litigation regarding the same attendance problem. In fact, dual litigation may be advantageous. The

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pressure of criminal sanctions may facilitate increased parental cooperation while the CHINS or delinquency actions will enable supervision and treatment of the child's education problems.

1. CHINS, Delinquency, and Termination of Parental Rights Proceedings for Educational Neglect
   CHINS neglect of education (IC 31-34-1-1), CHINS parental failure to participate in disciplinary proceeding (IC 31-34-1-7), and delinquency truancy (IC 31-37-2-3) can be initiated in the juvenile court to address attendance problems at school.

   The office of family and children and the prosecutor have standing to initiate a delinquency action (IC 31-37-10-1) with regard to a child's failure to attend school. There are reported delinquency cases based on truancy, and the trial court can use secure detention for children who violate court orders to attend school. See B.L. v. State, 688 N.E. 2d 1311 (Ind. Ct. App. 1997) (court could not use inherent contempt power to incarcerate repeat truant for violating order in delinquency case to attend school, but could use statutory modification procedure). Under IC 31-37-19-4 the juvenile court "shall" order the Bureau of Motor Vehicles to invalidate driver's permits and licenses of children who have repeat delinquency adjudications for truancy.

   The office of family and children and the prosecutor have standing to initiate a CHINS action for educational neglect. There are no reported CHINS cases based solely on neglect of education, although truancy and other school problems are frequent issues in neglect cases. There may be other educational neglect issues besides school attendance. Arguably, a child may be a CHINS if the parents do not cooperate with the school in obtaining needed evaluations, medications, or special placements for the child, if the situation rises to the level of seriously impairing the child's mental condition. But see E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio, 720 N.E. 2d 447, 452 (Ind. Ct. App. 1999) (mother's failure to attend case conferences and refusal to sign Individualized Education Plan and to release medical records of child did not prevent school from providing free and appropriate education to developmentally disabled child, and court erred in ordering appointment of educational guardian for child).

   Termination of parent-child relationship cases often mention the parent's failure to ensure the child's school attendance as a factor. In the termination case of S.J.J. v. Madison Cty. Dept. of Welfare, 629 N.E. 2d 866 (Ind. Ct. App. 1994), the statement of facts shows that the dispositional order required, among other things, that the mother "see that the children attend school daily." Id. at 867. In affirming the termination judgment, the court concluded that evidence of failure to maintain visitation and counseling schedules supported the inference that the mother's problems "with her children's school attendance has not been remedied." Id. at 869. For additional cases which included school issues as a factor in the termination of the parent-child relationship, see Matter of C.M., 675 N.E. 2d 1134, 1139, 1140 (Ind. Ct. App. 1997) (mother neglected sibling's education); Matter of V.M.S., 446 N.E. 2d 632, 633 (Ind. Ct. App. 1983) (children had attendance problems and parents didn't cooperate with the school and ignored school effort to enroll children in special and remedial school programs); In Re Wardship of M.H., 490 N.E. 2d 1119 (Ind. Ct. App. 1985) (failure of parents to ensure children had proper clothing, hygiene and sleep for school attendance). Irregular school attendance was also a factor in the termination cases of Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824 (Ind. Ct. App. 1995) and Matter of D.B., 561 N.E. 2d 844 (Ind. Ct. App. 1990).

2. Criminal Proceedings for Educational Neglect
   Parents can be charged with a misdemeanor compulsory attendance violation (IC 20-8.1-3-33, 34, and 37) or felony neglect of dependent (IC 35-46-1-4(4)) if they do not ensure their child's school attendance. In Hamilton v. State, 694 N.E. 2d 1171 (Ind. Ct. App. 1998), the mother was convicted of felony neglect of a dependent and misdemeanor failure to ensure school attendance, but her convictions were reversed on appeal due to insufficient evidence. The facts show that over a period of six months one child had ten unexcused absences and the other child had four. An absence was considered unexcused if the school did not receive a call or note from the parent. Mother's convictions for violation of the compulsory attendance law were reversed because the school did not give her personal notice of failed attendance by (1) personal delivery, (2) certified mail, or (3) leaving notice at the last or usual place of residence. Notice is required by IC 20-8.1-3-33, it is a prerequisite to initiating the misdemeanor failure to ensure attendance charge, and it must be proven beyond a reasonable doubt. Testimony of the attendance officer that she mailed notice to the mother was not sufficient, because the record did not show that the notice was sent by certified mail. Mother's felony neglect of dependent convictions for her

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children's absences were also reversed. To prove felony neglect of education, the State is required to prove not only a violation of the compulsory attendance law, but that as a result of the child's failure to attend school, the child failed to acquire the knowledge and training taught at school.

3. Home Schooling and Alternatives to Public Education
Parents may avoid the Compulsory Attendance requirement if they provide their children with "instruction equivalent to that given in the public schools." See IC 20-8.1-3-34; Mazanec v. North Judson-San Pierre Sch. Corp., 614 F. Supp. 1152 (N.D. Ind. 1985), aff'd, 798 F. 2d 230 (7th Cir. 1986) (mother of "home schooled" children claimed school violated her civil rights, but Court rejected claim on its finding that school had statutory right to investigate and pursue whether children were in compliance with compulsory education law). Teaching a child at home may be referred to as "home schooling." Indiana law does not require parents to give notice or certification of "home schooling" or alternative education, except IC 20-8.1-3-17(h) authorizes a superintendent to seek certification from parents providing "home schooling" or another alternative for children who will reach the age of seven during the school year.

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

1. CHINS Cases
In Matter of E.M., 581 N.E. 2d 948 (Ind. Ct. App. 1991), the Court ruled that allowing the mother's boyfriend to discipline the thirteen year old daughter did not constitute neglect of supervision. While noting that parents are responsible for ensuring their children are adequately supervised and that lack of parental supervision can support a CHINS determination in some situations, the Court found that IC 31-6-4-3(a)(1) [recodified at IC 31-34-1-1] "does not require parents to be the only supervisors of their children" and the parent may allow others to supervise and discipline the child. Id. at 954. Based upon the facts of the case, the Court determined that the boyfriend was not the primary disciplinarian when the mother was home, the mother was consulted on discipline, and the mother did not fail to adequately supervise the child. With regard to the allegations that mother's methods of parenting were neglectful or abusive, the Court acknowledged that punishment by confinement or grounding could be excessive and deprive a child of a healthy emotional development, but that the type of confinement and grounding used in this case was not excessive. Id. at 953. Even if it was determined that the mother's methods of parenting were "inappropriate", the Court stated that "inappropriateness" is not enough to support intervention. Id. at 954. The Court stated that the "conclusion that Anita [mother] needed to change her parenting style amounted to nothing more than the trial court improperly substituting its judgment for Anita's." Id.

In Parker v. Dept. of Public Welfare, 533 N.E. 2d 177 (Ind. Ct. App. 1989), the mother took her children to a friend's home before consuming large quantities of Valium and speed, and when the police later sought to help her locate her children at her request, the mother was irrational, uncooperative and combative. The Court found that the mother had exhibited a pattern of aberrant conduct related to her drug use, and concluded that the mother was "out of control, incompetent to care for her children, and posed a threat to the children's welfare and safety." Id. at 179. The Court of Appeals affirmed a CHINS judgment that the children were endangered as a result of the mother's inability, refusal, or neglect to supply the children with supervision.

In the CHINS case of Matter of M.R., 452 N.E. 2d 1085 (Ind. Ct. App. 1983), the Court of Appeals found that leaving children with a babysitter could constitute neglect of supervision if the mother did not make provision for the children's food, clothing, and care, even though the children were adequately cared for through the actions and resources of the friends and relatives who served as babysitters. The Court stated:

> Although Mother's children were fed and clothed by their babysitters, the CHINS statute provides that a child may be endangered by a lack of parental supervision-and parental supervision is what mother's children lacked.

Id. at 1089.

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In Wardship of Nahrwold v. Dept. of Public Welfare, 427 N.E. 2d 474 (Ind. Ct. App. 1981), the Court of Appeals noted that the caseworker removed the child from the home upon evidence that the child had been spanked with a metal spatula and was "regularly left without supervision from 3:30 p.m. until about 5:10 p.m." Id. at 478.

2. Termination Cases

Several termination of parental rights cases are based on parental inability to provide supervision, protection, care or emotional support. See Matter of C.M., 675 N.E. 2d 1134, 1136, 1140 (Ind. Ct. App. 1997) (paraplegic child was initially removed from home due to mother's inability to provide supervision and needed medical care, and allowing sibling to accompany mother during criminal activity was a factor in termination of parental rights); In Re Termination of Parental Rights of V.A., 632 N.E. 2d 752, 756 (Ind. Ct. App. 1994) (mother's most serious deficiency was failure to supervise daughters and provide clean, safe, and stable home); In Re Wardship of R.B., 615 N.E. 2d 494, 495 (Ind. Ct. App. 1993) (CHINS petition was based on allegations that mother was cocaine user, sought no prenatal care during pregnancy, couldn't provide appropriate home or supervision due to drug use, had no job to support children, and her child was born addicted); Matter of Adoption of D.V.H., 604 N.E. 2d 634, 636 (Ind. Ct. App. 1992) (CHINS petition alleged mother's inability to adequately supervise child and provide for his physical needs); Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956, 960 (Ind. Ct. App. 1991) (children removed from home, and parental rights eventually terminated, due to inability of parents to maintain stable home (twenty-seven moves in ten years) and to provide children with necessary emotional support, care, and supervision); Matter of D.B., 561 N.E. 2d 844, 845 (Ind. Ct. App. 1990) (Court affirmed termination based on following neglect: lack of parental supervision; educational neglect of older girls; unstable living conditions; too many people (particularly young men) coming and going from home; mother's lack of parenting skills and inability to institute house rules).

Termination cases may also deal with failure to protect the child from harm, which is arguably a form of failure to supervise. In Alexander v. La Porte Co. Welfare Dept., 465 N.E. 2d 223 (Ind. Ct. App. 1984), the Court of Appeals affirmed a termination of the mother's parental rights based on the mother's failure to protect the daughter from abuse by the mother's boyfriend. Failure to protect may also qualify as abuse by omission under the CHINS abuse category stated at IC 31-34-1-2.

3. Criminal Neglect of Dependent Cases

Criminal neglect of dependent cases may be based on dangerous supervision of children. See Kile v. State, 729 N.E. 2d 211, 213 (Ind. Ct. App. 2000) (Court affirmed sentencing on father's admission to neglect of dependent for having his twelve and six year old children present when he tried to buy cocaine); Thames v. State, 653 N.E. 2d 517, 517 (Ind. Ct. App. 1995) (mother's boyfriend convicted for neglect of dependent for leaving mother's five year child napping alone for several hours while he went "two streets over" to help someone move furniture); Kellogg v. State, 636 N.E. 2d 1262, 1265 (Ind. Ct. App. 1994) (Court affirmed father's neglect of dependant conviction for driving intoxicated, twenty miles over the speed limit, with his child unrestrained in the back seat); Demontigney v. State, 593 N.E. 2d 1270, 1272 (Ind. Ct. App. 1992) (Court affirmed neglect conviction of parents for cruelly confining their six year old child by chaining him to his bed for long periods of time); Hartbarger v. State, 555 N.E. 2d 485, 487 (Ind. Ct. App. 1990) (Court reversed neglect conviction because confining sixteen year old son by locking him in bedroom at night for two weeks and not allowing visits with sibling during day for two week period, did not constitute cruel confinement within meaning of criminal neglect statute); Shoup v. State, 570 N.E. 2d 1298, 1303 (Ind. Ct. App. 1991) (Court affirmed neglect of dependent conviction of stepfather for taping child to chair placed close to stairway, and for placing child in closet for punishment); Johnson v. State, 555 N.E. 2d 1362, 1366 (Ind. Ct. App. 1990) (Court affirmed conviction of mother's boyfriend for neglect for leaving mother's child unattended in bathtub where child received serious burns, after which boyfriend failed to seek prompt medical attention for child's burns); Riffel v. State, 549 N.E. 2d 1084, 1088 (Ind. Ct. App. 1990) (Court affirmed neglect conviction of father for allowing five year old child to place child's penis in mechanical doll, by which act child may have contracted chlamydia (sexually transmitted disease) from doll's previous user); White v. State, 547 N.E. 2d 831, 836 (Ind. 1989) (Court affirmed neglect of dependent conviction of father for placing ten year old daughter in environment of frequent illegal drug use, providing her with marijuana, and smoking with her).

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F. Neglect of Medical Care

Medical neglect can be the basis of a CHINS petition, and such neglect may eventually result in termination of the parent-child relationship. See Matter of C.M., 675 N.E. 2d 1134, 1136 (Ind. Ct. App. 1997) (paraplegic child initially removed from home due to mother's inability to provide supervision and needed medical care); R.G. v. MCOFC, 647 N.E. 2d 326, 329 (Ind. Ct. App. 1995) (mentally retarded parents lacked willingness or ability to provide for the exceptional medical needs of hydrocephalic child); Matter of V.M.S., 446 N.E. 2d 632, 638 (Ind. Ct. App. 1983) (children initially removed from the home on evidence that parents had not provided children with needed immunizations, parents did not keep medical appointments for the children, and parents did not give children prescribed medications).

A CHINS case and a termination case dealt with parents who suffered from Munchausen Syndrome by proxy: a psychiatric condition in which the parent fabricates or exacerbates the illness of a dependent child to gain attention and approval from the medical community and others. See Matter of Jordan, 616 N.E. 2d 388, 389 (Ind. Ct. App. 1993); Matter of Tucker, 578 N.E. 2d 774, 777 (Ind. Ct. App. 1991).

1. Religious Belief Rebuttable Presumption

In some limited situations a child who is deprived of medical care may not be considered a CHINS if the parent's failure to provide medical care is based upon genuine religious beliefs. Quoting from IC 31-34-1-14:

> If a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian, a rebuttable presumption arises that the child is not a child in need of services because of the failure. However, this presumption does not do any of the following:
>
> > (1) Prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana.
> > (2) Apply to situations in which the life or health of a child is in serious danger.

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

There are no reported CHINS cases dealing with the religious belief rebuttable presumption. However, there are reported cases on the religion defense for denial of medical treatment in criminal neglect of dependent cases. See Hall v. State, 493 N.E. 2d 433 (Ind. 1986).

2. Criminal Neglect of Dependent Cases for Medical Endangerment

For criminal neglect of dependent cases dealing with medical neglect or endangerment, see Herron v. State, 729 N.E. 2d 1008, 1011 (Ind. Ct. App. 2000) (mother could not be charged with neglect of dependent for use of cocaine during pregnancy: unborn child not a "dependent" for purposes of criminal neglect statute); Smith v. State, 718 N.E. 2d 794, 807 (Ind. Ct. App. 1999) (neglect of dependent conviction affirmed on evidence that allowed inference that mother placed infant in highly dangerous situation with abusive boyfriend and deliberately avoided medical assistance because of concern that her child would be taken away); Taylor v. State, 644 N.E. 2d 612, 614 (Ind. Ct. App. 1994) (father convicted of neglect of dependent on evidence that four-month-old child received second degree facial burns while father was bathing him, and father did not seek prompt medical care for child's life-threatening injuries); Sample v. State, 601N.E. 2d 457, 460 (Ind. Ct. App. 1992) (neglect conviction affirmed on mother's failure to get prompt medical attention when four-month-old child fell and fractured skull and child's head would have had noticeable swelling); Fout v. State, 619 N.E. 2d 311, 311 (Ind. Ct. App. 1993) (mother's neglect conviction reversed because evidence was insufficient to show mother's subjective knowledge that fetus had bacterial infection or that, after at-home birth, mother knew child's condition warranted medical attention); Fout v. State, 575 N.E. 2d 340, 342 (Ind. Ct. App. 1991) (father's neglect conviction affirmed on evidence that father had knowledge of fetus's potential bacterial infection and father knew what conditions signified need for immediate medical attention for child, but father failed to seek medical attention and child died within twenty-four hours of at-home birth); Rinker v. State, 565 N.E. 2d 344, 346 (Ind. Ct. App. 1991) (mother convicted of neglect of dependent for failure to provide

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adequate nutrition and reasonably clean living conditions, and failure to obtain needed medical attention); Johnson v. State, 555 N.E. 2d 1362, 1366 (Ind. Ct. App. 1990) (mother convicted of neglect for failure to get prompt medical care for infant daughter who was burned while in care of mother's boyfriend); Mallory v. State, 563 N.E. 2d 640, 644 (Ind. Ct. App. 1990) (mother convicted of neglect of dependent for failure to obtain medical care for daughter who had been hit in the head while in the care of mother's boyfriend and daughter had exhibited paralysis, vomiting, headaches, lethargy, seizure, moodiness and other symptoms for a three week period following the injury); Hill v. State, 535 N.E. 2d 153, 154 (Ind. Ct. App. 1989) (neglect conviction of baby sitter for endangering a child in her care by failing to get necessary medical attention for child's peritonitis, affirmed on expert testimony that the child would have exhibited severe symptoms that would have indicated to a lay person the need for medical treatment); McMichael v. State, 471 N.E. 2d 726, 731 (Ind. Ct. App. 1984) (neglect conviction of father for failure to obtain adequate medical care for child, affirmed on expert testimony that child would have exhibited vomiting, severe pain, difficulty in movement and other symptoms that would have indicated the need for immediate medical treatment); Perkins v. State, 392 N.E. 2d 490, 492, 494 (Ind. Ct. App. 1979) (neglect conviction of child's mother for failure to seek prompt medical attention for child affirmed on the following evidence: mother was in the room next to where the child was beaten; the child vomited, looked pale and sick and had multiple bruises; and expert testimony that the child would have been listless with labored breathing).

G. Denying Treatment to Severely Disabled Newborns

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

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

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

The term "disability" is defined at IC 22-9-1-3(r) as: "the physical or mental condition of a person that constitutes a substantial disability."

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

H. State of Mind

The CHINS neglect category requires proof that the child's endangerment was the result of the "inability," "refusal," or "neglect" of the parent, guardian, or custodian. If the CHINS petition alleges "refusal," then the state must prove an intentional state of mind. If the petition alleges "neglect," then presumably the state must prove a reckless state of mind, i.e. a conscious and unjustifiable disregard of harm that involves a substantial

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deviation from acceptable standards of conduct. However, if the petition alleges "inability," then the state does not have to prove that the respondent had an intentional, knowing, or reckless state of mind. A child can be in need of services even if the neglect was the result of the parent's financial situation, mental illness, or other problem beyond his/her control.

I. Child's Condition Seriously Impaired or Endangered

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

1. Mental Condition

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

In Matter of Dull, 521 N.E. 2d 972 (Ind. Ct. App. 1988), the Court of Appeals affirmed the termination of the parental rights of mentally retarded parents whose care of their children resulted in severe developmental delays. The Court noted that the children's endangered condition was attributable to the parents. The Court stated:

> The evidence sufficiently supported the trial court's findings that Jeremy's and Rebecca's developmental delays were caused by their parents and that those problems would recur if the children were returned to the home.

Id. at 975.

In In Re Wardship of M.H., 490 N.E. 2d 1119 (Ind. Ct. App. 1985), the Court of Appeals affirmed a termination of parental rights judgment in a case based on severe and long-standing neglect which affected both the mental and physical condition of the children. The causal connection between the neglect of the parent and the endangerment to the children was shown by the fact that the children's language, self help, academic skills and personalities improved when the children were removed from the parent's home.

In J.K.C. v. Fountain County Dept. of Public Welfare, 470 N.E. 2d 88 (Ind. Ct. App. 1984), the Court of Appeals found that parental neglect denied the children necessary security and an opportunity for normal development. The Court stated:

> Life with Mary [mother] was constant upheaval, presenting none of the stability necessary for normal social development of a child. Both S.C. and J.C. [children] are of school age now. They need the reassurance that one single family home, one school and one set of friends brings to a grade school child. Proper development of a child also requires the influence and presence of a significant adult, the knowledge that his next meal has been provided for and that he has his own place to sleep at night. The absence of these security factors led to S.C.'s and J.C.'s removal from Mary's custody. There is no evidence of a change in Mary's way of life which will insure a solid home and family life for S.C. and J.C., complete with the necessities of food and clothing.

Id. at 93.

2. Physical Condition

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

3. Failure to Thrive

Failure to thrive refers to the inadequate emotional or physical development of an infant, associated with neglect. Seaman's Medical Dictionary, 26th ed. 1995 defined "failure to thrive" as a "condition in which an infant's weight gain and growth is far below usual levels for age." Failure to thrive may have medical, physical and emotional aspects. It may be caused by the parent's intentional or unintentional failure to provide adequate nutrition for the child, or the parent's failure to nurture the child, or a combination of both.

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The third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) included "failure to thrive" as a mental health diagnosis under 313.89 Reactive Attachment Disorder of Infancy or Early Childhood. Although the 1994 DSM-IV deleted the specific reference to "failure to thrive," Reactive Attachment Disorder continues to include children whose "markedly disturbed and developmentally inappropriate social relatedness" is associated with "grossly pathological care that may take the form of persistent disregard of the child's basic emotional needs for comfort, simulation, and affection; persistent disregard of the child's basic physical needs; or repeated changes of primary care giver that prevent formation of stable attachments." Id. at 116. The child's inappropriate social relatedness may take two different forms: (1) pattern of excessively inhibited, hyper vigilant or highly ambivalent responses or (2) indiscriminate sociability or a lack of selectivity in the choice of attachment figures.

The termination of parental rights case, M.B. v. Dept. of Public Welfare, 570 N.E. 2d 78 (Ind. Ct. App. 1991), is based on the neglect of two "failure to thrive" children. In the statement of facts the Court noted the following: the mother did not feed, change, and respond appropriately to the two-month-old infant; the mother gave the doctor inaccurate information about the infant's condition; and the mother seemed "ambivalent" when the doctor discussed parenting skills with her. Id. at 79. The doctor testified that the infant's illnesses, which he described as "failure to thrive," ear infections, and dehydration, were due to parental neglect. With regard to the older child, the doctor did not find any medical reasons for M.B.'s failure to gain weight and to develop, but instead attributed the condition to "social and nurturing problems." Id. In footnote 1 of the opinion, the Court quotes the doctor's explanation of failure to thrive as "the child not growing as much as we would like a child to grow." Id.

In the criminal neglect of dependent case, Rinker v. State, 565 N.E. 2d 344 (Ind. Ct. App. 1991), the condition of the child fits the "failure to thrive" syndrome, although that term is not used in the statement of facts. The facts show that the child was extremely thin, nutritionally deficient, and unresponsive to stimuli while in the care of the mother. However, when the child was placed in the care of the hospital and foster parents, he gained substantial weight and his condition vastly improved. Id. at 346.

III. ABUSE

A. Statute

IC 31-34-1-2 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; and
(2) the child needs care, treatment, or rehabilitation that the child:
 (A) is not receiving, and
 (B) is unlikely to be provided or accepted without the coercive intervention of the court.

B. Injury by Act or Omission

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

The following CHINS cases dealt with physical or mental injury caused by the act of the child's parent, guardian or custodian. In Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990), the boyfriend's biological children were removed from his care, when the girlfriend's daughter suffered second and third degree burns in the bathtub while in the boyfriend's care. The opinion notes that the boyfriend had physically and emotionally disciplined his own children in the past with the following methods: he bruised their buttocks and legs through belt whippings; he left finger bruises on the children's faces when he slapped them; he held a child's hand over an open flame; he forced a child to hold a push-up position until the child cried in pain; and he locked the children in their rooms while he took a nap. These abusive acts, some of which occurred several

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years prior to the bathtub incident that gave rise to the CHINS petition, were not too remote in time to be inadmissible. The Court also ruled that the testimony of the caseworker that the child had been admitted to a local hospital for second and third degree burns and bruising was sufficient to establish the injury, and further medical testimony was not required. Id. at 871. Further, the Court ruled that evidence that a parent had injured any child was sufficient to meet the "injury" requirement of the abuse statute, as long as the evidence also showed that the parent had injured his own child in the past by the parent's action or inaction. Id. at 872. In Matter of E.M., 581 N.E. 2d 948, 954-955 (Ind. Ct. App. 1991), the Court of Appeals reversed a CHINS judgment because the evidence was not sufficient to show, among other things, that the child's mother and her boyfriend emotionally abused the child. The Court noted that a child could be a CHINS under IC 31-34-1-3 if the child's mother failed to protect the child from abuse by another. Id. at 954-955. However, that provision did not apply in this case because the derogatory statements of the boyfriend to the child did not constitute emotional abuse.

Abuse by omission is defined at IC 31-9-2-87:

> "Omission," for purposes of IC 31-34-1-2, means an occurrence in which the parent, guardian, or custodian allowed the child of the parent, guardian, or custodian to receive an injury that the parent, guardian, or custodian had a reasonable opportunity to prevent or mitigate.

Although the CHINS case of Maybaum v. Office of Family & Children, 723 N.E. 2d 951 (Ind. Ct. App. 2000) was reversed because the CHINS judgment was based on a CHINS category that was not pled or litigated by consent, it is still instructive with regard to abuse by omission in child sexual abuse cases. In Maybaum, the trial court found that the child had been injured and had experienced sexual activity and abuse over a six-year period in the father's home, but the trial court concluded that the evidence was not sufficient to show that the father was the child's molester. Id. at 953. Instead, the trial court ruled that the child was a CHINS due to the father's act or omission of failing to protect the child from injury. Id. Although not ruling specifically on that issue, the Court of Appeals noted that given the facts of the case the office of family and children may have been able to establish that the parent's failure to protect the child from injury inflicted upon her by the sexual acts of a sibling or other person could constitute CHINS Abuse. Id. at 955.

1. Termination Cases Based on Abuse by Act or Omission
   Many termination of parental rights judgments arise from CHINS adjudications based on acts or omissions of abuse. See Matter of D.G., 702 N.E. 2d 777, 781 (Ind. Ct. App. 1998) (father's acts of physical abuse of mother and child, and mother's failure to leave abusing father who had not obtained court ordered counseling, supported termination judgment); In Re Children: T.C. and Parents: P.C., 630 N.E. 2d 1368, 1369, 1374 (Ind. Ct. App. 1994) (CHINS petition filed on mother's act of striking child with belt causing welts on child's buttocks and face, but Court ruled that evidence of single incident of unreasonably harsh corporal punishment was insufficient to support termination); Kern v. Wolf, 622 N.E. 2d 201, 203, 206 (Ind. Ct. App. 1993) (child adjudged CHINS based on burns and bruises sustained while in the care of mother's boyfriend, and subsequent termination judgment was affirmed on the following evidence: mother married abusive boyfriend; mother's denial of danger to child from boyfriend; mother's inability to protect child; and boyfriend's physical threat to child); Matter of C.D., 614 N.E. 2d 591, 593-595 (Ind. Ct. App. 1993) (Court found that father's discipline by hitting children with a paint stirrer exceeded reasonable corporal punishment, and subsequent termination judgment was affirmed on evidence that father wouldn't change and on father's statement that he would resume his way of discipline when the welfare restriction on corporal punishment was lifted); Matter of A.M., 596 N.E. 2d 236, 237-239 (Ind. Ct. App. 1992) (CHINS case initiated when one child was beaten by putative father, and subsequent termination judgment was affirmed as to mother on evidence of mother's neglect of medical care, frequent moves, poor visitation, and allowing abuser to be around children); Alexander v. La Porte Co. Welfare Dept., 465 N.E. 2d 223, 226 (Ind. Ct. App. 1984) (mother's omission of failure to protect the child from abuse by the mother's boyfriend supported termination of mother's parental rights).

2. Criminal Neglect, Battery, Murder Cases Based on Abuse by Act or Omission
   See the following criminal cases based on child abuse by act or omission: Sanders v. State 734 N.E. 2d 646, 650 (Ind. Ct. App. 2000) (evidence of mother's striking child and failing to seek medical care was sufficient to support neglect conviction); Smith v. State, 718 N.E. 2d 794, 806-807 (Ind. Ct. App. 1999) (finding sufficient to uphold conviction of neglect of dependent resulting in serious bodily injury and

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death where mother continued to live with her boyfriend and leave baby alone with him despite other child's report that boyfriend hurt the baby and baby's multiple visible injuries and signs of distress); Lloyd v. State, 669 N.E. 2d 980, 984 (Ind. 1996) (Court affirmed criminal neglect of dependent conviction of boyfriend in death of girlfriend's eighteen-month-old child on evidence boyfriend assumed parental responsibility for child, child died of internal bleeding while in boyfriend's care, child's injuries were consistent with multiple instances of severe physical abuse, and boyfriend used belt and hands to strike child); Muehe v. State, 646 N.E. 2d 980, 983 (Ind. Ct. App. 1995) (mother convicted of neglect of dependent for failing to take steps to prevent father's continued sexual abuse of their fourteen-year-old daughter); Shipley v. State, 620 N.E. 2d 710, 716-717 (Ind. Ct. App. 1993) (murder conviction affirmed on evidence that parents caused child's death by combination of blunt force trauma, dehydration, malnutrition, and forced consumption of pepper); Eastman v. State, 611 N.E. 2d 139, 141 (Ind. Ct. App. 1993) (mother's neglect conviction upheld on evidence that mother inflicted injury to two-month-old child's skull causing permanent brain damage); Clemens v. State, 610 N.E. 2d 236, 243 (Ind. 1993) (medical evidence that child's injuries were not accidental and evidence of similar abuse inflicted on child's sibling by father, was sufficient to identify father as perpetrator of fatal blow and to show his failure to obtain medical attention for child); Vest v. State, 621 N.E. 2d 1094, 1096 (Ind. 1993) (evidence that defendant smoked and might have accidentally flicked ashes on three-year-old child was not sufficient to support battery conviction for child's cigarette burns); Sipress v. State, 562 N.E. 2d 758, 760 (Ind. Ct. App. 1990) (Court affirmed neglect of dependent conviction of father for scalding three-month-old daughter, and opinion contains expert testimony on distinguishing between intentional and accidental burns); Hendricks v. State, 554 N.E. 2d 1140, 1144-1145 (Ind. Ct. App. 1990), decision affirmed on this issue at 562 N.E. 2d 725 (Ind. 1990) (Court affirmed father's battery conviction for striking his four week old infant and applying pressure to infant's leg causing transverse fracture, despite father's allegation that mother was the abuser); Mitchell v. State, 557 N.E. 2d 660, 664-665 (Ind. 1990) (battery conviction of mother affirmed for intentionally burning two-year-old child in bathtub); Wilson v. State, 525 N.E. 2d 619, 625 (Ind. Ct. App. 1988) (mother's neglect conviction affirmed on evidence that mother was aware live-in boyfriend was spanking child forcefully and did not intend to stop such method of discipline, and that mother chose to have child remain in boyfriend's home).

C. Prior Acts or Omissions Causing Injury

IC 31-34-12-5 provides that evidence of prior or subsequent acts or omissions by a parent, guardian, or custodian which injured a child are admissible in the CHINS factfinding hearing for limited purposes. See Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990) (evidence of injury to "any" child is admissible, including children who are not the subject of the CHINS); Matter of J.L.V., Jr, 667 N.E. 2d 186 (Ind. Ct. App. 1996) (evidence of mother's prior involvement with office of family and children on four other children was admissible in CHINS case involving later born child). See also Chapter 7 at X. for detailed discussion on admissibility of prior and subsequent acts.

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

A rebuttable presumption arises that a child is a CHINS if the office of family and children presents competent evidence at the factfinding hearing that the child was non-accidentally injured while in the care or control of the parent. IC 31-34-12-4 states:

> A rebuttable presumption is raised that the child is a child in need of services because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that:
>
> (1) the child has been injured;
>
> (2) at the time the child was injured, the parent, guardian, or custodian:
>
> (A) had the care, custody, or control of the child; or
>
> (B) had legal responsibility for the care, custody, or control of the child; and
>
> (3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian.

The rebuttable presumption enables the court to presume a causal link between the act or omission of the parent, guardian, or custodian and the child's injury. One commentary on the purpose of IC 31-34-12-4 states that "[t]he res ipsa loquitur provision was believed to be necessary to establish a cause-effect relationship between a child's injury and an act or omission of his parent, guardian or custodian where there are no

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witnesses to the injury." IC 31-6-4-3, Commentary, (West 1979) p. 113. Ind. Evidence Rule 301 on presumptions in civil actions states:

> ...a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

In In Re C.W., 723 N.E. 2d 956, 957 (Ind. Ct. App. 2000), the Court noted in its statement of facts that the child was diagnosed with "shaken infant syndrome," and the mother admitted at the CHINS factfinding hearing that the child was a CHINS, but denied that she caused the injuries. Id. at 959. In the discussion section of the opinion, the Court stated that "a rebuttable presumption is raised that the child is a CHINS if the state introduces evidence that the child has been injured. Ind. Code 31-34-12-4." Id. at 961. The Court continued on to state: "In the present case, C.W. [child] was presumed to be a CHINS because of the injuries she incurred while in the care of Mother." Id. Although the rebuttable presumption was not at issue in the appeal, the Court's discussion is helpful in understanding the possible use of the presumption when a parent admits the existence of the child's injury, but there is no direct evidence that the parent caused the injury.

E. State of Mind

The CHINS Abuse category does not specifically require proof that the parent, guardian, or custodian acted intentionally, knowingly, or recklessly in injuring the child. Abuse by omission, however, may contain a state of mind element. The definition of omission at IC 31-9-2-87, provides that the parent, guardian or custodian "allowed" the child to receive an injury and had a "reasonable opportunity to prevent or mitigate" the injury. This language seems to require proof that the person knew of the injury, or potential for injury, and had the means to prevent or avoid further injury. However, it can be argued that the term "allows" only requires proof of a reckless state of mind. IC 35-41-2-2(c) states that a person engages in conduct "recklessly" if he acts in plain, conscious, and unjustifiable disregard of harm which might result, and the disregard involves a substantial deviation from acceptable standards of conduct.

F. Child's Health Seriously Endangered

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

1. Mental Health

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

2. Physical Health

The court found in Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990), that children who were abused by their father in the past, were endangered by the father's current act of abuse or neglect regarding his girlfriend's child. The Court stated:

> As has been stated, the CHINS statutes do not require that the courts and the Welfare Department wait until a tragedy occurs to intervene; a child is a Child In Need of Services when it is endangered by parental action or inaction. Certainly, a child who has been injured in the past by a parent may be considered endangered when that parent's acts or omissions cause injuries as severe as those sustained in this case to another child in the parent's care. [citation omitted].

Id. at 872.

Alexander v. La Porte Co. Welfare Dept., 465 N.E. 2d 223 (Ind. Ct. App. 1984), is a termination of parental rights case in which the child was removed from the home because she was abused by her

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mother's boyfriend. The injuries noted in Alexander included red marks on the cheek, a swollen nose, a scraped and bruised forehead, a black eye, a large lump on the back of the head, a hypertrophic burn scar due to being forced to sit on a hot radiator, shampoo in the eyes and the mouth, head put into the toilet, and fingers burned with a lighter. Id. at 224, 225. While Alexander is a termination case, the expert testimony at trial on the likelihood of continued abuse may be applicable to the "endangerment" element in a CHINS abuse case. The expert psychologist testified that "statistically, abuse can be expected to recur in a home where conditions have not changed; that is, if the abuser still resides there and changes have not been brought about through counseling." Id. at 225.

3. Shaken Baby Syndrome

In the termination of parental rights case of Waltz v. Daviess County Dept. of Public Welfare, 579 N.E. 2d 138 (Ind. Ct. App. 1991), the infant was removed from the home on the allegation that she was suffering from "shaken baby syndrome." The parents admitted the child was a CHINS, but neither parent took specific responsibility for the shaking in the admission nor gave explanation for the circumstances of the child's injury. Id. at 139, 141. The opinion included expert testimony that "shaken baby syndrome" is defined as "cerebral hemorrhage and possibly permanent atrophy of brain tissue, resulting from the violent shaking of a child younger than eighteen months." Id. at 139. The Court also noted "[u]ncontradicted medical testimony explained that shaken baby syndrome occurs in an instant and is not immediately apparent." Id. at 141. The Court declined to find that the termination could hinge on the shaken baby incident because the evidence showed that the abuse occurred within a narrow time frame, was unaccompanied by other abuse by the mother, it was unclear whether mother was the actual shaker, and the particular abuse of shaken baby syndrome could not recur because of the child's age at the time of the termination hearing. Examining the remainder of the evidence, the Court found that it was insufficient to support termination of mother's rights. The evidence did not show that the mother willfully failed to comply with the welfare programs, id. at 142, or that the mother was aggressive, violent, or abusive to her children, even though she had a history of being forceful and aggressive with adults, id. at 143.

The facts of In Re C.W., 723 N.E. 2d 857 show that the child suffered from Shaken Infant Syndrome. Although the mother admitted the child was a CHINS, she denied causing the injury. See this Chapter above at III. D. for discussion of this case on presumption of CHINS when child is injured while in the care of the parent. In In Re J.J., 711 N.E. 2d 872 (Ind. Ct. App. 1999), the court found that evidence that the child had suffered from Shaken Baby Syndrome supported the termination of parental rights judgment.

Shaken Baby Syndrome was also at issue in several criminal cases. In Ault v. State, 705 N.E. 2d 1078, 1080 (Ind. Ct. App. 1999), the Court affirmed the sentence of a boyfriend who admitted shaking the baby and seeing the baby's head go "back and forth" three to four times. The baby was diagnosed with Shaken Baby Syndrome and suffered retinal hemorrhaging and permanent brain damage. In Baker v. State, 569 N.E. 2d 369 (Ind. Ct. App. 1991), a father was convicted of murder and neglect of dependent for violently shaking his baby, which caused brain hemorrhaging and bruising resulting in death. On appeal, the murder conviction was reversed, but the neglect conviction was upheld. In the neglect of dependent and reckless homicide case, McClaskey v. State, 540 N.E. 2d 41 (Ind. 1989), the Court discussed the Shaken Infant Syndrome (SIS) with regard to the medical needs and eventual death of a nine-month-old child. The Court reported the doctor's opinion on SIS:

> Dr. Hawley found the baby's brain and spinal cord injuries were typical of a unique set of injuries characteristic of Shaken Infant Syndrome. This occurs when a child is held under the arms and violently shaken so that the head oscillates back and forth and the spinal cord snaps. Although the brain and spinal cord injuries would have rendered the baby nearly lifeless, he might still have been capable of crying and minimal movement.

Id. at 43.

G. Corporal Punishment Defense

Indiana law does not prohibit the use of reasonable corporal punishment, but the term "reasonable" is a key issue. IC 31-34-1-15(1) states that the juvenile code does not:

> Limit the right of a parent, guardian, or custodian of a child to use reasonable corporal punishment when

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disciplining a child.

In Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990), the Court of Appeals rejected the respondent's argument that his use of a belt on his children was protected by the corporal punishment defense at IC 31-6-4-3(e) (recodified at IC 31-34-1-15). The Court stated that the "use of a belt on any child under the age of ten is an unreasonable form of corporal punishment." Id. at 871.

In Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824 (Ind. Ct. App. 1995), the Court affirmed a termination of parental rights judgment, in part, on evidence of the father's belief that hitting and using a belt on a child were acceptable and the father's unwillingness to consider different means of discipline. In Matter of C.D., 614 N.E. 2d 591, 595 (Ind. Ct. App. 1993), evidence that father had "not changed his views on corporal punishment" supported the termination judgment.

In In Re Children: T.C. and Parents: P.C., 630 N.E. 2d 1368 (Ind. Ct. App. 1994), the child was removed from the mother because the mother struck him upon the buttocks and face so hard that it left welts. A second child, born after the abuse incident, was also adjudicated CHINS. The welfare department prohibited the mother from using corporal punishment on the children. Subsequently, a termination petition was filed and granted, but the Court of Appeals reversed. The Court found that the welfare department's overt goal of requiring mother to renounce corporal punishment, due to one past incident of unreasonably harsh corporal punishment, was not required of a parent. The Court ruled that only "unreasonable corporal punishment is proscribed by statute." Id. at 1374.

In the divorce custody case of Law v. Law, 676 N.E. 2d 771, 773 (Ind. Ct. App. 1997), the court ruled that a finding of excessive corporal punishment by the father was inconsistent with awarding the father custody.

IV. SEXUAL ABUSE

A. Overview

IC 31-34-1-3, 4, and 5 contain three separate CHINS Sex Abuse categories based on sex crimes committed against, with, or by a child. In determining the specific sex offense and CHINS category applicable to a child, it may be helpful to distinguish the sex offenses upon these factors: (1) age requirement of the child; (2) age requirement of alleged perpetrator; (3) relationship requirement between child and perpetrator (biological, legal-adoptive/step/custodian, or none); and (4) type of sexual act or conduct prohibited.

The CHINS Sex Abuse categories are grouped together in this section because they all involve forms of child sexual abuse, and this section includes generic information about child sexual abuse. However, the three CHINS Sex Abuse categories are also dealt with separately below in this Chapter and Roman Numeral at:

B. Victim of Sex Offense
C. Parental Allowance of Child's Participation in Obscene Performance
D. Parental Allowance of Child's Commission of Sex Offense

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

1. Pleading Multiple CHINS Categories in CHINS Sex Abuse Cases

It may be advisable for the office of family and children to plead multiple CHINS categories when dealing with child sexual abuse. In addition to pleading one of the CHINS Sex Abuse categories, the CHINS Abuse category at IC 31-34-1-2 may be applicable to child sexual abuse, since sexual abuse may constitute an injury by act or omission which seriously endangers the physical and mental health of a child. The rebuttable presumption of CHINS at IC 31-34-12-4 (child presumed to be in need of services if non-accidentally injured while in the care or custody of his parent, guardian or custodian) may be helpful in proving CHINS when the identity of the sexual perpetrator is unknown or uncertain. This may

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apply particularly if the victim is too young to indicate the perpetrator's identity, but has injuries to the sexual organs or a sexually transmitted disease only possible through illegal sexual activity. The CHINS Neglect category at IC 31-34-1-1 might also be an appropriate pleading against a parent who allows, or does not protect a child from sexual abuse. Arguably Child Self Endangerment at IC 31-34-1-6 could also apply, if a child is endangered by sexual activity but the identity of the perpetrator cannot be proven.

The need for multiple CHINS pleadings was clarified in Maybaum v. Office of Family & Children, 723 N.E. 2d 951 (Ind. Ct. App. 2000). In Maybaum the office of family and children alleged in the CHINS petition that the child was a victim of sexual molestation by her adopted father under the CHINS Sex Abuse category at IC 31-34-1-3. At the factfinding hearing, the office of family and children caseworker testified to medical examination results that showed "clear evidence of penetrating injury" to the child, but the results did not identify a perpetrator. Id. at 952. The child's testimony was equivocal as to whether her father was the molester. The trial court entered findings of fact and conclusions of law that the child was the victim of molestation and that there were incidents of sexual activity and abuse over the past six years, including masturbation, sexual exploration, and contact with siblings. Although the trial court concluded there was insufficient evidence to find that the father molested the child as alleged by the office of family and children, the trial court concluded that the child fit within the CHINS Abuse category, IC 31-34-1-2, because the father had a legal responsibility to care for the child and by either the father's act or omission he failed to protect the child from injury. In reversing the CHINS judgment, the Court of Appeals concluded that the office of family and children did not give the parents notice that they were required to defend against a claim that they had failed to protect the child. The Court stated that "[t]o permit the trial court to base its decision upon a theory not set forth by the OFC would contravene the purpose of the CHINS statutes, which specifically require the OFC to provide a citation to the precise section of the CHINS statute and the specific facts underlying the allegation." Id. at 956.

2. Must State Prove all Elements of the Criminal Charge? Perpetrator and Criminal Intent?
Each CHINS Sex Abuse category is based on the commission of a particular sexual crime. There has been disagreement on whether all of the elements of the alleged criminal sex offense must be proven in the CHINS litigation. There are two different positions on this issue. One position contends that the child cannot be a victim unless there is a crime, and there is no crime without proof of all of the elements of the crime, including identity of the perpetrator. The other position contends that the "victim of sex offense" category only requires proof that the child is a victim, and that victimization can be proven without proving who committed the crime or that the perpetrator had the requisite criminal intent.

In Maybaum v. Office of Family & Children, 723 N.E. 2d 951 (Ind. Ct. App. 2000), the Court of Appeals ruled it was error for the trial court to enter judgment that the child was a CHINS under the theory that the child had been abused by the father's act or omission of failing to protect the child from molestation, because the office of family and children had only pled and litigated the CHINS Sex Abuse category on the theory that the father was the molester. The Court did not specifically address the contention of the office of family and children that the office had met the requirements for the Sex Abuse CHINS category at IC 31-34-1-3 by showing that the child was molested (even absent proof that the father was the molester). Id. at 953. Therefore, the case may leave open the question of whether the office of family and children can prove a child is a victim of a sex offense under IC 31-34-1-3, if the office does not plead a specific perpetrator and/or a specific perpetrator cannot be proven by a preponderance of the evidence. There is no case law addressing whether proof of criminal intent is necessary to show that the child is a victim of a sex offense for purposes of the CHINS law. Therefore criminal law on intent may be relevant. Criminal case law requires proof of a criminal state of mind (intent) even when that element is not included in the statute. See State v. J.D., 701 N.E. 2d 908, 909 (Ind. Ct. App. 1998) (delinquency case holding that criminal intent required for all sections of child molestation statute); Warren v. State, 701 N.E. 2d 902, 905 (Ind. Ct. App. 1998) (criminal intent required in crime of sexual misconduct with a minor). Intent may be established by circumstantial evidence and inferred from the actor's conduct and the natural consequences therefrom. See Nuerge v. State, 677 N.E. 2d 1043, 1049 (Ind. Ct. App. 1997); but see J.H.v. State, 655 N.E. 2d 624, 626 (Ind. Ct. App. 1995) (twelve-year-old girl's act of flicking little boys on the penis over their clothes hard enough to hurt might constitute battery, but this act alone was insufficient to show intent to molest).

To date there are no reported CHINS cases challenging the lack of specificity in pleading the date of the alleged sexual act or acts in the CHINS petition, but it is assumed that the juvenile court would give very

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broad latitude in pleading. In criminal child sex abuse cases the Court has affirmed a lack of specificity in pleading the date of the alleged sexual acts. See Brewer v. State, 562 N.E. 2d 22, 24 (Ind. 1990) (criminal charge alleged that sexual acts occurred on or about the month of February, 1987); Hodges v. State, 524 N.E. 2d 774, 779 (Ind. 1988) (criminal charge alleged that child molestation occurred from August 1982 to September 1984).

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

The uncorroborated testimony of a child victim is sufficient to support a criminal sex abuse conviction. Spurlock v. State, 718 N.E. 2d 773 (Ind. Ct. App. 1999); but see Maybaum v. Office of Family & Children, 723 N.E. 2d 951 (Ind. Ct. App. 2000) (trial court found that equivocal testimony of child did not support CHINS finding that child was molested by father).

4. Attempted Child Sexual Abuse
If a child is being solicited to participate in sexual acts, this may constitute an "attempt" to commit child molestation, which could give rise to a criminal charge under IC 35-41-5-1, and possibly a CHINS petition. In Shahan v.State, 669 N.E. 2d 1012 (Ind. Ct. App. 1996), the defendant was charged in criminal court with attempted child molestation for asking his twelve-year-old daughter twice if she would touch him sexually. In affirming the defendant's conviction, the Court of Appeals ruled that the defendant's solicitation could be characterized as an urging that his daughter fondle him, and such conduct amounted to a criminal attempt. The evidence was sufficient to support the determination that the father "engaged in an overt act which constituted a substantial step toward the commission of child molesting." Id. at 1014. See also Mettler v. State, 697 N.E. 2d 502, 504 (Ind. Ct. App. 1998) (father's one-time-only letter to daughter to come into front room "some night" so he could perform sexual acts with her and mention of payment, did not constitute attempted incest); Stevens v. State, 580 N.E. 2d 274, 276 (Ind. Ct. App. 1991) (attempted child molesting conviction affirmed on evidence that defendant pulled child's pants and underwear down, pushed his penis against child, and stopped this conduct when he heard child's mother returning from store); Benson v. State, 574 N.E. 2d 934, 935 (Ind. Ct. App. 1991) (attempt conviction affirmed on defendant's repeated verbal attempts to persuade victim to engage in sexual intercourse); Coleman v. State, 409 N.E. 2d 647, 648 (Ind. Ct. App. 1980) (attempted child molesting conviction affirmed on evidence that nude defendant awoke nine-year-old child in her bedroom and attempted to touch her back).

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

Children can be held responsible for their illegal sexual acts under the delinquency provision of the juvenile code. In State v. J.D., 701 N.E. 2d 908 (Ind. Ct. App. 1998) the Court upheld the delinquency charge for child molestation by a fourteen-year-old perpetrator.

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6. Using Criminal Conviction in CHINS Sexual Abuse Case
In cases of child sexual abuse, it is common to have both CHINS and criminal proceedings filed regarding the same acts of sexual abuse. The juvenile court may continue the CHINS proceeding to allow completion of the criminal case. When this happens, the office of family and children may admit the criminal felony conviction as evidence of the sexual abuse in the CHINS case if the requirements of IC 34-39-3-1 are met. See Kimberlin v. DeLong, 637 N.E. 2d 121, 124-125 (Ind. 1994) (criminal felony judgment is admissible in civil trial and can serve as basis for offensive use of collateral estoppel to bar defendant from denying liability, but may not necessarily serve as conclusive proof in civil trial of factual issue determined by criminal judgment); Hawkins v. Auto Owners (Mut.) Ins. Co., 608 N.E. 2d 1358 (Ind. 1993) (evidence of criminal conviction admissible in civil proceeding). See also Ind. Evidence Rule 803(22) (hearsay exception for felony judgment); Meridian Ins. Co. v. Zepeda, 734 N.E. 2d 1126 (Ind. Ct. App. 2000) (trial court erred when it failed to grant insurance company's summary judgment motion against convicted battery defendant and allowed defendant to relitigate issue of his intent in declaratory judgment action); Doe v. Tobias, 715 N.E. 2d 829 (Ind. 1999) (abuse of discretion to deny collateral estoppel effect to rapist's conviction).

7. Rights of Alleged Sex Offenders
If the alleged sex offender in the CHINS case is the child's parent, guardian, or custodian, then the offender is entitled to receive notice of the proceedings, IC 31-34-10-2, to deny the CHINS petition, IC 31-34-10-6, and to subpoena witnesses and tangible evidence, cross-examine witnesses, and present evidence in his/her own behalf at the factfinding hearing, IC 31-32-2-3(b). The juvenile code does not give the alleged offender the constitutional or statutory protections reserved for persons charged with crimes, since CHINS proceedings are civil proceedings, not criminal proceedings. The civil rules of procedure apply in CHINS cases, IC 31-32-1-3. The alleged offender does not have a right to a jury trial, IC 31-32-6-1, but alleged offenders who are the child's parent, guardian or custodian may request counsel under the civil statute, IC 34-10-1-2, if they are indigent. The CHINS standard of proof is preponderance of the evidence. IC 31-34-12-3.

   The juvenile code does not specifically provide any rights, or grant party status, to alleged perpetrators who are not the child's parent, guardian, or custodian. In fact, IC 31-34-10-6 provides that the child's parent, guardian, or custodian may admit the CHINS petition, thereby possibly eliminating the ability of perpetrators who are not the parent, guardian, or custodian to vindicate themselves in the juvenile court. However, a stepparent, live-in boyfriend, or live-in relative who is the alleged perpetrator may qualify as a custodian for purposes of obtaining party status and contesting the CHINS allegation. The term "custodian" is defined very broadly in the juvenile code at IC 31-9-2-30 as "a person with whom a child resides."

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

8. Child Sex Offenses Not Included in CHINS Statutes
The offense of child solicitation, IC 35-42-4-6 (person eighteen years of age and older can't solicit sex acts from child under fourteen years of age) and the offense of vicarious sexual gratification, IC 35-42-4-5 (person eighteen years of age or older can't cause child under sixteen to fondle himself for vicarious sexual gratification) are criminal sex offenses that do not serve as grounds for a CHINS determination of child sexual abuse.

9. Reasonable Efforts toward Reunification not Required for Parent Convicted of Specified Sex Offenses
IC 31-34-21-5.6 provides that a court can enter a finding that reasonable efforts toward parent-child reunification are not required when the parent has been convicted of rape, criminal deviate conduct, child molesting, child exploitation, sexual misconduct with a minor, or incest, and the victim was less than sixteen years of age, and was the parent's biological, adopted, or step child. When the trial court makes a ruling under this provision, expedited permanency proceedings are required and expedited termination proceedings are required. See Chapter 4 at VII. C. for further discussion on reasonable efforts exception.

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10. Termination Cases Involving Sexual Abuse

Sexual abuse is a common factor in termination cases. See Adams v. Office of Fam. & Children, 659 N.E. 2d 202, 206 (Ind. Ct. App. 1995) (evidence of father's sexual abuse, mother's efforts to make one child retract her sexual allegations, and parents' failure to complete sexual abuse treatment, was sufficient to support termination); Matter of Relationship of M.B., 638 N.E. 2d 804, 807 (Ind. Ct. App. 1994) (termination affirmed on evidence of abnormal sexual behavior of children indicating they had been subjected to, or exposed to, inappropriate sexual activity, i.e. one child performed oral sex on foster mother's child; one child acted out sexually to the foster mother, etc.); Matter of Y.D.R., 567 N.E. 2d 872, 877 (Ind. Ct. App. 1991) (the court rightfully considered evidence that mother cohabited with a man suspected of being a child molester because mother took no actions to alleviate welfare department's concerns that he was a danger and the boyfriend refused suggested counseling).

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

11. Possible Criminal Charges in Child Sexual Abuse

A parent, guardian or custodian can be charged with a specific sexual crime (such as child molest, incest, etc) for acts perpetrated upon the child. When parents have failed to protect their children from sexual abuse they may be charged with criminal neglect of dependent or failure to report child abuse. In Muehe v. State, 646 N.E. 2d 980 (Ind. Ct. App. 1995), the mother was convicted of neglect of dependent for failing to take steps to prevent the father's continued sexual abuse of their fourteen-year-old daughter. The Court affirmed the conviction upon the mother's incriminating statement and the following evidence: the mother knew the father had previously been convicted of fondling the daughter; the father discussed his sexual feelings for the daughter with the mother; the family had ceased professional counseling; the mother's proximity to the sexual events in a small house should have put her on notice; and the daughter had developed behavioral problems. The Court inferred from the above circumstances that the mother had knowledge of the abuse, stating that the "nature of the peril" to which the child had been exposed was such that the mother should have been aware of the father's sexual conduct. Id. at 983. The mother had an obligation as a parent to remove the daughter from the situation and to prevent her husband from spending time alone with the child, or at the very least, to report her suspicions to the proper authorities. Id. The mother argued that she had no legal right to remove the child from the father or to place restrictions on the father-child relationship, and that she was powerless to prevent the continuing abuse. The Court rejected the argument noting the many alternatives available to the mother to protect the child: "counseling, separation, divorce, and/or contacting the proper authorities." Id. 984. If the family was "not intact" the mother could protect the child by legally challenging court approved visitation or seeking an emergency injunction or restraining order to stop visitation. Affirming the conviction, the Court stated:

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

Id. at 983-84.

In the criminal neglect of dependent case of Harrison v. State, 644 N.E. 2d 888 (Ind. Ct. App. 1994), the female defendant had the care of a twelve-year-old girl, an eleven-year- old girl, and an infant. She took them to a nursing home to visit a male patient who had a reputation of exposing and touching himself in public and touching women. While in the patient's room, the defendant demonstrated fellatio to the girls using her finger as a model. The girls then performed fellatio on the patient and the defendant told them afterward not to tell anyone. The defendant was charged and convicted of criminal neglect of a dependent. On appeal, the defendant argued the evidence was insufficient to prove that her conduct threatened the girls' life or health. She claimed that the deletion of the phrase "moral well-being" from

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the current criminal neglect statute strongly indicated a legislative intent that conduct affecting the moral welfare of children no longer constitutes neglect. Id. at 890. The Court rejected the defendant's argument and concluded that the criminal neglect statute applies to the psychological, mental, and emotional injuries, which are inflicted on children by deviate conduct. The Court held that the evidence was sufficient to show that the defendant knowingly placed the children in a situation that threatened their life or health.

B. Victim of Sex Offense

1. Statute

IC 31-34-1-3 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child is the victim of a sex offense under:
(A) IC 35-42-4-1 [rape];
(B) IC 35-42-4-2 [criminal deviate conduct];
(C) IC 35-42-4-3 [child molestation];
(D) IC 35-42-4-4 [exploitation];
(E) IC 35-42-4-7 [seduction];
(F) IC 34-42-4-9 [sexual misconduct with a minor];
(G) IC 35-45-4-1 [indecency];
(H) IC 35-45-4-2 [prostitution]; or
(I) IC 35-46-1-3 [incest]; and
(2) the child needs care, treatment, or rehabilitation that the child:
(A) is not receiving, and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

2. Generally

This CHINS category includes a child who has been sexually abused by any person, including (but not limited to) the child's parent, guardian, or custodian. See 1979 Op. Atty. Gen. No. 79-28. When the perpetrator is not the child's parent, guardian, or custodian, a CHINS action will be initiated only if the parent, guardian, or custodian is unable to protect the child from the perpetrator or is unable to provide necessary care and treatment for the child.

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

Each of the criminal sex offenses included in this section are summarized below, but see Appendix 1 for full text of each offense. See also this Chapter above at IV. A. 1. through 11 for discussion of issues relevant to this CHINS Sex Abuse category.

3. Rape

Rape occurs when a person (no age specified) has sexual intercourse with a victim (no age specified) of the opposite sex, if the intercourse is either (1) compelled by force or threat of force; (2) the victim is unaware the intercourse is occurring; or (3) the victim is so mentally disabled or deficient that the victim cannot give consent to the intercourse.

4. Criminal Deviate Conduct

Criminal deviate conduct occurs when a person (no age limit) causes a victim (no age limit) to perform or submit to deviate sexual conduct under one or more of these conditions: (1) the conduct is compelled by force or threat of force; (2) the victim is unaware the conduct is occurring; or (3) the victim is so mentally disabled or deficient that the victim cannot give consent to the conduct.

The term “deviate sexual conduct” means an act involving either (1) the sex organ of one person and the mouth or anus of another; or (2) the penetration of the sex organ or anus by an object.

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5. Child Molesting
The offense of child molesting has been amended several times and there is frequent confusion about the required elements of the age of the child and the perpetrator. The significant elements are summarized as: (1) age of child victim - child under the age of fourteen; (2) age of the perpetrator -no age requirement; (3) legal or biological relationship between the victim or perpetrator - none required; (4) prohibited sex acts - performing or submitting to sexual intercourse or deviate sexual conduct, or performing or submitting to fondling or touching with the intent to arouse or satisfy sexual desires.

The child molesting statute applies to offenders regardless of their age, and even applies to offenders who fall within the protected age group set forth in the statute for victims. See State v. J.D., 701 N.E. 2d 908 (Ind. Ct. App. 1998) (fourteen-year-old found delinquent for criminal offense of child molestation).

See this Chapter above at IV. A. 3. for sufficiency of evidence in child molestation.

6. Child Exploitation and Possession of Pornography
Child exploitation provides that it is illegal to create, exhibit, or disseminate photographs, films or videotapes depicting the sexual conduct of a child under eighteen years of age. It is also illegal to possess drawings or filmed material depicting or describing sexual conduct by a child less than sixteen years of age.

In Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691 (1990), the U.S. Supreme Court upheld an Ohio statute criminalizing the possession of material and performances showing a minor in a state of nudity, against the defendant's First Amendment and overbreadth challenges. The Court found that the state had a compelling interest in controlling the possession of child pornography. Quoting from one of its earlier opinions, the Court stated that:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."... The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Osborne at 1696, quoting New York v. Ferber, 458 U.S. 747, 756-758.

7. Child Seduction
Child seduction occurs when a person eighteen years of age or older performs or submits to intercourse or deviate sexual conduct with a victim who is sixteen or seventeen years of age. The older person must be the guardian, adoptive parent, adoptive grandparent, custodian, stepparent, or child care worker for the younger person. In State v. D.M.Z., 674 N.E. 2d 585 (Ind. Ct. App. 1996), the Court affirmed the dismissal of three counts of child seduction, holding that the residential care worker who allegedly seduced a child did not qualify as a "custodian" for purposes of this statute.

8. Sexual Misconduct with a Minor
Sexual misconduct with a minor occurs when a person at least eighteen years of age performs or submits to sexual intercourse, deviate sexual conduct, or sexual touching with a victim fourteen or fifteen years of age.

9. Incest
Incest occurs when a person eighteen years or older engages in sexual intercourse or deviate sexual conduct with another person (no age required) that he/she knows is related biologically as a parent, child, grandparent, grandchild, sibling, aunt, uncle, niece or nephew. In Bohall v. State, 546 N.E. 2d 1214, (Ind. 1989), the Indiana Supreme Court overruled prior law to hold that the incest statute includes a biological father who has intercourse with his minor daughter after the daughter has been adopted by another person.

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

1. Statute
IC 31-34-1-4 provides that a child is a child in need of services if before the child becomes eighteen (18)

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years of age:

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

2. Obscene Performance Crimes
Three criminal statutes are relevant to this CHINS category. IC 35-49-2-2 states:

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

IC 35-49-3-2 provides:

> A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance commits a Class A misdemeanor. However, the offense is a Class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.

IC 35-49-2-1 defines obscene performance. It is included here because IC 35-49-2-3 (contained in the CHINS statute) refers to any obscene performance. IC 35-49-2-1 states:

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

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

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

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

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In the criminal case of Riffel v. State, 549 N.E. 2d 1084 (Ind. Ct. App. 1990), the Court addressed the issue of obscene performances in the home. In Riffel, the father required his five-year-old child to watch the father have intercourse with the father's girl friend. The Court determined, sua sponte, that acts committed in the privacy of the home could not constitute an obscene performance. The Court stated:

> In our opinion, the purpose of those statutes [obscene performance and matter statutes], and the legislative intent revealed by the language used, is to prohibit obscene performances of a theatrical, show, or entertainment nature, performed live, or on film or video, before an audience, and not to ban an act in a private setting, no matter how disgusting... (material in brackets added).

Id. at 1088.

In his dissent, Judge Hoffman noted that the father's sexual acts constituted an obscene performance and that the son's presence constituted an audience, as is required for the obscene performance statute. Id. at 1089. Judge Hoffman found that the legislation does not exclude obscene performances done in a private setting, and noted that the right to privacy does not authorize persons to engage in sexual intercourse at all times and places of their choosing. Id.

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

1. Statute
IC 31-34-1-5 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

   (1) the child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by IC 35-45-4 [offenses of public indecency, prostitution, and voyeurism]; and
   (2) the child needs care, treatment, or rehabilitation that the child:
      (A) is not receiving, and
      (B) is unlikely to be provided or accepted without the coercive intervention of the court.

2. Prohibited Sex Offenses
IC 35-45-4 contains five offenses of public indecency, prostitution, and voyeurism, listed below.

IC 35-45-4-1. Public Indecency; Indecent Exposure
IC 35-45-4-2. Prostitution
IC 35-45-4-3. Patronizing a Prostitute
IC 35-45-4-4. Promoting Prostitution
IC 35-45-4-5. Voyeurism (Peeping)

See Appendix 1 for text of these crimes.

3. State of Mind and Act or Omission of Parent, Guardian, or Custodian
See this Chapter above at IV. C. 3. for discussion on the term "allows."

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

V. CHILD ENDANGERMENT OF SELF OR OTHERS

A. Statute
IC 31-34-1-6 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

   (1) the child substantially endangers the child's own health or the health of another individual;
   (2) the child needs care, treatment, or rehabilitation that the child:

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

B. Generally

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

This category may be appropriate for children exhibiting suicidal behavior or substance addiction, endangering sexual activity, pregnant teens without prenatal care, or children exhibiting aggressive or violent behavior due to emotional disability or mental illness. It may also be appropriate for children committing the status delinquency acts of running away, truancy, incorrigibility, repeated curfew violations, and alcohol offenses, if these acts are committed in such a way (or to such an extent) that the child's physical or mental health is substantially endangered. See Hodgkins v. Peterson, 2000 WL 892964 (S.D. Ind.) (Indiana's curfew law is overbroad in violation of the First Amendment).

The child endangerment category, IC 31-34-1-6, has often been used to deal with children who have run away from home. IC 31-34-1-8 created a CHINS category on missing children which may also be appropriate for dealing with runaway children. A missing child is defined, in part, as a child who is a temporary or permanent resident of Indiana whose location cannot be determined by the child's parent or legal custodian. See this Chapter below at VII. for discussion on missing children.

C. Rights of Child

IC 31-34-10-7 provides that the child, not the parent, guardian or custodian, must admit or deny the allegation of endangerment to self or others. Presumably this prevents exclusion of the child from the proceedings under IC 31-32-6-4. IC 31-34-10-3 requires that a child who is alleged under IC 31-34-1-6 to endanger his own health or the health of others, shall have a guardian ad litem or court appointed special advocate (CASA) appointed for him/her at the initial hearing.

Special effort should be made to protect the rights of the child in this CHINS category. The child may not be competent to make an admission due to age or immaturity, and the allegations of endangerment to self or others may constitute acts that could be charged as delinquent offenses against the child. The court is encouraged to appoint counsel for the child under IC 31-32-4-2 if appointment of a guardian ad litem or CASA will not adequately protect the legal interests of the child.

D. Case Law

In Re Heaton, 503 N.E. 2d 410 (Ind. Ct. App. 1986), is an Indiana case that specifically mentions the self-endangerment category. In Heaton a child ran away from a private Indiana residential facility after being placed there by his parents. The child was apprehended and detained in Hendricks County. The child later made an admission that he was a child in need of services on the ground of self-endangerment. The parties to the appeal did "not dispute the fact that, by running away, James [the child] endangered his health." Id. at 412.

VI. PARENTAL FAILURE TO PARTICIPATE IN SCHOOL DISCIPLINARY PROCEEDING

A. Statute

IC 31-34-1-7 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's parent, guardian, or custodian fails to participate in a disciplinary proceeding in connection with the student's improper behavior, as provided for by IC 20-8.1-5.1-19, if the behavior of the student has been repeatedly disruptive in the school; and
(2) the child needs care, treatment, or rehabilitation that the child:
(A) is not receiving, and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

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

B. School Rules Requiring Parental Participation in Discipline Proceeding

IC 20-8.1-5.1-19 states:

> The governing body of a school corporation may adopt rules that require a person having care of a dependent student to participate in an action taken under this chapter in connection with a student's behavior. The rules must include the following:
> (1) Procedures for giving actual notice to the person having care of the dependent student.
> (2) A description of the steps that the person must take to participate in the school corporation's action.
> (3) A description of the additional actions in connection with the student's behavior that are justified in part or in full if the person does not participate in the school corporation's action.

This statute gives the school broad authority to include the parents in the child's disciplinary procedure; however, it is essential that the school give actual notice of what action is required of the parents. Practitioners should be aware of the rights of children and parents in the various discipline actions outlined in the sections below. Any rights granted to a student or a student's parent under the school discipline laws may be waived only by a written instrument signed by both student and parent. IC 20-8.1-5.1-21.

C. School Disciplinary Actions

School law provides a range of actions and discretion in dealing with discipline issues in the school. The principal has broad discretion to take action reasonably necessary to carry out or prevent interference with an educational function or school purpose, IC 20-8.1-5.1-5, and the school superintendent and principal can establish regulations and guidelines for discipline procedures, IC 20-8.1-5.1-7(b). The school corporation "must" establish written discipline rules, and provide notice of the rules. IC 20-8.1-5.1-7(a). As a disciplinary action a child may be suspended from school for up to ten days, IC 20-8.1-5.1-12, or expelled for a longer period of time, IC 20-8.1-5.1-14. Expulsion is mandatory if the child's conduct involves firearms or a deadly weapon. IC 20-8.1-5.1-10. Teachers and school staff are authorized under IC 20-8.1-5.1-18 to require the following disciplinary action: counseling, parent conferencing, additional homework, rearranging class schedules, after school attendance, restricting extracurricular activities, removal of the student from class, assignment to service at a non-profit organization, reassignment by the principle to an alternative educational program or an alternative school.

See Chapter 3 at II. H. 5. for case law on limited authority of juvenile court to override school expulsion of child adjudicated CHINS or delinquent.

VII. MISSING CHILD

A. Statute

IC 31-34-1-8 provides that a child is a child in need of services if before the child becomes eighteen (18) years of age:

> (1) the child is a missing child (as defined in IC 10-1-7-2); and
> (2) the child needs care, treatment, or rehabilitation that:
> (A) the child is not receiving, and
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

To initiate a case under this CHINS category, the requirements for "missing child" status must be met as stated in IC 10-1-7-2. See immediately below for text of IC 10-1-7-2.

B. Defining Missing Child

IC 10-1-7-2 states that a "missing child" means a person less than eighteen (18) years of age who:

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(1) is, or is believed to be:
(A) a temporary or permanent resident of Indiana;
(B) at a location that cannot be determined by the person's parent or legal custodian; and
(C) reported missing to a law enforcement agency; or
(2) is, or is believed to be:
(A) a temporary or permanent resident of Indiana; and
(B) a victim of the offense of criminal confinement (IC 35-42-3-3) or interference with custody (IC 35-42-3-4).

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

C. Reporting and Locating a Missing Child
See Chapter 4 Roman Numeral I. at section I., 1 through 4 for detailed discussion on reporting and locating missing children.

VIII. ALCOHOL OR DRUG AFFECTED NEWBORNS AND YOUNG CHILDREN

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

A. Alcohol or Drug Affected Newborns
IC 31-34-1-10 states that except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

(1) the child is born with:
(A) fetal alcohol syndrome; or
(B) any amount, including a trace amount, of a controlled substance or a legend drug in the child's body; and
(2) the child needs care, treatment, or rehabilitation that:
(A) the child is not receiving; or
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

B. Injury, Abnormal Development, or Endangering Condition Caused by Mother's Substance Use During Pregnancy
IC 31-34-1-11 states that except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

(1) the child:
(A) has an injury;
(B) has abnormal physical or psychological development; or
(C) is at a substantial risk of a life threatening condition;
that arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy; and
(2) the child needs care, treatment, or rehabilitation that the child:
(A) is not receiving; or
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

C. Summarizing the Elements of Proof for Both CHINS Categories
These two CHINS categories have been grouped together because of their similarities, but they also have significant differences. The first category (IC 31-34-1-10) involves children who are diagnosed at birth with fetal alcohol syndrome or having a trace amount of a controlled substance or legend drug in their systems.

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These newborns need not be addicted to, or show any signs of injury from, the trace amount of substance in their systems. Expert medical testimony may be needed to prove the existence of substances in the child's system or fetal alcohol syndrome.

The second CHINS category (IC 31-34-1-11) requires proof that the child has an injury, impairment, or risk of life-threatening condition that is caused or aggravated by the mother's use of alcohol or drugs during pregnancy. Although the first category dealt with newborns, there is no age requirement for this category, although presumably the diagnosis would be made when the child was very young. Both categories require proof of the child's age and that the child needs treatment that will not be provided without coercive court intervention.

The terms "legend drug" and "controlled substance" are defined in Article 9 of the Juvenile Code with cross-references to more specific definitions in Title 35 and Title 16. Generally, it is considered that the term "controlled substance" includes illegal street drugs, i.e. heroin, LSD, cocaine, etc., whereas "legend drug" includes drugs which require a prescription. This is only a general guideline and has many exceptions. The legal definitions should be consulted carefully regarding the particular drug involved.

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

In 1994, the legislature created a defense for these CHINS categories. The defense provides that a child is not a CHINS if the mother had a valid prescription for the controlled substance or legend drug that was detected in the child's body at birth, or the mother had a valid prescription for the controlled substance or legend drug that she consumed during pregnancy that caused damage or endangerment to the child's development. See IC 31-34-1-12 and 13. Further, the mother must show that she made a good faith attempt to use the drug according to prescription instructions. Id.

E. Obtaining Drug Testing on Newborns in Hospital

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

F. Mandatory Reporting

The CHINS categories of IC 31-34-1-10 and 11 are included in the definition of "victim of child abuse or neglect." Therefore, these two CHINS categories must be reported under the mandatory child abuse and neglect reporting law at IC 31-33-5-1.

G. Termination Cases Involving Drug Affected Children

There are no reported CHINS cases based on IC 31-34-1-10 or 11; however, the following termination cases seemingly originated from CHINS cases based on drug affected newborns: In Re Wardship of R.B., 615 N.E. 2d 494, 495 (Ind. Ct. App. 1993) (CHINS petition based, in part, on allegation child was born addicted to controlled substance or legend drug and mother used crack cocaine); Odom v. Allen County DPW, 582 N.E. 2d 393, 394 (Ind. Ct. App. 1991) (on day after child's birth, child and mother tested positive for cocaine and child was removed from mother who later admitted CHINS).

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