

5.4 Diversion

- A. Diversion Plan
 - B. Diversion Contract
 - C. Court Counselor's Records of Diversion Plans and Contracts
-

5.4 Diversion

A. Diversion Plan

Discretion of juvenile court counselor. Diversion is the determination by a juvenile court counselor that a petition will not be filed in juvenile court even though the complaint is legally sufficient to allege a delinquent act. The juvenile court counselor has discretion to divert any complaint unless the alleged offense is nondivertible. G.S. 7B-1706(a); *see supra* “Nondivertible and divertible offenses” in § 5.3A, Preliminary Inquiry. Because discretion to divert a case rests primarily with the juvenile court counselor, the court counselor has significant influence over the outcome of individual cases.

In some judicial districts, juvenile court counselors require an admission from a juvenile as a condition for diverting a case. Although this compels the juvenile to incriminate him or herself, there is no clear redress. The Juvenile Code grants juvenile court counselors wide discretion over the decision to divert cases, and there is no statutory authority for a court to review a court counselor's exercise of that discretion. If the decision to divert a case is contingent on the juvenile admitting responsibility, counsel should advise the juvenile of the consequences of an admission.

Terms of plan. The juvenile court counselor may formulate a plan of diversion that includes referral to community resources. Referral to the following resources may be included in a diversion plan:

- an appropriate public or private resource;
- a program to help the juvenile earn funds to pay restitution;
- a community service program;
- victim-offender mediation;
- regimented physical training;
- counseling; and
- a teen court program

G.S. 7B-1706(a).

In the discretion of the juvenile court counselor, a diversion plan may be incorporated into a formal diversion contract, which has more extensive requirements. G.S. 1706(a), (b); *see infra* § 5.4B, Diversion Contract.

A public or private resource might include mental health counseling, an after-school program, a tutoring program, or substance abuse counseling. The diversion plan should address any underlying problems of the juvenile or the juvenile's family and seek to prevent future involvement with the juvenile or the criminal justice system.

Many counties have restitution, community service, mediation, counseling, and teen court programs. As of the writing of this manual there is no regimented physical training program offered in North Carolina.

B. Diversion Contract

Contract requirements. A juvenile court counselor may enter into a diversion contract with the juvenile and the juvenile's parent, guardian, or custodian with their consent. The juvenile court counselor must provide copies of the diversion contract to the juvenile and the juvenile's parent, guardian, or custodian after signing.

The diversion contract must set forth: the conditions agreed to by the juvenile and parent; the responsibilities of the juvenile court counselor; the length of the contract, which is not to exceed six months; and an explanation that violation of the contract by the juvenile may result in the filing of a petition, while successful completion will preclude the filing of a petition. G.S. 7B-1706(b). If the diversion contract includes a referral to local programs, defense counsel should advise the juvenile and the juvenile's parent, guardian, or custodian to comply with any rules or instructions issued by the programs because the failure to do so could result in the termination of the diversion contract and the filing of a petition.

If a diversion contract is executed, the statute directs the juvenile court counselor to mark the *complaint* "Not Approved for Filing" as well as "Diverted and Retained." G.S. 7B-1703(c). In practice, this information is written on the juvenile petition form provided by the North Carolina Administrative Office of the Courts, also used by the juvenile court counselors to record the complaint. See [Form AOC-J-310](#) (Juvenile Petition (Delinquent)) (Oct. 2008). The form also provides a section labeled "Post-Diversion Approval for Filing of Petition." This means that if a petition is later filed, the district court judge will know before adjudication that the juvenile violated a diversion contract. Nevertheless, defense counsel should object if the State presents evidence during the adjudication hearing about alleged violations of the diversion contract on the ground that such evidence is irrelevant to determining whether the juvenile committed the offense described in the petition.

Determination of compliance. Within 60 days of diversion, the juvenile court counselor must determine whether the juvenile and the juvenile's parent, guardian, or custodian have complied with the terms of the diversion plan or contract. G.S. 7B-1706(e). The juvenile court counselor must contact referral resources to determine whether there has been compliance with their recommendations for treatment or services. *Id.* If there has not been compliance, the juvenile court counselor may authorize the filing of a petition within 10 days of the determination of non-compliance. *Id.* If a petition is not authorized,

the juvenile court counselor may continue the diversion plan or contract for up to six months from the date of diversion. *Id.* Failure to comply at any point during the continuance may result in the filing of a petition.

If a petition is filed because of non-compliance, defense counsel should investigate the nature of the violation of the diversion plan. This information should be accessible to the attorney through the juvenile court file. Counsel might be able to persuade the juvenile court counselor to reconsider going forward with the petition by providing information that explains or excuses the violation. A sincere recommitment to the terms of the diversion plan by the juvenile and parent may also convince the juvenile court counselor not to go forward with the filing of the petition.

Termination. A plan or contract for diversion ends upon the filing of a petition, upon the expiration of the term of the plan or contract, or six months after the date of diversion if no petition has been filed. G.S. 7B-1706(b), (e).

C. Court Counselor's Records of Diversion Plans and Contracts

The juvenile court counselor is required to maintain a file of diversion plans and contracts for determining whether a complaint has been previously diverted. These are not public records and are not to be included in any juvenile court record maintained by the clerk of superior court. The plans and contracts must be destroyed when the juvenile reaches the age of 18 or is no longer under the jurisdiction of the juvenile court, whichever is longer. G.S. 7B-1706(d).

In some circumstances, a court may be able to consider a diversion plan or contract at disposition. In an unpublished decision, a juvenile court counselor recommended a higher dispositional level because, among other things, the juvenile had entered into two previous diversion plans for past offenses. *In re T.P.*, 194 N.C. App. 200 (2008) (unpublished). The Court of Appeals held that it was permissible for the trial court to take the court counselor's recommendation into consideration. *Id.* The decision does not address the extent to which a court may rely on diversion plans or on allegations about how the juvenile violated the terms of the plans. Counsel should object if the State presents inadmissible evidence at disposition about a diversion plan or the juvenile's alleged non-compliance. Although the trial court is permitted to consider reliable hearsay during a dispositional hearing, G.S. 7B-2501(a), out-of-court statements that led to the termination of a diversion contact may be too unreliable to support a dispositional order or even be considered. For example, statements about the juvenile's non-compliance likely occurred outside court and might involve multiple layers of unreliable hearsay. Further, statements the juvenile made when entering the diversion contract or during the period of the contract may have occurred while the juvenile was not represented by counsel and might implicate constitutional or statutory rights.