



Wisconsin



Diversion



Standards

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## Wisconsin Diversion Standards Introduction

In Wisconsin, there has been increased interest regarding alternatives to incarceration and diversion of individuals from the criminal justice system into treatment and other appropriate services to meet their assessed needs. Much of this momentum has been focused on problem-solving (or treatment) courts, which have an established model and have increased rapidly in Wisconsin in recent years. However, there has also been an increased interest in and expansion of other types of diversion programs.

The overall expansion can largely be attributed to the expansion of the state-funded [Treatment Alternatives and Diversion](#) (TAD) program. TAD has undergone numerous expansions in funding and has increased from originally funding 9 counties (through 2013) to funding 53 counties and three tribes for calendar year 2021. Another factor in the expansion of diversion options and models is Wisconsin's participation in the National Institute of Corrections' [Evidence-Based Decision Making Initiative](#), which emphasizes a system-wide planning approach and the use of research to inform decisions at all levels of the criminal justice system.

In recent years, there have been many advances in providing guidance to problem-solving (or treatment) courts, both at the national and state level. In 2013, the National Association of Drug Court Professionals (NADCP) published their [Adult Drug Court Best Practice Standards, Volume I](#) ([Volume II](#) has since been released). In April 2014, the Wisconsin Association of Treatment Court Professionals followed suit with the publication of the [Wisconsin Treatment Court Standards](#). Since these Standards were developed, numerous national and statewide trainings and other resources have been developed to help guide problem-solving court planning and implementation in Wisconsin.

To date, however, these types of resources and standards have been unavailable to other types of diversion models in Wisconsin. As the TAD program continues to expand, more counties receive funding to implement programs, and more counties work on reviewing their criminal justice system to implement programming through the EBDM Initiative. Within this initiative, there is an increased need to provide a similar set of standards and resources for diversion programs to encourage effective implementation, based on the current research.



## Goal of the Diversion Standards

As part of the EBDM Initiative, the State Criminal Justice Coordinating Council's Model Policies and Training Subcommittee developed Diversion Standards to provide guidance to local jurisdictions in Wisconsin when planning and implementing a pre-charge or post-charge diversion program. The core of these standards is the [EBDM Framework](#), which is based on the following guiding principles developed through Wisconsin's EBDM effort:

- a. Wisconsin's criminal justice system should support the overall Wisconsin EBDM effort by utilizing data and research, as well as professional judgment based on comprehensive case-specific information, to:
  - i. Promote fairness and equal treatment: A criminal justice system that is fair is based on the equal assessment of objective factors relevant to public safety and the success of justice-involved individuals.
  - ii. Increase public safety, reduce harm, and improve quality of life: A criminal justice system that reduces harm protects the public from those who pose a danger to the community, while reducing the detention of those whose risk to public safety may actually be increased as a result of detention.
  - iii. Use resources effectively: A criminal justice system that uses resources effectively reserves expensive incarceration resources for those who pose a danger to public safety, while focusing resources to support efforts to promote participant success for those who can be safely managed in the community.
  - iv. Team members should be aware of the role that race, socioeconomic status, gender, and age can play in equal access to treatment courts or diversion options and should continually examine if diversion at this decision point is being offered and accepted without disparity.

Additional research, evaluation, and lessons learned from across the nation are also incorporated into these Standards.

The State CJCC recognizes that different types of diversion programs may have unique practices, and those practices may not be found in these Standards. These Standards seek to create a level of uniform practices and to encourage local jurisdictions to tailor their programs to meet their local needs. The CJCC encourages programs to attempt to follow the Standards as best as practicable. The Standards will be reviewed and modified periodically based upon empirical research.



Each Standard includes commentary and references related to evidence-based practices, organizational theory, and/or federal and state laws that support the inclusion of the specific Standard in this document. There are also references to other pertinent professional standards, such as the American Bar Association Standards, the National Association of Pretrial Services Agencies (NAPSA) Standards, and the National Association of Drug Court Professionals (NADCP) Standards.

These Diversion Standards are intended to coordinate with and complement the [Wisconsin Treatment Court Standards – Revised 2018](#) to provide a more complete set of tools and resources for local jurisdictions seeking to implement effective interventions at different criminal justice decision points, as part of an overall systemic approach.



## Diversions Overview

The goal of diversion programs in Wisconsin is to increase public safety, reduce harm, promote fairness and equal treatment, and use resources effectively. For the purpose of these Standards, “diversion” encompasses pre-charge and post-charge programs that provide an alternative to the formal prosecution process and allow certain offenders to enter voluntary programs of supervision and services. In an effort to reduce the collateral impact, participants who successfully complete the program will not be charged or, if charged, will have the charges or penalties against them dismissed or reduced. Unsuccessful participants are returned to (or referred to) the formal prosecution process.

Definitions of each model are as follows:

### **Diversions:**

*A global term used to describe pre-arrest, pre-charge, post-charge, and treatment/specialty court programs (which can be pre- or post-conviction) that are an alternative to the formal prosecution process and that divert participants into voluntary programs of supervision and services, based on established criteria and a screening or assessment process. Participants who successfully complete the program will receive a beneficial outcome (no charges filed, charges reduced or dismissed, averted incarceration, etc.).*

### **Pre-Charge Diversion:**

*Following a referral for prosecution, the prosecutor has discretion to withhold filing of charges and provide an alternative in the form of a diversion agreement which may include certain program requirements (e.g., do not commit a new crime for a specified period of time, participate in education classes, complete community service, and/or receive an assessment for treatment needs). Satisfactory completion of program requirements results in charges not being issued (no formal criminal complaint is filed).*

### **Post-Charge Diversion:**

*Following the filing of charges, the prosecutor can exercise discretion to suspend formal prosecution and provide an alternative in the form of a diversion agreement including certain program requirements (e.g., do not commit a new crime for a specified period of time, participate in one or more programs or services). Satisfactory completion of program requirements results in reduced charges or the dismissal of formal charges.*

Only individuals assessed as appropriate for the program’s activities and level of support should be admitted into the program. In keeping with current evidence-based principles and avoiding



unnecessary expenditures, the services provided need to be directly linked to the assessed risk level/need of the individual. Low-risk/low-need individuals should be directed to less costly and less intensive services, such as check-in monitoring. Medium and high-risk/need individuals should be directed to appropriate services that might include more frequent and active monitoring, drug testing, and participation in regular treatment with qualified providers for documented substance use needs, such as through a drug or treatment court.

Diversion programs have wide-ranging benefits:

- Public safety is improved when jails are less crowded. Incarcerated offenders in overcrowded facilities are at greater risk of physical and psychological impairment, leading to problems when re-entering society, including increased risk of new offenses.
- Promoting fairness and equity in the criminal justice system improves outcomes for Wisconsin's communities.
- Crime victims benefit through a restorative justice system that holds the offender accountable while facilitating and enforcing restorative agreements, including restitution.
- Participants benefit by receiving the services necessary to address their assessed needs to avoid further involvement in the criminal justice system, as well as the negative consequences associated with a criminal conviction, criminal history and/or incarceration.
- Local justice systems benefit because they can concentrate their limited resources on more serious or violent criminal behaviors.
- Taxpayers benefit from savings realized in reduced court and corrections costs.
- Participants benefit by having the opportunity to receive necessary supportive services and treatment that improves their lives and their chances for future success.



## Legal Overview

All Diversions are subject to Wisconsin and U.S. Constitutional limits and requirements. Equal Protection and Due Process requirements are primary concerns.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, “No state shall...deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend XIV). Equal Protection, as addressed in these Standards, requires that eligibility to participate in diversion programs be open to individuals regardless of race, ethnicity, gender, sexual orientation, sexual identity, physical or mental disability, religion, or socioeconomic status. Due Process generally requires access to counsel, notice of violations and sanctions, a process to contest and appeal decisions, and a record of the proceedings. Although the specific requirements of due process vary according to the types of potential sanctions and proceeding that an individual faces, the underlying principle is a fair process.

Title VI of the Civil Rights Act of 1964 states “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

For pre-charge diversions and post-charge pre-plea diversions, the participants’ right to counsel and the right to remain silent should be protected. If these rights are to be waived as consideration for any program, the waiver must be knowing, voluntary, and intelligent. The rights of victims and witnesses of crime should also be protected as required by statute, and all victims and witnesses of crime are to be treated with dignity, respect, courtesy, and sensitivity (Wis. Stat. 950.04).

Wisconsin has a number of statutes that apply to certain types of “Deferred Prosecution Programs” (Wis. Stats. Secs. 971.37, 971.375, 971.38, 971.39, 971.40, 971.41, and 973.11). The statutory “Deferred Prosecution Programs” are not the exclusive diversion programs that can be implemented by counties in Wisconsin, but if they are utilized, they should be implemented consistent with these Standards.

A diversion agreement is considered a type of plea bargain, which is analogous to a contract, so contract-law principles may help determine a participant’s rights (*State v. Roou*, 2007 App 193, 305 Wis. 2d 164, 738 N.W.2d 173) (*State v. Kaczmariski*, 2009 WI App 117, 320 Wis. 2d 164, 738 N.W.2d 173). A material and substantial breach is a manifest injustice because it violates the terms of the agreement and defeats the benefit for which the parties bargained (*State v. Williams*, 2002 WI 1, 249 Wis. 2d 733) (*State v. Deilke*, 2004 274 Wis. 2d 595, 682 N.W.2d 945).



## References:

*State v. Deilke*, 274 Wis. 2d 595, 682 N.W.2d 945 (2004)

*State v. Kaczmariski*, 2009 WI App 117, 320 Wis. 2d 164, 738 N.W.2d 173

*State v. Roou*, 2007 App 193, 305 Wis. 2d 164, 738 N.W.2d 173

*State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733

U.S. Const. amend XIV

Wis. Stat. 950.04

Wis. Stats. Secs. 971.37, 971.375, 971.38, 971.39, 971.40, 971.41, and 973.11

US Department of Labor, Title VI, Civil Rights Act of 1964

<https://www.dol.gov/agencies/oasam/regulatory/statutes/title-vi-civil-rights-act-of-1964#:~:text=No%20person%20in%20the%20United,activity%20receiving%20Federal%20financial%20assistance.>



## Wisconsin Diversion Standards Definitions

**Arrest:** Act of detaining a person in legal custody in response to a charge that the person committed an offense in a particular jurisdiction. This includes notification of charges and date and time to appear in court or for processing such as by summons, order-in or citation (when issued by an officer). Arrests are typically not documented until the point of booking or issuance of a citation or summons.

**Assessment:** A comprehensive process conducted by trained professionals who have specialized education and training in the use of diagnostic tools to determine a prospective participant's criminogenic risk and need for specific types and intensity of services. The results of the assessment will determine the appropriate diversion program placement.

**Bail/Bond Hearing:** A court hearing where a judicial officer reviews the bail/bond and determines if the bail/bond or conditions should be changed.

**Booking:** The process of collecting data to detain an individual into custody for criminal or non-criminal offenses or holds. Bookings for criminal offenses involve the collection of photographs, fingerprints, and demographic information. Adapted from Wisc. Stats. 165.83(2).

**Crime:** A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime (Wisc. Stat. 939.12).

**Criminal Court File:** A basic record kept by the clerk of circuit court that adequately documents the progress of the treatment court proceedings in relation to the criminal case and records any judicial action taken in relation to it. Access to and retention of the file is governed by the laws and procedures pertaining to criminal court cases (Wisconsin Supreme Court, 2011).

**Diversion:** A global term used to describe pre-arrest, pre-charge, post-charge and treatment/specialty court programs (which can be pre- or post-conviction) that are an alternative to the formal prosecution process and divert offenders into voluntary programs of supervision and services based on established criteria and a screening or assessment process. Participants who successfully complete the program will receive a beneficial outcome (no charges filed, charges reduced or dismissed, averted incarceration, etc.).

**Evidence-Based Decision Making (EBDM):** A strategic and deliberate method of applying empirical knowledge and research-supported principles to justice system decisions made at the case, agency, and system level (National Institute of Corrections, 2018).

**Evidence-Based Practice:** The partnership between research and practice. Research is used to determine how effective a practice is at achieving positive measurable outcomes, including reduction of recidivism and increasing public safety (Wisconsin Statewide Criminal Justice Collaborating Council, 2013).



**Failure to Appear:** A willful failure to appear for a known (i.e. defendant was present in court when the date was scheduled, or the defendant signed a bail/bond form acknowledging date, time and location of next court date) scheduled court date.

**Impact Evaluation:** A form of outcome evaluation that assesses the net effect of a program by comparing program outcomes with an estimate of what would have happened in the absence of the program (US Government Accountability Office, 2011). Impact evaluation is used to gauge the effect of the intervention on the target population, if information is available on comparable defendants or offenders outside the program (National Institute of Justice, 2010).

**Outcome Evaluation:** This form of evaluation assesses the extent to which a program achieves its outcome-oriented objectives. It focuses on outputs and outcomes (including unintended effects) to judge program effectiveness (US Government Accountability Office, 2011).

**Performance Measurement:** Involves the regular collection of data throughout the year (Hatry, 2014), for the ongoing monitoring and reporting of program accomplishments, particularly progress toward pre-established goals. It is typically conducted by program or agency management and may address process, outputs, and/or outcomes (US Accountability Office, 2011). Implicit in performance measurement is the idea of performance management, in which data are actively used to revise an ongoing program to improve efficiency or results (Tatian, 2016).

**Post-Charge Diversion:** Following the filing of charges, the prosecutor can exercise discretion to suspend formal prosecution and provide an alternative in the form of a diversion agreement including certain program requirements (e.g., do not commit a new crime for a specified period of time, participate in one or more programs or services). Satisfactory completion of program requirements results in reduced charges or the dismissal of formal charges.

**Post-Conviction Diversion:** Following a criminal conviction, a variety of alternative interventions may be mandated for an individual. Most typically, post-conviction diversion involves participation in a treatment or specialty court (drug court, mental health court, veterans' court, etc.). This form of agreement may result in an individual's sentence being withheld, or may be imposed as the sentence itself, or in conjunction with other sentencing conditions. Satisfactory completion of program requirements results in a beneficial outcome (e.g. the dismissal or reduction of charges, averted incarceration).

**Pre-Arrest Diversion:** A form of pre-charge diversion where discretion is exercised by law enforcement officers to take an alternative course of action to arrest, typically referral to a program or service to address the potential underlying cause(s) of the criminal behavior (e.g., mental health, substance abuse, housing services) and/or completion of specific program requirements (e.g. attend an education class, complete community service hours, do not commit a new crime for a specified time period). Satisfactory completion of program requirements results in no formal arrest or filing of charges.



**Pre-Charge Diversion:** Following a referral for prosecution, the prosecutor has discretion to withhold filing of charges and provide an alternative in the form of a diversion agreement which may include certain program requirements (e.g., do not commit a new crime for a specified period of time, participate in education classes, complete community service, and/or receive an assessment for treatment needs). Satisfactory completion of program requirements results in charges not being issued (no formal criminal complaint is filed).

**Pretrial Risk Assessment:** A validated tool that measures a person's likelihood for failure to appear in court, to engage in new criminal activity during pretrial release, and/or violate conditions of pretrial release.

**Process Evaluation:** This form of evaluation assesses the extent to which a program is operating as it was intended. It typically assesses program activities, conformance to statutory and regulatory requirements, program design, and professional standards or customer expectations. (US Government Accountability Office, 2011).

**Program Evaluation:** Individual systematic studies conducted periodically or on an ad hoc basis to assess how well a program is working. They are often conducted by experts external to the program, either inside or outside the agency, as well as by program managers. Types of program evaluation include process, outcome, impact, and cost-benefit analyses (US Government Accountability Office, 2011).

**Release:** Discharge or setting free from custody, detention or confinement.

**Release without Bail:** When a defendant is released from custody without posting a cash bail and promises to return to court when required.

**Responsivity Needs:** Conditions that are likely to interfere with retention or compliance (NADCP, Vol. II, p. 9).

**Risk Assessment Tool:** Actuarial-based tools used to classify offenders into levels of risk (e.g., low, medium, and high) and to identify and target interventions to address offender needs (e.g., antisocial attitudes, antisocial peer groups) generally related to recidivism. A risk/needs assessment does not indicate whether a particular offender will actually recidivate; rather it identifies the "risk" or probability that the offender will recidivate. The probability is based on the extent to which an offender has characteristics like those of other offenders who have recidivated (Casey et al., 2014).

**Screening:** A process conducted in the very early stages of diversion involvement and typically precedes assessment and other diagnostic activities. Screening typically consists of two steps: (1) justice system screening to decide if the prospective participant meets predetermined eligibility requirements related to criminal history, offense type and severity, etc.; and (2) clinical screening to determine whether the prospective participant has a substance abuse problem that can be addressed by available treatment services, and whether there are other clinical features (e.g., serious mental



health disorders) that would interfere with an individual's involvement in treatment (Peters & Peyton, 1998).

**Violation:** Behaviors contrary to rules of supervision or conditions of release (U.S. Government Accountability Office, 2011).

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# Pre-Charge Diversion



## **Pre-Charge Diversion Standards**

### **Justice Equity & Inclusion**

Individuals who have historically experienced sustained discrimination or reduced social opportunities because of their race, ethnicity, gender, sexual orientation, sexual identity, physical or mental disability, religion, or socioeconomic status receive the same opportunities as other citizens to participate and succeed in the diversion program.

- 1.1** Create objective eligibility criteria and utilize validated screening and assessment tools that are nondiscriminatory in intent and impact to ensure equitable access to the program.
- 1.2** All participants have equitable access to the same levels of care available, based on their assessed needs, as well as the same quality treatment and supportive services.
- 1.3** Pre-charge diversion programs take into consideration an individual's responsibility needs, including but not limited to the assessed level of care, culture, gender, temperament, learning style, motivation, age, trauma history and cognitive abilities when creating an individualized case plan.
- 1.4** Program retention rates, the application of incentives and sanctions and final case dispositions are reviewed to promote equal outcomes for all participants.
- 1.5** Staff are trained to recognize implicit cultural bias and correct disparate impacts for members who have endured sustained discrimination or reduced social opportunities.
- 1.6** Program policies and procedures are created and reviewed through an equity and inclusion lens to reduce and eliminate institutional bias.



## Commentary:

Systemic and pervasive racial disparities exist within the criminal justice system that must be acknowledged and considered when assessing the eligibility of an individual for diversion programs. These racial disparities begin at the law enforcement level when arrest decisions are being made and continue through the traditional prosecution and sentencing decision points of a case. There are racial disparities at every level of the criminal justice system, which has resulted in concerns being raised about the possibility of risk assessments exacerbating racial and ethnic disparities since they are largely based on criminal history records (Freeman, Hu and Jannetta, 2021). Pre-Charge and Post-Charge Diversion programs have historically targeted lower-risk individuals; therefore, extra attention must be given to ensure all individuals are screened and assessed with this information in mind.

A goal of the criminal justice system is to provide a fair process. Some of the ways to advance this goal are to have equal access to programs through objective and uniformed screening and assessment procedures that come *before* the District Attorney makes the decision to divert or prosecute. Programs must also seek to identify and eliminate bias, and to educate staff about the history of groups that have experienced discrimination. It has been shown that implicit bias exists in the criminal justice system and that greater bias results in a greater reliance on punishment (Levinson and Smith, 2017). By ensuring that participants have equitable access and that staff working in diversion programs are properly trained, programs can limit this bias and offer participants opportunities for growth rather than merely punishment.

In keeping with organizational and systems theories, confidence in an organization or societal institutions may be undermined when principles of justice operate ineffectively or are completely absent. Trust must be restored for systems to operate effectively and having a transparent process can facilitate that relationship (Gillespie and Dietz, 2009). This is true for both stakeholders and participants. Because a criminal record results in a host of other consequences regarding housing, employment, education, and other social opportunities, jurisdictions must not limit access to diversion programs and their benefits.

## References:

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## **Pre-Charge Diversion Standards**

### **Definition & Purpose of Pre-Charge Diversion**

Research demonstrates that better outcomes are possible when appropriate individuals are offered a pre-charge diversion opportunity rather than prosecuted through the traditional justice system process.

- 2.1** Pre-charge diversion can occur at any point from law enforcement contact through the prosecutor's charging decision.
- 2.2** All cases considered for diversion at the charging decision shall have prosecutorial merit and should be provable beyond a reasonable doubt.
- 2.3** Pre-charge diversion promotes individual justice and harm reduction opportunities while effectively utilizing system resources and research.
- 2.4** Jurisdictions provide pre-charge diversion options and designate an entity to oversee and/or administer diversion services.
- 2.5** Successful pre-charge diversion results in no issuance of criminal charges.

#### **Commentary:**

Research in the criminal justice field has given us a template for evidence-based practices. "These are practices that deliver the best outcomes for reducing recidivism. Justice, health, and community resources should be allocated to programs that demonstrate the greatest capacity to reduce recidivism, protect public order and safety, and promote public health, while also mitigating the need for costly justice supervision" (Center for Health and Justice, 2013). Pre-charge diversion programs are an opportunity to reduce recidivism and the burden of a criminal record for individuals because they are designed to occur at any point from law enforcement contact to the charging decision by the District Attorney's Office, thereby resulting in no criminal charges (and, in some programs, resulting in no arrest record).

Programs originating from law enforcement contact, before an arrest is made, have shown success. In a multi-site analysis, the Technical Assistance and Policy Analysis (TAPA) Center for Jail Diversion found that pre-booking jail diversion programming, including diversion by law enforcement before formal charges are brought, did not result in increased re-arrest rates among participants (2007). Prosecutor-led diversion programs were shown to reduce re-arrest



in four out of five locations studied in the National Institute of Justice's Multi-Site Analysis (2018). Jurisdictions with diversion programs have also shown positive outcomes for participants, including less time spent incarcerated, avoidance of criminal convictions, and improved outcomes regarding substance use and mental health (Camilletti, 2010).

Individual Criminal Justice Coordinating Councils (CJCC) should make decisions involving all stakeholders. The value of this collaborative approach to criminal justice policies cannot be overstated. The benefits to the collaborative approach include the following: "joining resources and dividing labor, alleviating isolation, sustaining motivation through commitments to other collaborators, and creating energy through interpersonal relationships to complete projects" (Fox and Faver, 2016). This collaborative approach should include a separate and independent entity to administer and/or oversee services because having one stakeholder responsible for providing all of the resources does not allow for the sharing of responsibilities in the collaboration (Hord, 1981).

### References:

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## **Pre-Charge Diversion Organizational Structure**

**D**iversion programs should adhere to [Evidence-Based Decision Making \(EBDM\) Framework](#).

- 3.1** Pre-charge diversion programs have policies and procedures that include operational and program goals.
- 3.2** Pre-charge diversion programs are overseen by a multidisciplinary team as part of a collaborative approach to addressing criminal conduct.
- 3.3** In all policies and actions, pre-charge diversion programs, seek to eliminate bias and provide equal opportunities for staff and participants regardless of race, ethnicity, gender, sexual orientation, physical ability, and any other protected class.
- 3.4** Pre-charge diversion programs follow evidence-based practices. The guidelines are updated on a regular basis and are widely distributed to all interested parties.
- 3.5** Pre-charge diversion programs develop and utilize a management information system to support data collection and presentation, compliance monitoring, case management, and program evaluation. The program also develops and implements policies that address data sharing and information protection.
- 3.6** Pre-charge diversion programs conduct periodic program evaluations and audits to determine effectiveness in their performance and practices.

### **Commentary:**

The EBDM Framework does not attempt to prescribe implementation in precisely the same way in every community. Therefore, it does not define “a model” program. The Framework is instead intended to frame a purpose, articulate principles, and propose a process for decision making that can be applied to the system as a whole. These standards take into account that not every jurisdiction has the same needs, presents the same issues, or has the same resources available. However, these standards are developed under and guided by the Framework of the EBDM Initiative in the State of Wisconsin.

The creation of CJCCs and Treatment Courts in the State of Wisconsin has demonstrated the benefit of the collaborative approach in criminal justice system program development and



implementation. This collaboration of system stakeholders should continue in the operation of diversion programs. Stated operational procedures and shared program goals guide decision making and increase effectiveness (Allen, 2007).

The use of evidence-based practices with those involved in the criminal justice system has been shown to decrease recidivism an average of 30% of the time (Andrews, 2006). Pre-charge diversion programs should use strategies that have been shown to have positive outcomes and are based on empirical research.

While there are many diversion programs in existence across the country, there are “no apparent overarching standards for collecting or publishing data for the purposes of evaluating different types of programs against common sets of performance measures” (Center for Health and Justice, 2013). A goal of these Standards is to have a better system of identification and cohesion for diversion programs. Each jurisdiction needs the freedom and flexibility to develop individual programs. Data collection, information sharing, and program evaluations are essential for all programs to effectively address identified issues and to provide appropriate services to individuals. The success of diversion programs depends upon the quality of program design and implementation. Diversion programs that encompass active fidelity as a best practice are especially promising for reducing recidivism rates (Schwalbe, Gearing, MacKenzie, Brewer, & Ibrahim, 2012).

Diversion programs should begin with system mapping, so that appropriate data is gathered about the system and decision points can be assessed by the individual jurisdiction (National Association of Counties). Having this foundation of information can assist the CJCC in appropriately planning for a diversion program. Research has shown that successful collaboration should include an agreement on the exchange of tasks; development of a joint staff system (which includes representatives from the different stakeholders); and the projected results, outcomes, and services (Fox and Faver, 1984).

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[http://www.naco.org/sites/default/files/documents/2017%20Collaboration%20in%20Pretrial\\_FIN\\_AL.PDF](http://www.naco.org/sites/default/files/documents/2017%20Collaboration%20in%20Pretrial_FIN_AL.PDF)

Schwalbe, C. S., Gearing, R. E., Mackenzie, M. J., Brewer, K. B., & Ibrahim, R., *A meta-analysis of experimental studies of diversion programs for juvenile offenders*. *Clinical Psychology Review*, 32(1), 26-33 (2012).

The Center for Health and Justice at TASC, *A National Survey of Criminal Justice Diversion Programs and Initiatives* (2013).



## Pre-Charge Diversion Eligibility

**M**inimizing barriers to participation for appropriate candidates leads to better outcomes.

- 4.1** Eligibility criteria are formally defined and documented.
- 4.2** Eligibility criteria are research-informed.
- 4.3** Eligibility criteria are objective.
- 4.4** Eligibility of individual is assessed and referrals are made to diversion programs as soon as possible.
- 4.5** Individuals have the opportunity to consult with counsel before deciding to participate in a diversion program.
- 4.6** An individual's decision to participate in a pre-charge diversion program is voluntary and made with written, informed consent.
- 4.7** The decision to apply for a pre-charge diversion does not preclude an individual from considering or pursuing other strategies that may be more beneficial.
- 4.8** Individuals who meet the research-based criteria for admission are considered for participation in a pre-charge diversion program.
- 4.9** Written eligibility, completion, and termination criteria are clearly established for participation in diversion. The guidelines are updated on a regular basis and widely distributed to all interested parties.
- 4.10** Eligible participants will not be denied access or referrals to pre-charge diversion programs based solely on race, ethnic origins, gender, sexual orientation, physical ability, any other protected class, and inability to pay restitution or program fees, or inability to perform community service.



## **Commentary:**

Establishing written criteria is a strategic management tool that has been shown to improve performance in various organizations (Weiss and Piderit, 1999). Input from individual stakeholders into the written criteria also reinforces the collaboration among justice professionals.

Eligibility criteria for diversion programs should be applied early and consistently at multiple points of case processing and should be broad, equitable, and objective. Criteria should include as many appropriate populations as possible and be consistent with the sequential intercept model of considering program placements whenever warranted by the individual's current situation or the current nature of adjudication (Munetz & Griffin, 2006).

Documenting eligibility criteria helps to ensure that all stakeholders are aware of and consistently using diversion options. Each jurisdiction will plan for and develop criteria that meet the needs of their communities, while providing opportunities for individuals in the system to be diverted to appropriate resources. Stakeholders should discuss balancing diversion to community programming with the protection of public safety. A threshold criteria in the interest of public safety will decrease the number of individuals eligible for diversion. Restrictive criteria potentially increase long-range risks to public safety by decreasing the opportunities for the diversion program to direct participants to community services known to reduce recidivism.

The appropriate length of time between identification, referral, assessment, and program start depends upon how individual systems function. These Standards are meant to be guidelines and not to place unrealistic expectations on those systems to perform. However, research from the Laura and John Arnold Foundation indicates that being detained pretrial for two days or more is related to the likelihood of post-disposition recidivism. As the length of time in pretrial detention increases, so does the likelihood of recidivism at both the 12-month and 24-month points (Lowenkamp, VanNostrand, and Holsinger, 2013). Research has also shown that diversion programs, both caution and intervention, are significantly more effective in reducing recidivism than the traditional justice system (Wilson & Hoge, 2012).



## References:

- Lowenkamp, C., VanNostrand, M., and Holsinger, A. *The Hidden Costs of Pretrial Detention*. The Arnold Foundation, 2013.
- Munetz, M. R., & Griffin, P. A., *Use of the Sequential Intercept Model as an Approach to Decriminalization of People With Serious Mental Illness*. *Psychiatric Services*, 57(4), 544-549 (2006).
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## Pre-Charge Diversion Enrollment

Research shows that individuals perform better when enrollment is based on individual needs, risk level, responsivity, and willingness to participate.

- 5.1 The diversion agreement is a contract outlining the program rules and expectations, conditions, the program length, benefits of completing the program, and consequences if terminated.
- 5.2 The conditions of pre-charge diversion are fair, equitable, individualized, and related to the goals of the diversion agreement based on a risk and needs assessment tool.
- 5.3 Conditions are reviewed at the time of entry into the pre-charge diversion program.

### Commentary:

Each program will have conditions that reflect the intentions of the stakeholders involved in the planning and implementation of the diversion program. The use of a risk/needs assessment is fundamental to determining the goals and conditions of the diversion program. Research has shown the superiority of actuarial approaches to decision making over intuitive judgments in a variety of contexts, including recidivism risk (National Center for State Courts, 2014).

In the past, the participant release status was a moot point for diversion programs because most participants were either totally diverted out of the system and had no release conditions or because their release status did not affect the diversionary process, as in a release on recognizance. At the time of diversion enrollment, many participants are under pretrial release supervision with conditions that may or may not support diversion plans. Pretrial release conditions in these cases must be reviewed in order to ensure that they are consistent with the goals of the diversion program and the effects of these mandatory conditions are considered. If the diversion staff must enforce release conditions as well as monitor a voluntary intervention plan, the conflict between these types of conditions can erode the voluntary nature of diversion.

### References:

*Offender Risk & Needs Assessment Instruments: A Primer for Courts*. National Center for State Courts, 2014.



## **Pre-Charge Diversion Intervention Services**

Use of a validated risk assessment tool, in conjunction with the traditional decision making process, provides consistent interventions with enhanced outcomes.

- 6.1** Pre-charge diversion plans are developed through the use of a validated risk and/or needs assessment designed to develop an intervention plan that is the least restrictive possible and is structured to minimize the risk of future criminal behavior.
- 6.2** Pre-charge diversion programs utilize individualized, realistic, and achievable expectations.
- 6.3** Program dosage is based on risk level.
- 6.4** Pre-charge diversion programs can be available to all risk levels, as long they are appropriately designed.
- 6.5** Pre-charge diversion programs do not mix risk levels in programming.
- 6.6** Pre-charge diversion programs are responsive to assessed level of care needs, temperament, learning style, motivation, culture, and gender when assigning programs.
- 6.7** When indicated by a risk-based needs assessment, pre-charge diversion programs utilize services in their community that adhere to evidence-based practices.
- 6.8** As the participant progresses, modifications may need to be made to the individualized treatment plan to address risk, needs, and responsivity factors.
- 6.9** All drug testing policies and procedures are developed using Appendix A of this document as a guide.



## Commentary:

The use of a risk and/or needs assessment has been consistently shown to identify a participant's likelihood of future recidivism and to identify the criminogenic needs to be addressed with programming for successful reduction of recidivism. As a result of this research and the variety of research available on what works to decrease recidivism based on assessed level, it is particularly important to correctly identify risk level.

Low, medium, and high-risk offenders can be included in pre-charge diversion programs, but placing high-risk and low-risk offenders together is not evidence-based. Mixing risk groups exposes the lower-risk offenders to the antisocial behaviors of higher-risk offenders and jeopardizes their prosocial relationships and productive community engagement (Latessa, 2010). A 2010 study found that the programs reduced recidivism for high-risk offenders by 10 percent but increased recidivism of low-risk offenders by two percent. One program decreased recidivism rates by more than 25 percent for high-risk offenders but increased new incarcerations by almost 18 percent for low-risk individuals (Latessa, 2010).

As noted in Appendix A, the Wisconsin Diversion Standards intentionally focus on including information that is supported by and grounded in research and evidence. Research is not currently available to indicate if drug and alcohol testing is a necessary component of diversion programs to produce successful outcomes. Pre-Charge and Post-Charge Diversion programs generally serve lower-risk individuals; research has shown that lower-risk individuals are more likely to self-correct and thus require less interventions. However, this population may have a high treatment need, which makes drug and alcohol testing an appropriate program requirement if the criminal conduct was a result of a substance use disorder. In these cases, drug and alcohol testing frequency should be determined by the individual's risk and needs level and a clinical assessment. The frequency should not follow the testing regimen of a treatment court because that level of testing is most effective for the high-risk population. See Appendix A for guidance on appropriate drug and alcohol testing requirements for prosecutor-led diversion programs.

## References:

Latessa, Edward J. & Lovins, Brian, *The Role of Offender Risk Assessment: A Policy Maker Guide*, Victims & Offenders, 5:3, 203-219 (2010).



## Pre-Charge Diversion Behavior Response

Consequences for participants' behavior are predictable, fair, and consistent.

- 7.1 Pre-charge diversion programs develop and utilize an incentive structure and violation matrix.
- 7.2 Pre-charge diversion programs provide participants notice of possible behavioral responses.
- 7.3 Behavioral responses are provided fairly, timely, and consistently.

### Commentary:

A program model that encompasses both rewards and sanctions is more predictive of success than a reward model or a sanction model alone. The probability of successful program completion is optimized when the reward-to-sanction ratio is at least 4 to 1 (Lou, Hsu, and Sajda, 2015). Participants are aware of the documented behavior response and staff should be consistent with their responses. Sanctions on their own do not change offender behavior or reduce recidivism, and research shows that severe sanctions may actually increase recidivism (Gendreau, 1996).

Research has shown that higher perceptions of procedural fairness lead to better acceptance of court decisions, a more positive view of individual courts and the justice system, greater compliance with court orders, and reduced recidivism (Burke & Leben, 2007).

### References:

- Lou, B., Hsu, W.-Y., & Sajda, P. (2015). Perceptual Salience and Reward Both Influence Feedback-Related Neural Activity Arising from Choice. *The Journal of Neuroscience*, 35(38), 13064–13075. <http://doi.org/10.1523/JNEUROSCI.1601-15.2015>
- Burke, K., & Leben, S. *Procedural Fairness: A Key Ingredient in Public Satisfaction* (2007), Retrieved from <http://aja.ncsc.dni.us/publications/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf>
- Gendreau, P. (1996). The principles of effective intervention with offenders. In A. Harland (Ed.), *Choosing correctional options that work* (pp. 117–130). Thousand Oaks, CA: Sage.



## Pre-Charge Diversion Completion

Successful participants experience the harm reduction benefits of program participation.

- 8.1** Information provided to the prosecutor is limited to the information necessary to verify compliance with program requirements.
- 8.2** Successful pre-charge diversion participants will not be readily identifiable on any public state court record management systems.
- 8.3** Successful completion of the pre-charge diversion program results in no charges being filed.

### Commentary:

A major incentive or benefit to the pre-charge diversion participant is that no charge is filed and, therefore, no court record of the offense is made. To limit the collateral consequences associated with an arrest that is resolved by a pre-charge diversion program, records of individual diagnosis, treatment records, and other information should not be submitted to the prosecutor or court if it does not have an impact on program compliance or completion. Collateral consequences tend to last indefinitely, long after an individual is fully rehabilitated. Many collateral consequences affect a person's employment and business opportunities; others deny access to government benefits and program participation, including student loans, housing, contracting, and other forms of participation in civic life (Ewald and Smith, 2008). Perceptions of stigma toward criminals prior to release predicted poorer adjustment in the community (Moore, Stuewig, Tangney, 2015).

In collaboration, the risks and rewards are shared by all stakeholders, and the interactions among individuals are characterized by a fair process (Fox and Faver, 1984). The individual entering into a pre-charge diversion agreement is also taking risks regarding the consequences for future behavior. Thus, it is imperative that only information related to program compliance and requirements be entered into official records or used in the decision-making process of future criminal charges.



## References:

- Ewald, A. C., & Smith, M., *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, *Encyclopedia of Criminal Justice Ethics*, 29(2) (2008).
- Fox, M. F., & Faver, C. A. *Independence and Cooperation in Research*, *The Journal of Higher Education*, 55(3), 347-359 (1984).
- Moore, K. E., Stuewig, J. B., & Tangney, J. P. (2016). The effect of stigma on criminal offenders' functioning: a longitudinal mediational model\*. *Deviant Behavior*, 37(2), 196–218.  
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## Pre-Charge Diversion

### Termination

Termination procedures are fair, equitable, and consistent with due process.

- 9.1 Termination policies are included in the policies and procedures manual. Participants are not terminated for arbitrary or capricious reasons.
- 9.2 Participants are notified of the program's termination policy and are afforded reasonable opportunities to demonstrate compliance with the terms of the program before termination proceedings are initiated. These opportunities must be documented and the participant must be made aware of these consequences.
- 9.3 A pre-charge diversion participant may withdraw from the diversion program voluntarily at any time before completion. An individual's decision to withdraw is not considered an aggravated factor within any ensuing criminal prosecution.
- 9.4 A pre-charge diversion participant is provided a written explanation of termination.
- 9.5 Arrests that occur during the course of the pre-charge diversion program are not grounds for automatic termination.

#### Commentary:

In a number of Wisconsin cases, a diversion agreement is considered a type of plea bargain, according to *State v. Kaczmarck*, 2009 WI App 117, 320 Wis. 2d 811, 772 N.W.2d 702 (Ct. App. 2009)) and *State v. Roou*, 2007 WI App 193, 305 Wis. 2d 164, 738 NW 2<sup>nd</sup> 173 (Ct. App. 2007). Plea bargains are analogous to contracts, so contract-law principles may help determine a participant's rights. A material and substantial *breach* is a manifest injustice because it violates the terms of the agreement such that it defeats the benefit for which the accused bargained. See [Williams, 2002 WI 1, ¶ 38, 249 Wis.2d 492, 637 N.W.2d 733 \(2002\)](#); see also [Deilke, 2004 WI 104, ¶¶ 11-14, 274 Wis.2d 595, 682 N.W.2d 945 \(2004\)](#).

Diversion programs should use a range of sanctions for non-compliance, resorting to the ultimate sanction of termination only when all reasonable opportunities have been given for the participant to succeed. Participants will invariably differ in their level of commitment, the other demands on their time and energy, their access to reliable transportation, and other characteristics that can make compliance with diversion requirements more challenging.



**References:**

*Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973).

*State ex rel. Klink v. Wisconsin Dept. of Health and Social Services*, 87 Wis.2d 110, 273 N.W.2d 379 (1978).

*Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972).



## **Pre-Charge Diversion**

### **Confidentiality & Data Privacy**

To encourage open and honest participation, information is kept confidential.

- 10.1** As a general rule, information gathered in the course of the pre-charge diversion program and intervention process is considered confidential and will not be released without the participant's prior written consent.
- 10.2** Program compliance reporting is kept confidential, unless disclosure is required by mandatory reporting laws.
- 10.3** Qualified researchers and auditors, under limited and controlled conditions, may be afforded access to pre-charge diversion participant records provided that no identifying characteristics of individual participants are used in any report.

#### **Commentary:**

In collaboration, the risks and rewards are shared by all stakeholders, and the interactions among individuals are characterized by a fair process (Fox and Faver, 1984). The individual entering into a pre-charge diversion agreement is also taking risks regarding the consequences for future behavior. Thus, it is imperative that only information related to program compliance and requirements be entered into official records or used in the decision-making process of future criminal charges.

#### **References:**

Fox, M. F., & Faver, C. A. *Independence and Cooperation in Research*. The Journal of Higher Education, 55(3), 347-359 (1984).



## Pre-Charge Diversion

### Performance Measurement & Evaluation

**D**iversion programs engage in ongoing data collection, performance measurement, and evaluation to assess adherence to Wisconsin state and national standards, evidence-based practices, and progress on specific program goals and objectives.

- 11.1** Develop or utilize a process to routinely collect data in a consistent, electronic format for both performance measurement and program evaluation.
- 11.2** Collect data in a consistent, accurate, and timely fashion, preferably within 48 hours of events.
- 11.3** Collect demographic information for both referrals and program participants including, but not limited to, race/ethnicity, gender, and age to identify and address potential issues of equity across groups.
- 11.4** Utilize demographic and related data to assess differences across categories of participants for the percentage who are referred, admitted, denied, successfully complete, or are terminated from the program (including the basis for denial or termination), to evaluate factors that might contribute to discrepancies in admission or termination rates across groups (see Standard 1).
- 11.5** Routinely monitor data for overall adherence to best practice standards, review performance measures, compare to benchmarks or performance targets, ensure consistency with goals, and take corrective actions as identified.
- 11.6** Utilize reliable and valid scientific principles in the completion of process, outcome, and impact evaluations, as well as cost-benefit analyses.
- 11.7** Utilize an outside, trained, independent evaluator to conduct process, outcome, and impact evaluations periodically (at least every five years) using vigorous standards of evidence-based practices.
- 11.8** Base evaluations on an intent-to-treat analysis that includes all program participants regardless of whether they terminate or successfully complete the program.



## Commentary:

Analyzing program processes, outcomes and impacts, assessing adherence to best practices, monitoring ongoing performance measures, and, in turn, making changes to programs as needed should be central to the implementation of diversion programs. To support the ongoing review of programs, it is important for programs to collect data in a timely, accurate, and consistent manner. As such, programs should use a consistent data tracking system. Counties and tribes may utilize the Comprehensive Outcome, Research, and Evaluation (CORE) Reporting System provided by the Wisconsin Department of Justice or another comparable system for data collection. Performance data and evaluation results should be used to take corrective action, make program adjustments, and monitor changes in program progress and outcomes. In addition, programs should continually solicit feedback regarding program performance from participants, team members, and stakeholders to better address participants' needs and improve program outcomes.

Evaluators conducting impact evaluations should use a comparison group of similarly situated individuals who could have met the program eligibility criteria but did not take part in the program. Furthermore, for outcome and impact evaluations, recidivism should be tracked at multiple points in the criminal justice process, including arrest, charging, conviction, and incarceration for a minimum of three years following discharge from the program (for additional information, see the [Wisconsin State Criminal Justice Coordinating Council Framework for Defining and Measuring Recidivism](#)). Outcomes for both the treatment and comparison groups should be followed for the same time period (time at risk).

## References:

- Kissick, K. and Zil, C. (2018). *Evaluation 101 for Researchers* [Power Point slides]. Retrieved from <http://www.nadcpconference.org/wp-content/uploads/2018/06/C-19.pdf>
- National Association of Pretrial Services Agencies (NAPSA). (2008). *Performance Standards and Goals for Pretrial Diversion/Intervention*. Retrieved from <https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards>
- Pierce-Danford, K. and Guevara, M. (2013). *Creating an Effective Pretrial Program: A Toolkit for Practitioners*. Retrieved from <https://nicic.gov/creating-effective-pretrial-program-toolkit-practitioners>
- Rice, B and Mackin, J. (2015). *Data, Evaluation, and Fidelity to the Model: Best Practices* [Power Point slides]. Retrieved from [https://npcresearch.com/wp-content/uploads/Data-and-Evaluation-Fidelity-to-the-Model\\_NADCP-2015.pdf](https://npcresearch.com/wp-content/uploads/Data-and-Evaluation-Fidelity-to-the-Model_NADCP-2015.pdf)



# Post-Charge Diversion



## **Post-Charge Diversion Standards**

### **Justice Equity & Inclusion**

Individuals who have historically experienced discrimination or reduced social opportunities because of their race, ethnicity, gender, sexual orientation, sexual identity, physical or mental disability, religion, or socioeconomic status receive the same opportunities as other citizens to participate and succeed in the diversion program.

- 1.1** Create and utilize objective eligibility criteria and screening and assessment tools that are nondiscriminatory in intent and impact to ensure equitable access to the program.
- 1.2** All participants have equitable access to the same levels of care available, based on their assessed needs, as well as the same quality treatment and supportive services.
- 1.3** Post-charge diversion programs take into consideration an individual's responsibility needs, including but not limited to the assessed level of care, culture, gender temperament, learning style, motivation, age, trauma history and cognitive abilities when creating an individualized case plan.
- 1.4** Program retention rates, the application of incentives and sanctions and final case dispositions are reviewed to promote equal outcomes for all participants.
- 1.5** Staff are trained to recognize implicit cultural bias and correct disparate impacts for members who have endured sustained discrimination or reduced social opportunities.
- 1.6** Program policies and procedures are created and reviewed through an equity and inclusion lens to reduce and eliminate institutional bias.



## Commentary:

Systemic and pervasive racial disparities exist within the criminal justice system that must be acknowledged and considered when assessing the eligibility of an individual for diversion programs. These racial disparities begin at the law enforcement level when arrest decisions are being made and continue through the traditional prosecution and sentencing decision points of a case. There are racial disparities at every level of the criminal justice system, which has resulted in concerns being raised about the possibility of risk assessments exacerbating racial and ethnic disparities since they are largely based on criminal history records (Freeman, Hu and Jannetta, 2021). Diversion programs have historically targeted lower-risk individuals; therefore, extra attention must be given to ensure all individuals are screened and assessed with this information in mind.

A goal of the criminal justice system is to provide a fair process. Some of the ways to advance this goal are to have equal access to programs through objective and uniformed screening and assessment procedures that come *before* the District Attorney makes the decision to divert or prosecute. Programs must also seek to identify and eliminate bias, and to educate staff about the history of groups that have experienced discrimination. It has been shown that implicit bias exists in the criminal justice system and that greater bias results in a greater reliance on punishment (Levinson and Smith, 2017). By ensuring that participants have equitable access and that staff working in diversion programs are properly trained, programs can limit this bias and offer participants opportunities for growth rather than merely punishment.

In keeping with organizational and systems theories, confidence in an organization or societal institutions may be undermined when principles of justice operate ineffectively or are completely absent. Trust must be restored for systems to operate effectively and having a transparent process can facilitate that relationship (Gillespie and Dietz, 2009). This is true for both stakeholders and participants. Because a criminal record results in a host of other consequences regarding housing, employment, education, and other social opportunities, jurisdictions must not limit access to diversion programs and their benefits.

## References:

- Dietz, Graham & Gillespie, Nicole. (2011). Building and Restoring Organizational Trust.
- Levinson, Justin D. & Smith, Robert J., Systemic Implicit Bias, 126 Yale L.J. F. 406 (2017), <http://www.yalelawjournal.org/forum/systemic-implicit-bias>.
- Freeman, K R., Hu, Cathy & Jannetta, J. (2021). *Racial Equity and Criminal Justice Risk Assessment*. Urban Institute, Justice Policy Center. <https://www.urban.org/sites/default/files/publication/103864/racial-equity-and-criminal-justice-risk-assessment.pdf>



## Post-Charge Diversion Standards

### Definition & Purpose of Post-Charge Diversion

Research demonstrates better outcomes are possible when appropriate individuals are offered a post-charge diversion opportunity, rather than prosecuted through the traditional justice system process.

- 2.1** Post-charge diversion can occur at any point after charging and through case disposition.
- 2.2** Successful post-charge diversion results in dismissal or reduction of criminal charges.
- 2.3** Post-charge diversion promotes individual justice and reduces harm, while effectively utilizing system resources and research.
- 2.4** Jurisdictions provide post-charge diversion options and designate an entity to oversee and/or administer diversion services.
- 2.5** All cases considered for diversion at the charging decision have prosecutorial merit and they should be provable beyond reasonable doubt.

#### Commentary:

Research in the criminal justice field has given us a template for evidence-based practices. “These are practices that deliver the best outcomes for reducing recidivism. Justice, health, and community resources should be allocated to programs that demonstrate the greatest capacity to reduce recidivism, protect public order and safety, and promote public health, while also mitigating the need for costly justice supervision” (Center for Health and Justice, 2013). Post-charge diversion programs are an opportunity to reduce recidivism and an alternative to the burden of a criminal record for individuals, because they are offered after charging, but before engagement in the traditional court process. A successful completion of a post-charge diversion program usually results in dismissal of the charges and avoidance of a criminal conviction, thereby reducing burdens on the court calendar and increasing efficiency for multiple stakeholders.



Prosecutor led diversion programs were shown to reduce re-arrest in four out of five locations studied in the National Institute of Justice's Multi-Site Analysis (2018). Jurisdictions with diversion programs have also shown positive outcomes for participants, including less time spent incarcerated, avoidance of criminal convictions, and improved outcomes regarding substance use and mental health (Camilletti, 2010).

Individual Criminal Justice Coordinating Councils (CJCC) should make decisions involving all stakeholders. The value of this collaborative approach to criminal justice policies cannot be overstated. The benefits to the collaborative approach include the following: "joining resources and dividing labor, alleviating isolation, sustaining motivation through commitments to other collaborators, and creating energy through interpersonal relationships to complete projects" (Fox and Faver, 2016). This collaborative approach should include a separate and independent entity to administer and/or oversee services, because having one stakeholder responsible for providing all of the resources does not allow for the sharing of responsibilities in the collaboration (Hord, 1981).

### References:

- Camilletti, C. (2010). Pretrial Diversion Programs: Research Summary, Bureau of Justice Assistance, U.S. Department of Justice, <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>.
- CMHS National GAINS Center, *Practical Advice on Jail Diversions: Ten Years of Learning on Jail Diversion from the CMHS National GAINS Center*, (2007), <https://www.prainc.com/wp-content/uploads/2015/10/practical-advice-jail-diversion-ten-years-learnings-cmhs-national-gains-center.pdf>.
- Fox, M. F., & Faver, C. A., *Independence and Cooperation in Research*, THE JOURNAL OF HIGHER EDUCATION, 55(3), (1984) 347-359.
- Hord, S. *Working Together: Cooperation or Collaboration?* The University of Texas. February, 1981.
- Rempel, M., Labriola, M., Hunt, P., Davis, R., Reich, W., and Cherney, S. NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness, 2018.



## **Post-Charge Diversion**

### **Organizational Structure**

**D**iversion programs adhere to [Evidence Based Decision Making \(EBDM\) Framework](#).

- 3.1** Post-charge diversion programs have policies and procedures that include operational and program goals.
- 3.2** Post-charge diversion programs are part of a collaborative approach to criminal justice.
- 3.3** In all policies and actions post-charge diversion programs, seek to eliminate bias and provide equal opportunities for staff and participants regardless of race, ethnicity, gender, sexual orientation, physical ability, and any other protected class.
- 3.4** Post-charge diversion programs follow evidence-based practices. The guidelines are updated on a regular basis and are widely distributed to all interested parties.
- 3.5** Post-charge diversion programs develop and utilize a management information system to support data collection and presentation, compliance monitoring, case management, and program evaluation. The program also develops and implements policies that address data sharing and information protection.
- 3.6** Post-charge diversion programs conduct periodic program evaluations and audits to determine effectiveness in their performance and practices.

#### **Commentary:**

The Framework does not attempt to prescribe implementation in precisely the same way in every community. In this way it is not “a model.” It is instead intended to frame a purpose, articulate principles, and propose a process for decision making that can be applied to the system as a whole (CEPP, 2017). These Standards take into account that not every jurisdiction has the same needs, presents the same issues, or has the same resources available. However, these Standards are developed under and guided by the Framework of the EBDM initiative in the State of Wisconsin.



The creation of CJCCs and Treatment Courts in the State of Wisconsin have demonstrated the benefit of the collaborative approach in criminal justice system program development and implementation. This collaboration of the system stakeholders should continue in the operation of diversion programs. Stated operations and shared program goals guide decision making and increase effectiveness (Allen, 2007).

The use of evidence-based practices with those involved in the criminal justice system has been shown to decrease recidivism by up to 30% (Andrews, 2006). Post-charge diversion programs should use strategies that have been shown to have positive outcomes and are based on empirical research.

Despite many diversion programs in existence across the country, there are “no apparent overarching standards for collecting or publishing data to help in evaluating different types of programs against common sets of performance measures” (Center for Health and Justice, 2013). A goal of these Standards is to have a better system of identification and cohesion for diversion programs. Each jurisdiction needs the freedom and flexibility to develop its own programs. Data collection, information sharing, and program evaluations must ensure that for all programs we effectively address identified issues and provide appropriate services to the individuals in the system. The success of diversion programs is contingent on the quality of program design and implementation. Diversion programs that demonstrate a high level of fidelity monitoring are especially promising in reducing recidivism (Schwalbe, Gearing, MacKenzie, Brewer, & Ibrahim, 2012).

Pretrial programs should begin with system mapping, so that appropriate data is gathered about the system and decision points can be assessed by the individual jurisdiction (National Association of Counties). Having this foundation of information can assist the CJCC in appropriately planning for a diversion program. Research has shown that successful collaboration should include an agreement on the exchange of tasks; development of a joint staff system (which includes representatives from the different stakeholders); and the projected results, outcomes, and services (Fox and Faver, 1984).

## References:

- Allen, J., Jimmieson, N. L., Bordia, P., & Irmer, B. E. *Uncertainty during Organizational Change: Managing Perceptions through Communication*, *Journal of Change Management*, 7(2), 187-210 (2007).
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## Post-Charge Diversion

### Eligibility

**M**inimizing barriers to participation for appropriate candidates leads to better outcomes.

- 4.1** Eligibility criteria are formally documented.
- 4.2** Eligibility criteria are research-informed.
- 4.3** Eligibility criteria are objective.
- 4.4** Eligibility of individuals is assessed and referrals are made to diversion programs as soon as possible.
- 4.5** Individuals have the opportunity to consult with counsel before deciding to participate in a diversion program.
- 4.6** An individual's decision to participate in a post-charge diversion program is voluntary and made with written, informed consent.
- 4.7** The decision to apply for a post-charge diversion does not preclude an individual from considering or pursuing other strategies that may be more beneficial.
- 4.8** Individuals who meet the research-based criteria for admission are considered for participation in a post-charge diversion program.
- 4.9** Written eligibility, completion, and termination criteria are clearly established for participation in diversion. The guidelines are updated on a regular basis and widely distributed to all interested parties.
- 4.10** Eligible participants are not denied access or referrals to post-charge diversion programs based solely on race, ethnic origins, gender, sexual orientation, physical ability, any other protected class, inability to pay restitution or program fees, or inability to perform community service.



## **Commentary:**

Establishing written criteria is a strategic management tool that has been shown to improve performance in various organizations (Weiss and Piderit, 1999). Input from individual stakeholders into the written criteria also reinforces the collaboration among justice professionals.

Eligibility criteria for diversion programs should be applied early and consistently at multiple points of case processing and should be broad, equitable, and objective. Criteria should include as many appropriate populations as possible and be consistent with the sequential intercept model of considering program placements whenever warranted by the individual's current situation or the current nature of adjudication (Munetz & Griffin, 2006).

Documenting eligibility criteria helps to ensure that all stakeholders are aware of and consistently using diversion options. Each jurisdiction will plan for and develop criteria that meet the needs of their communities, yet provide opportunities for individuals in the system to be diverted to appropriate resources. Stakeholders should discuss balancing diversion to community programming and the protection of public safety. A threshold criteria in the interest of public safety will decrease the number of individuals eligible for diversion. Restrictive criteria potentially increase long-range risks to public safety by decreasing the opportunities for the diversion program to direct participants to community services known to reduce recidivism.

The appropriate time length between identification, referral, assessment, and program start depends upon how individual systems function. These Standards are meant to be guidelines and not to place unrealistic expectations on those systems to perform. However, research from the Laura and John Arnold Foundation indicates that being detained pretrial for two days or more is related to the likelihood of post-disposition recidivism. As the length of time in pretrial detention increases, so does the likelihood of recidivism at both the 12-month and 24-month points (Lowenkamp, VanNostrand, and Holsinger, 2013). Research has also shown that diversion programs are significantly more effective in reducing recidivism than the traditional justice system when using the appropriate interventions (Wilson & Hoge, 2012).



**References:**

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## Post-Charge Diversion

### Enrollment

Research shows that individuals perform better when enrollment is based on individual needs, risk level, responsivity, and willingness to participate.

- 5.1 The diversion agreement is a written contract outlining program expectations, conditions, time length, benefits of completion, and consequences of termination.
- 5.2 The conditions of post-charge diversion are based upon a risk/needs assessment and are fair, equitable, individualized, and related to the goals of diversion agreement.
- 5.3 Conditions are reviewed at the time of entry into the post-charge diversion program.

#### Commentary:

Each program will have conditions that reflect the intentions of the stakeholders involved in the planning and implementation of the diversion program. The use of a risk/needs assessment is fundamental to determining the goals and conditions of the diversion program. Research has shown the superiority of actuarial approaches to decision making over intuitive judgments in a variety of contexts, including recidivism risk (National Center for State Courts, 2014).

In the past, the participant release status was a moot point for diversion programs because most participants were either totally diverted out of the system without release conditions or because their release status did not affect the diversionary process, as in a release on recognizance. At the time of diversion enrollment, many participants are under pretrial release supervision with a number of conditions that may or may not support diversion plans. Pretrial release conditions in these cases must be reviewed in order to ensure that they are consistent with the goals of the diversion program and the effects of these mandatory conditions are considered. If the diversion staff must enforce release conditions as well as monitor a voluntary intervention plan, the conflict between these types of conditions can erode the voluntary nature of diversion.

#### References:

*Offender Risk & Needs Assessment Instruments: A Primer for Courts*. National Center for State Courts, 2014.



## Post-Charge Diversion Intervention Services

Use of a validated risk assessment tool in conjunction with the traditional decision making process provides consistent interventions with enhanced outcomes.

- 6.1** Post-charge diversion plans are developed through the use of a validated risk and/or needs assessment designed to develop an intervention plan that is the least restrictive possible and is structured to minimize the risk of future criminal behavior.
- 6.2** Post-charge diversion programs utilize individualized and realistic expectations.
- 6.3** Program dosage is based on risk level.
- 6.4** Post- charge diversion programs can be available to all risk levels, as long as they are appropriately designed.
- 6.5** Post- charge diversion programs do not mix risk levels in programming.
- 6.6** Post-charge diversion programs are responsive to temperament, learning style, motivation, culture, and gender when assigning programs.
- 6.7** When indicated by a risk-based needs assessment, post-charge diversion programs utilize services in their community that adhere to evidence-based practices.
- 6.8** As the participant progresses modifications may need to be made to the individualized treatment plan to address risk/needs, and responsivity factors.

### Commentary:

The use of a risk and/or needs assessment has been consistently shown to identify a participant's likelihood of future recidivism and to identify the criminogenic needs to be addressed with programming for successful reduction of recidivism. As a result of this research and the variety of research available on what works to decrease recidivism based on assessed level, it is particularly important to correctly identify risk level.



Low, medium, and high-risk offenders can be included in post-charge diversion programs, but placing high-risk and low-risk offenders together is not a good strategy. Mixing risk groups exposes the lower-risk offenders to the antisocial behaviors of higher-risk offenders and jeopardizes their prosocial relationships and productive community engagement (Latessa, 2010).

As noted in Appendix A, the Wisconsin Diversion Standards intentionally focus on including information that is supported by and grounded in research and evidence. Research is not currently available to indicate if drug and alcohol testing is a necessary component of diversion programs to produce successful outcomes. Pre-Charge and Post-Charge Diversion programs generally serve lower-risk individuals; research has shown that lower-risk individuals are more likely to self-correct and thus require less interventions. However, this population may have a high treatment need, which makes drug and alcohol testing an appropriate program requirement if the criminal conduct was a result of a substance use disorder. In these cases, drug and alcohol testing frequency should be determined by the individual's risk and needs level and a clinical assessment. The frequency should not follow the testing regimen of a treatment court because that level of testing is most effective for the high-risk population. See Appendix A for guidance on appropriate drug and alcohol testing requirements for prosecutor-led diversion programs.

## **References:**

Latessa, Edward J. & Lovins, Brian, *The Role of Offender Risk Assessment: A Policy Maker Guide*, Victims & Offenders, 5:3, 203-219 (2010).



## Post-Charge Diversion

### Behavior Response

Consequences for participants' behavior are predictable, fair, and consistent.

- 7.1 Post-charge diversion programs develop and utilize an incentive structure and violation matrix.
- 7.2 Post-charge diversion programs provide participants notice of possible behavioral responses.
- 7.3 Behavioral responses are provided fairly, timely, and consistently.

#### Commentary:

A program model that encompasses both rewards and sanctions is more predictive of success than a reward model or a sanction model alone. The probability of successful program completion is optimized when the reward-to-sanction ratio is at least 4 to 1 (Lou, Hsu, and Sajda, 2015). Participants are aware of the documented behavior response and staff should be consistent with responses. Sanctions on their own do not change offender behavior or reduce recidivism, and research shows that severe sanctions may actually increase recidivism (Gendreau, 1996).

Research has shown that higher perceptions of procedural fairness lead to better acceptance of court decisions, a more positive view of individual courts and the justice system, greater compliance with court orders, and reduced recidivism (Burke & Leben, 2007).

#### References:

- Lou, B., Hsu, W.-Y., & Sajda, P. (2015). Perceptual Saliency and Reward Both Influence Feedback-Related Neural Activity Arising from Choice. *The Journal of Neuroscience*, 35(38), 13064–13075. <http://doi.org/10.1523/JNEUROSCI.1601-15.2015>
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- Gendreau, P. (1996). The principles of effective intervention with offenders. In A. Harland (Ed.), *Choosing correctional options that work* (pp. 117–130). Thousand Oaks, CA: Sage.



## Post-Charge Diversion

### Completion

Successful participants experience the harm reduction benefits of program participation.

- 8.1** Information provided to the prosecutor is limited to the information necessary to verify compliance with program requirements.
- 8.2** Successful post-charge diversion participants will not be readily identifiable on any public state court record management systems. Every effort will be made to minimize the collateral consequences associated with a successful post-charge participant's information available on a state court records management system.
- 8.3** Successful completion of the post-charge diversion program results in a reduction or dismissal of the charges.

#### Commentary:

To limit the collateral consequences associated with admission to a post-charge diversion program, records of individual diagnosis, treatment records, and other information should not be submitted to the prosecutor or court if it does not have an impact on program compliance or completion. Collateral consequences tend to last indefinitely, long after an individual is fully rehabilitated, and many collateral consequences affect a person's employment and business opportunities; others deny access to government benefits and program participation, including student loans, housing, contracting, and other forms of participation in civic life (Ewald & Smith, 2008). Perceptions of stigma toward criminals prior to release predicted poorer adjustment in the community (Moore, Stuewig, Tangney, 2015).

In collaboration the risks and rewards are shared by all stakeholders, and the interactions among individuals are characterized by a fair process (Fox and Faver, 1984). The defendant entering into a post-charge diversion agreement is also taking risks regarding the consequences for future behavior. Thus, it is imperative that only information related to program compliance and requirements be entered into court records or used in the decision-making process of future criminal charges.



## References:

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- Fox, M. F., & Faver, C. A., *Independence and Cooperation in Research*, *The Journal of Higher Education*, 55(3), 347-359 (1984).
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## Post-Charge Diversion Termination

Termination procedures are fair, equitable, and consistent with due process.

- 9.1 Termination policies are included in the policies and procedures manual. Participants are not terminated for arbitrary or capricious reasons.
- 9.2 A post-charge diversion participant can be terminated from a diversion program only after being afforded every reasonable opportunity to demonstrate compliance with the terms of the program. Participants cannot be terminated for arbitrary and capricious reasons.
- 9.3 A post-charge diversion participant may withdraw from the diversion program voluntarily at any time before completion. An individual's decision to withdraw should not be considered an aggravated factor within any ensuing criminal prosecution.
- 9.4 A post-charge diversion participant is provided a written explanation of termination.
- 9.5 Arrests that occur during the course of the post-charge diversion program are not grounds for automatic termination.

### Commentary:

In a number of Wisconsin cases, a diversion agreement is considered a type of plea bargain, according to *State v. Kaczmarek*, 2009 WI App 117, 320 Wis. 2d 811, 772 N.W.2d 702 (Ct. App. 2009) and *State v. Roou*, 2007 WI App 193, 305 Wis. 2d 164, 738 N.W.2d 173 (Ct. App. 2007). Plea bargains are analogous to contracts, so contract-law principles may help determine a participant's rights. A material and substantial *breach* is a manifest injustice because it violates the terms of the agreement such that it defeats the benefit for which the accused bargained. See [Williams, 2002 WI 1, ¶ 38, 249 Wis.2d 492, 637 N.W.2d 733 \(2002\)](#); see also [Deilke, 2004 WI 104, ¶¶ 11-14, 274 Wis.2d 595, 682 N.W.2d 945 \(2004\)](#).

Diversion programs should use a range of sanctions for non-compliance, resorting to the ultimate sanction of termination only when all reasonable opportunities have been given for the participant to succeed. Participants will invariably differ in their level of commitment, the other demands on their time and energy, their access to reliable transportation, and other characteristics that can make compliance with diversion requirements more challenging.



**References:**

*Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973).

*State ex rel. Klinke v. Wisconsin Dept. of Health and Social Services*, 87 Wis.2d 110, 273 N.W.2d 379 (1978).

*Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972).

See *Morrisey v. Brewer*, 408 U.S. 471 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), defining basic Due Process rights in a parole revocation hearing to include the following: 1) right to notice of alleged violations; 2) disclosure of evidence; 3) timely hearing; 4) opportunity to be heard and to present witnesses; 5) opportunity to confront adverse witnesses; 6) neutral and detached decision maker; and 7) written statement by decision maker.

See *State ex rel. Klinke v. H&SS Department*, 273 N.W.2d 379 (WI Ct. App. 1978)



## **Post-Charge Diversion**

### **Confidentiality & Data Privacy**

To encourage open and honest participation information should be kept confidential.

- 10.1** As a general rule, information gathered in the course of the post-charge diversion program and intervention process is considered confidential and will not be released without the participant's prior written consent.
- 10.2** Program compliance reporting is kept confidential, unless disclosure is required by mandatory reporting laws.
- 10.3** Qualified researchers and auditors, under limited and controlled conditions, may be afforded access to post-charge diversion participant records provided that no identifying characteristics of individual participants are used in any report.

#### **Commentary:**

In collaboration, the risks and rewards are shared by all stakeholders, and the interactions among individuals are characterized by a fair process (Fox and Faver, 1984). The defendant entering into a post-charge diversion agreement is also taking risks regarding the consequences for future behavior. Thus, it is imperative that only information related to program compliance and requirements be entered into court records or used in the decision-making process of future criminal charges.

#### **References:**

Fox, M. F., & Faver, C. A., *Independence and Cooperation in Research*, The Journal of Higher Education, 55(3), 347-359 (1984).



## Post-Charge Diversion

### Performance Measurement & Evaluation

**D**iversion programs engage in ongoing data collection, performance measurement, and evaluation to assess adherence to Wisconsin state and national standards, evidence-based practices, and progress on specific program goals and objectives.

- 11.1** Develop or utilize a process to routinely collect data in a consistent, electronic format for both performance measurement and program evaluation.
- 11.2** Collect data in a consistent, accurate, and timely fashion, preferably within 48 hours of events.
- 11.3** Collect demographic information for both referrals and program participants including, but not limited to, race/ethnicity, gender, and age to identify and address potential issues of equity across groups.
- 11.4** Utilize demographic and related data to assess differences across categories of participants for the percentage who are referred, admitted, denied, successfully complete, or are terminated from the program (including the basis for denial or termination), to evaluate factors that might contribute to discrepancies in admission or termination rates across groups (see Standard 1).
- 11.5** Routinely monitor data for overall adherence to best practice standards, review performance measures, compare to benchmarks or performance targets, ensure consistency with goals, and take corrective actions as identified.
- 11.6** Utilize reliable and valid scientific principles in the completion of process, outcome, and impact evaluations, as well as cost-benefit analyses.
- 11.7** Utilize an outside, trained, independent evaluator to conduct process, outcome, and impact evaluations periodically (at least every five years) using vigorous standards of evidence-based practices.
- 11.8** Base evaluations on an intent-to-treat analysis that includes all program participants regardless of whether they terminate or successfully complete the program.



## Commentary:

Analyzing program processes, outcomes and impacts, assessing adherence to best practices, monitoring ongoing performance measures and in turn, making changes to programs as needed should be central to the implementation of diversion programs. To support the ongoing review of programs, it is important for programs to collect data in a timely, accurate, and consistent manner. As such, programs should use a consistent data tracking system. Counties and tribes may utilize the Comprehensive Outcome, Research, and Evaluation (CORE) Reporting System provided by the Wisconsin Department of Justice or another comparable system for data collection. Performance data and evaluation results should be used to take corrective action, make program adjustments, and monitor changes in program progress and outcomes. In addition, programs should continually solicit feedback regarding program performance from participants, team members, and stakeholders to better address participants' needs and improve program outcomes.

Evaluators conducting impact evaluations should use a comparison group of similarly situated individuals who could have met the program eligibility criteria but did not take part in the program. Furthermore, for outcome and impact evaluations, recidivism should be tracked at multiple points in the criminal justice process, including arrest, charging, conviction, and incarceration for a minimum of three years following discharge from the program (for additional information, see the [Wisconsin State Criminal Justice Coordinating Council Framework for Defining and Measuring Recidivism](#)). Outcomes for both the treatment and comparison groups should be followed for the same time period (time at risk).

## References:

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## Appendix A – Wisconsin Diversion Standards

### Drug and Alcohol Testing

The Wisconsin Diversion Standards intentionally focus on including information that is supported by and grounded in research and evidence. Research is not currently available to indicate if drug and alcohol testing is, or is not, a necessary component of diversion programs to produce successful outcomes. Diversion programs generally serve lower-risk individuals; research has shown that lower-risk individuals are more likely to self-correct and thus require less interventions. However, this population may have a high treatment need, which makes drug and alcohol testing an appropriate program requirement if the criminal conduct was a result of a substance use disorder. In these cases, drug and alcohol testing frequency should be determined by the individual's risk and needs level and a clinical assessment. The frequency should not follow the testing regimen of a treatment court because that level of testing is most effective for the high-risk population. This appendix is intended to provide Wisconsin diversion programs with guidance on appropriate drug and alcohol testing requirements for the programs.

- A.1 The diversion program policy and procedures manual, participant contract and participant handbook contain written procedures and methods for drug testing.
- A.2 Upon entry to the program, the participant is given a clear explanation of the drug testing policy, the testing procedures, the participant's rights and responsibilities regarding testing, and possible responses to a positive test.
- A.3 When developing the diversion program policies, responses to positive test results should include a therapeutic benefit for participants.
- A.4 Drug testing methods should be valid and legally defensible. The diversion program maintains a forensic evidentiary standard for drug test results, using scientifically valid and reliable testing procedures with an established chain of custody.
- A.5 Participants are tested on a truly random basis, so that the odds of being tested are the same on any given day, including weekends and holidays.
- A.6 Participants deliver observed specimens during the program's scheduled collection times.
- A.7 Testing is not confined to a participant's identified drug of choice. Tests should screen for multiple substances, including alcohol.
- A.8 Participants are given the opportunity to report substance use prior to testing. However, testing should still be completed even if a participant reports substance use.
- A.9 Failure to submit to a test is considered a positive test result.



- A.10 Participants are given the opportunity to contest a positive test result. The program shall have a procedure to verify any contested positive test with a certified laboratory. Responses to positive tests should be withheld until results are confirmed.
- A.11 A positive drug test in the program should not result in new criminal charges.
- A.12 To respond effectively to the needs of the participant, the diversion program team is informed in a timely manner of positive test results.

**References:**

Wisconsin Treatment Court Standards (2018), *Standard 13: Drug & Alcohol Testing* (pp. 26-27).

