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"PRACTICES OF PRETRIAL DIVERSION PROGRAMS: REVIEW AND ANALYSIS OF THE DATA"

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PROGRAM PRACTICES / DIVERSION

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Donald E. Pryor

FOREWORD

Formal diversion of defendants in adult courts has been in existence for almost twenty years. The information in this publication fills a crucial gap in understanding these two decades of experience; until now, literature on diversion programs has either reviewed legal issues, proposed standards, or evaluated individual agencies. A comprehensive overview of program practices, however, had never been done. Without this data, it is impossible to acquire a perspective on pretrial diversion as a whole, or to identify questions that should be addressed in the future.

Extensive interviews with all pretrial diversion programs known to the Resource Center were conducted over the phone. The findings were then tabulated and compared. And while the information is reported and non-evaluative, it illustrates trends and questions that require attention.

Our interviews confirmed that pretrial diversion programs have had to change in order to survive; that survival has been accomplished as a whole (the number of programs is stable); but that the purpose for continuing operations is muddled. Practices reflect an overall shift away from defendant oriented services and toward criminal justice system improvements. However, these practices vary so from program to program that it is almost impossible to define what "pretrial diversion" does, or what it is for. The lack of documentation and evaluation of stated objectives compound these questions.

In this publication, we attempt to summarize implications of these findings for diversion program directors and policy makers (Chapter II). This is preceded by a description of how the information was obtained and what it focuses on (Chapter I). Details on the data from which the summary analysis was drawn are covered in Chapters III through V. This portion is also the most voluminous. Yet this is where program administrators will find specific information that might assist them in remedying obstacles unique to their programs.

As we compiled the results of our decisions, it became clear to us that a re-assessment of program practices is needed if a re-identification of pretrial diversion is to occur; and that a similar case by case (program by program) re-assessment would also be useful in most instances. We hope this publication will provide assistance and incentive in doing so.

Madeleine Crohn

I. INTRODUCTION

Among the important and widespread reforms in the criminal justice system during the past 15 years has been the development of the pretrial diversion concept (also referred to as pretrial intervention and deferred prosecution programs in various locations).

This monograph is designed to raise key questions and present information concerning the current status of pretrial diversion programs and the implications of their practices and policies.

Pretrial diversion programs operate with differing goals and under a variety of different practices, policies and philosophies. Thus, agreement on an all-encompassing definition of pretrial diversion is difficult. 1/ The National Advisory Commission on Criminal Justice Standards and Goals defined it as the "halting or suspending before conviction of formal criminal proceedings against a person on the condition or assumption that he will do something in return." 2/ Beyond that general definition of the process, this monograph considers a pretrial diversion program to be one in which defendant participation is voluntary, 3/ the diversion occurs prior to adjudication, various services are available to the defendant, and charges are dismissed (or the equivalent) if the defendant successfully completes the diversion process. For purposes of this discussion, the definition is further limited to those programs which operate in the adult criminal courts (although some also provide diversion services to juveniles). 4/

1/ For discussions of various definitions, see John Bellassai, "Pretrial Diversion: The First Decade in Retrospect", Pretrial Services Annual Journal, 1978, Washington, D.C.: Pretrial Services Resource Center, pp. 15-16 and accompanying footnotes 6, 8, 9; and Madeleine Crohn, "Diversion Programs: Issues and Practices", Pretrial Services Annual Journal, Vol. III (1980), Washington, D.C.: Pretrial Services Resource Center, p. 21. See also National Association of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion: Diversion, August 1978, p. 5. The latter definition, provided in the standards of the national association of pretrial practitioners, is an ideal one based on the standards themselves. Due to frequent program deviations from two of the standards (having to do with access to legal counsel prior to a decision to divert and with whether or not formal charges are filed pre-diversion), many otherwise-legitimate pretrial diversion programs would not be included under the NAPSA definition. Thus, the more general definition stated above in the text is considered preferable.

2/ National Advisory Commission on Criminal Justice Standards and Goals, Report on the Courts, 1973, p. 27.

3/ The defendant cannot be compelled to participate in a diversion program. However, how truly voluntary the defendant's decision is is sometimes unclear. This issue will be addressed later in the monograph.

4/ The above definition specifically excludes such non-program legal forms of "diversion without services" as New York's Adjournment in Contemplation of Dismissal (ACD) and Massachusetts' "case continued without a finding", in which cases are in effect dismissed subject to defendant "good conduct" over a specified period of time. Prosecution is rarely resumed in such cases. Dispute resolution programs and specialized treatment programs (e.g., family violence, substance abuse, etc.), which can also be used to "divert" cases from the criminal justice system, are also excluded from the definition of pretrial diversion used in this monograph.

Since the diversion concept was introduced in the last half of the 1960s, programs have been established in many jurisdictions throughout the country. 5/ The Pretrial Services Resource Center's 1980/81 Directory of Pretrial Services lists 139 formal adult diversion programs -- a total which underrepresents the scope of diversion activity in the country. 6/

Since the development of the initial diversion programs, various changes have occurred within the pretrial diversion field, in the entire criminal justice system, and in the public's attitudes toward crime and the treatment of defendants. In addition, various national organizations and commissions have published standards and guidelines dealing totally or in part with pretrial diversion practices. 7/

5/ The Citizen's Probation Authority program in Flint, Michigan is generally acknowledged to have been the first formal adult pretrial diversion program, having begun in 1965. Following that, the U.S. Department of Labor funded two pilot diversion projects in 1968 in New York City and Washington, DC. A variety of different types of diversion programs began to proliferate in the early 1970s. Useful historical perspectives on the development of the pretrial diversion movement can be found in the separate articles by Bellassai and Crohn, Supra note 1.

6/ Although the 1980/81 edition of the Directory provides the most comprehensive listing and description of pretrial programs currently available, the total above understates the number of programs that actually exist. It is likely that some programs are not known to the Resource Center. Moreover, not included here are police diversion programs or Treatment Alternatives to Street Crime (TASC) programs which often provide diversion services to those with drug-related problems. Nor, as indicated above, does the total include programs which divert only juveniles. In addition, relatively informal diversion practices exist whereby a number of jurisdictions around the country have developed some mechanism to ensure that the process of pretrial diversion with services occurs even if there is no formal program per se (i.e., the practice may be "buried" in a larger agency without a separate pretrial diversion budget).

7/ The national association of pretrial practitioners, NAPSA, published comprehensive standards in 1978 (see note 1, Supra). Among the other organizations and commissions which have published standards and guidelines dealing at least in part with diversion practices are the following: the National Advisory Commission on Criminal Justice Standards and Goals (1973), the National Conference of Commissioners on Uniform State Laws (1974), the National District Attorneys Association (1977), the American Law Institute Model Code of Pre-Arraignment Procedure (1972), the American Bar Association (standards relating to the prosecution and defense functions - 1980).

Nonetheless, despite these developments and the pervasiveness of the pretrial diversion movement throughout the country, there has been no systematic attempt -- until this monograph -- to comprehensively assess pretrial diversion program practices and the extent to which they are consistent with national standards and goals. 8/

A. The Data Base

All known formal adult pretrial diversion programs in the United States were canvassed by the Resource Center in late 1979. Comprehensive information was obtained by Center staff from 127 programs. 9/

8/ This Resource Center did publish a preliminary and partial analysis of pretrial practices in both diversion and release programs. See Donald E. Pryor and D. Alan Henry, Pretrial Issues, "Pretrial Practices: A Preliminary Look at the Data," Vol. 2, No. 1, Washington, DC: Pretrial Services Resource Center, April 1980. The publication examined certain assumptions based on national standards and assessed the extent to which selected program practices were consistent with them. That assessment drew upon the data-gathering process described herein in Section A of the text. However, only a small proportion of the information had been analyzed at that time, and much more detailed analyses have subsequently been undertaken. They form the basis of this monograph.

Prior to that publication, the National Center for State Courts had published a limited survey of policymakers and diversion program directors concerning diversion goals. Limited descriptive information was also obtained about the programs. However, only 22 programs were represented in the survey. See Robert Stover and John Martin, "Results of a Questionnaire Survey Regarding Pretrial Release and Diversion Programs", in Policymakers' Views Regarding Issues in the Operation and Evaluation of Pretrial Release and Diversion Programs: Findings from a Questionnaire Survey, Denver: National Center for State Courts, April 1975. The most comprehensive information previously obtained about diversion programs nationally was contained in the ABA Pretrial Intervention Service Center's Directory of Criminal Justice Diversion Programs 1976. That directory contained 148 pretrial diversion programs, but only 110 were actually non-TASC, adult programs; moreover, very little information was included in the directory, and no analysis or compilation was provided of the minimal information which was collected. For other useful reviews of practices in limited numbers of diversion programs, see Joan Mullen, Pre-Trial Services: An Evaluation of Policy Related Research, Cambridge, MA: Abt Associates, December 1974; Roberta Rovner-Pieczenik, Pretrial Intervention Strategies: An Evaluation of Policy-Related Research and Policymaker Perceptions, Washington, DC: National Pretrial Intervention Service Center, November 1974; and Pretrial Diversion from Prosecution: Descriptive Profiles of Seven Selected Programs, New York: Vera Institute of Justice, April 1978. Each of these publications provides information of value in understanding diversion programs and their practices, but none provides a comprehensive description and analysis of all known programs and their practices. Not until the creation in 1977 of the Pretrial Services Resource Center did the capability exist for systematic, ongoing tracking of pretrial programs, and for documenting the evolution of individual programs and of the field as a whole.

9/ Actually, a total of 131 programs were interviewed and were included in the previously-mentioned Pretrial Issues publication. However, four programs no longer provide pretrial diversion services and thus are not included here. Also, some additional programs of the 139 listed in the 1980/81 Directory of Pretrial Services were not interviewed at that time. They have subsequently been interviewed, but the information on those programs was not complete enough to be included in the analyses for this monograph. As a result, the monograph is based on practices and policies of 127 programs.

The programs are located in 31 states plus the District of Columbia. Their locations are noted in Appendix A. As indicated there and as discussed in more detail later in the monograph, 40 of the programs (almost one-third of the total) are located in two states -- Florida (19) and New Jersey (21). Within each of those two states, many of the programs operate under a common administrative framework and common standards and guidelines. However, there are significant variations between these programs as well, particularly in Florida. Where any data presented later in the monograph are distorted by program profiles in either or both of these states, this will be noted.

Information was primarily obtained through telephone interviews and was supplemented by additional statistical data. Of the 127 programs, 102 supplied at least some of this follow-up statistical information. All of the information was updated in 1980 to reflect any program changes and was verified for accuracy with the program directors. 10/

The questions asked by Center staff ranged from those dealing with a description of the programs to those focusing on program practices, policies and philosophies. Both the interview format and the statistical questionnaire are presented in Appendix B.

Some limitations should be noted. Conclusions must technically be limited to the 127 programs; but the findings are actually considered representative of all formal adult diversion programs. 11/ Except in those cases where Resource Center staff have actually visited or in other ways worked directly with programs, there was no way of independently verifying the information provided. There were some questions which were subject to different interpretations, as indicated in the analyses below, e.g., terms defined in different ways by different programs (although this problem was minimized to the extent possible as a result of careful attempts by the Resource Center interviewers to explain terms and to clarify program answers to questions). In addition, it is not possible from the data to make any judgments about the quality of the actual services provided by the programs.

Despite these limitations, the responses provided important insights about program operations and practices which should have significant implications for program administrators and policymakers in the future. The broad scope of questions raised -- and the ability to compare the responses to published standards and guidelines for the pretrial diversion field -- helped yield information and suggest implications never before examined in a systematic way across all diversion programs.

10/ Thus many of the numbers differ somewhat from those published in the earlier Pretrial Issues preliminary data analyses (see note 8, Supra), due to program changes and further verification of information.

11/ Subject to the limits and definitions described in the text and in notes 4, 6 and 9, Supra.

B. Purpose of the Monograph

The monograph is published at a time when various changes and events are occuring which can have -- and in some cases already have had -- a significant impact on how diversion programs operate. For example, many programs have become institutionalized components of local criminal justice systems; on the other hand, budget crises increasingly force programs to justify their existence more carefully; various states are contemplating -- or have already established -- statewide systems defined by standards and guidelines to deliver pretrial services; the public and their elected officials express increasingly hardline attitudes toward crime and the treatment of defendants within the criminal justice system.

Founders of the early pretrial diversion programs were practical and realistic enough to recognize that specific objectives and procedures must be modified to accommodate local circumstances and political realities, but they remained idealists in pursuing the goals of improving the criminal justice system and providing important services to defendants entering that system. 12/ Today, however, much of the reformers' zeal and idealism that fueled the early pretrial movement has waned and, to some extent at least, been replaced by different purposes and approaches and by concerns related to maintenance and institutionalization of functions. As stated by one who has been involved with diversion programs from the early days:

> "The innovation of formalized pretrial diversion was initiated at a time when society was intensely questioning and reevaluating its practices and institutions. Within that context, those who started the first programs believed that a radically different approach to criminality could yield better results. In short, the programs were designed to focus on and assist the defendant, and challenged the conventional response of the criminal justice system. Almost immediately, however, the societal context changed. This led to a profound transformation of the programs. While the programmatic 'shell' and guidelines were left somewhat intact, the purpose was altered. To be relevant, the programs were required to improve the system itself and to satisfy new societal interests." 13/

Thus, many programs have evolved and/or been established with purposes and approaches very different from the principles that motivated the initial development of the pretrial field.

In this context, it becomes especially important to take a fresh look at the current state of diversion programs and their practices, and to assess where individual programs and the field as a whole are and where they are going -- and where they should be going. This monograph is designed to aid in this process.

Among the questions which needed to be raised, and which are addressed in the following chapters, are the following:

- To what extent are programs helping meet the goals of the early pretrial reform movement? What compromises have programs made with those initial goals? With what effect?

12/ The initial diversion programs tended to be primarily defendant-oriented in their goals, although they were also designed to bring about benefits within the criminal justice system as well. See Crohn, Supra note 1, pp. 23-30 and Rovner-Pieczenik, Supra note 8, pp. 11-12.

13/ Crohn, op. cit., p. 23.

- How much variation in practices actually exists among programs? How consistent are the practices and policies with national standards and goals?

- Are diversion programs declining in numbers and significance, or showing signs of stability and institutionalization?

- What impact are diversion programs having? Are they unnecessarily cautious in whom they divert? Not cautious enough?

- Do programs know what impact they are having?

- How can programs best allocate scarce resources in the future? What changes should they be considering? Are there changes which should be considered in certain standards for the field?

The basic purpose of the monograph, then, is to raise questions and thus encourage all those involved with the pretrial stage of the criminal justice system to review, assess and rethink existing practices, and to enter into dialogue with one another concerning the future role of the pretrial diversion field and its individual programs and practitioners (and including the related roles and responsibilities of judges, prosecutors, defense attorneys, and others who affect -- and are affected by -- the decisions made at the pretrial stage of justice).

Answers to key questions raised throughout the monograph and the related policy implications will largely determine the impact of formal pretrial diversion programs in the future -- indeed, they will largely determine whether such programs continue to exist as we know them today.

C. Format of the Monograph

The next chapter summarizes the major findings detailed throughout the monograph, briefly discusses their implications, and raises questions for future consideration. Following that, Chapter III provides a basic descriptive profile of the 127 diversion programs. Chapter IV contains detailed analyses of program practices, policies and philosophies. Chapter V discusses the extent to which there are systematic differences in practices between different types of programs.

Where possible, information about programs and their practices is contrasted with recommended standards and goals for the pretrial diversion field. This monograph primarily focuses on those standards published by the National Association of Pretrial Services Agencies, because these are the most comprehensive of the various national standards, and because they have benefited from the thinking of the earlier efforts (and quote widely from them). 14/

Throughout the monograph, each of the various sections concerning program operations and practices is preceded by boxed-in highlights which summarize the major findings and policy implications of the more detailed analyses and discussion which follow. Detailed tables are presented in a separate section preceding the Appendices at the end of the monograph. In some cases, summarized data from those tables are also highlighted in boxes within the text.

14/ See note 7, Supra.

II. POLICY IMPLICATIONS AND PRESCRIPTIONS

Pretrial diversion has -- so far -- survived the many questions directed at its practices and adapted to the more conservative policy changes which have affected our criminal justice system in recent years. The number of diversion programs may not have expanded to the extent anticipated when this "new" idea surfaced. But, despite a high attrition rate among programs for the last fifteen years, new agencies continue to be established; and their total number has remained fairly constant (approximately 150 formal diversion programs operate in the adult courts around the country).

Whether these programs should exist, toward what end, and in what form, are questions that are decided ultimately by taxpayers and policy makers. Diversion is no longer the most visible option that removes pretrial defendants from the process of traditional prosecution. Other approaches -- e.g. dispute resolution, summary probation, referral and treatment of special cases (substance abuse, mental handicaps) -- have captured their share of attention and support in recent years. Meanwhile, diversion programs, no longer a fad and more settled in, seldom provoke controversy particularly when we compare today's situation with that of a decade ago.

Yet, throughout the country, pretrial diversion touches the lives of at least 35,000 defendants annually, and aggregate budgets of diversion programs represent upwards of $13 million per year*. These figures are significant enough to warrant attention, particularly when state and local governments must pay for most of the criminal justice system and establish priorities that respond to fearful (and sometimes angered) communities.

Diversion program practices indicate that most agencies intend to help reduce cost and lessen court or prosecutorial backlogs and caseloads. Services that respond to defendants' needs, originally a principal purpose of the programs, are now secondary. Whatever the goals may be, it is important to determine whether they are met; and the data that emerge from program practices are troubling in that regard.

A. Current Practices Confirm a Change in Purpose

Pretrial diversion has not escaped the re-direction that has affected our entire system of criminal justice over the past fifteen years. Current program practices confirm this observation.

* The total budget figure underestimates the total amount of money spent by diversion programs around the country since it is based only on 107 of the programs surveyed.

Unlike some other reforms initiated in the 1960s, pretrial diversion and its operational guidelines were not grounded in constitutional or legal traditions. Standards, court rules, and legislation were developed after the fact, several years after many programs had been established (and in some cases closed), and after serious questioning had occurred. Criticisms of diversion practices had included, for example: lack of mechanisms to ensure equal access to programs or prevent abuse of discretion; absence of defense counsel when various decisions (program entry, termination, etc.) were made about the defendant; possibility that the program was more restrictive than the normal processing of the case (net-widening). Formal guidelines were designed to provide legally tenable principles that would shape the practices. They sought, among other goals, to reconcile the somewhat ambiguous status of the pretrial defendant with the imposition of conditions placed on such a defendant by the state (and program).

Fifteen years later (and five years after the NAPSA standards were promulgated), mechanisms aimed at protecting defendant's rights are among those least reflected in program practices. In contradiction to the suggested standards:

- Almost half of the programs divert some or all defendants before the filing of formal charges.

- More than 40% of the programs have no formal requirement for defense counsel involvement in or agreement to diversion decisions.

- One third of all programs require an informal admission of guilt, and some demand a guilty plea as a condition of entry; yet assistance from counsel is not mandated in half of those programs.

- At least two thirds of the programs require restitution and/or community services as a mandatory condition of program entry; and 40% of all programs automatically terminate defendants who fail to make restitution payment -- regardless of circumstances or compliance with other requirements.

- Approximately half of the programs have no appeal process to review their decision to terminate a defendant (thereby typically returning a defendant to prosecution) regardless of the reasons for the termination; and almost one fifth terminate participation automatically on the basis of an arrest, whether or not there is a subsequent conviction.

- Although completion of the program leads to a dismissal of the charges in most -- though not all -- instances, records are seldom sealed or expunged. (This procedure is followed by only one fourth of the programs.)

These practices, individually or in combination, are similar to those which led to serious questioning of diversion programs by the legal community in the late 1960s. Whether such questioning will occur again or not, it is clear that concerns about defendant rights reflected in early programs have often been superseded by other priorities. These include: reducing program and criminal justice system costs; providing procedures that may be more expedient; helping courts with backlogs of cases; and developing an alternative which can meet with the approval of a more conservative public opinion.

B. Are the New Objectives Met? An Open Question.

The data described in this publication in no way suggests that program staff and administrators are unconcerned with the well being of defendants placed in their charge. But they confirm that the operations of most programs center less on the defendant as the principal beneficiary, and more on providing the community and criminal justice system with options responsive to their interest(s).

A number of diversion program practices are consistent with objectives of cost effectiveness, efficiency, and with a sensitivity to community concerns that defendants are "let off the hook" too easily. They include, among others:

- opting for pre-charge diversion -- which leads to a speedier process and easier disposition of the charges
- the imposition of payment of an entry fee -- which (separate from or in addition to restitution and community services) leads programs to argue that they are cost effective
- mandatory terminations with no hearings, bypassing the appointment of counsel, and similar practices -- which help in a more expedient processing of the cases.
- fewer direct services, or increased referrals to other local agencies for provision of services -- as a means of increasing program efficiency
- mandatory restitution and/or community services -- which intend to distribute criminal justice system resources more appropriately with regard to victims' losses

Unfortunately, the impact and success of these practices in meeting objectives sought have been neither tested nor documented for the most part. Only 15% of the programs indicated they had attempted to determine whether their services and approach have had an impact on defendant outcomes (such as subsequent criminal activity); and only 20% had a cost effectiveness evaluation conducted during the past five years. Moreover, only 25% of the programs have systematically tracked data that would enable them to assess the value of their program practices (such as selection criteria, determination of program impact on specific defendant target groups, assessment of which services have greatest success in meeting program goals, etc.).

This general absence of data is illustrated by the fact that, when information for this publication was compiled, virtually no program was able to indicate the number of arrests or cases that were processed, per year, in their jurisdiction. Many reasons explain this lack of response, including the unavailability of reliable statistics from other criminal justice system components. The consequences, though, are easy to understand. Without information that allows for valid comparisons, it is impossible to confirm whether stated program objectives are being met; whether monies used for pretrial diversion should be used for these or other practices; and/or whether some of the program goals could be achieved but might require different criteria or methods.

C. Should Pretrial Diversion Programs be Supported?

The question is irrelevant to some extent. A large number of cases will continue to be referred to alternate forms of processing as long as court calendars are congested, prosecutorial and other resources are limited, and certain behaviors are not decriminalized.

Pretrial diversion is one of those alternatives. It is not much different from other components of the criminal justice system in its general inability to document objectives and impact. And it is debatable whether programs are supported simply on the basis of good statistics or closed because of lack of data.

On the other hand, formal diversion is a relatively new institution and, as such, is more vulnerable than the more entrenched and traditional criminal justice operations. Limited budgets tend to eliminate the more recent programs first. Unless diversion programs are able to assert their impact in a convincing fashion, their future will predictably follow one of two routes: they will wither as a whole, with the exception of those which have the support of a particular prosecutor, or other influential local sponsors; or they will achieve some level of survival by adapting to whichever practices are in vogue in their respective communities.

In either case, a consistency in purpose and a demonstration of success should -- but probably won't -- shape these decisions regarding the future of diversion programs. As a result, the quandary now faced by diversion programs would be aggravated: a review of operations that have evolved over the years suggests that survival was managed by a number of programs, but that key questions have yet to be answered. This ambiguity is consistent with the assessment made by observers and evaluators of diversion: there is no evidence that the concept is invalid; but implementation of the concept has yet to document impact in order for supportive conclusions to be drawn.

The purpose of our examination is less to define what the primary purpose(s) of diversion should be, than to indicate that conscious choices should be made -- and when made tested. Program administrators should not shy away from raising these questions. Review and assessment of program practices are not necessarily costly, and can be done incrementally over time.

A systematic exchange of information on practices between programs would help in that regard. And re-allocation of certain budget items -- such as an increased use of volunteers and student interns, and coordination of work with other local pretrial screening agencies, both of which are seldom used -- could if implemented carefully yield support for research and development efforts.

Since it is apparent that federal monies will no longer be available for local initiatives in such areas, practitioners in the diversion field will have to assume the responsibility for shaping the future development of their programs. If they do not, and remain fragmented, they may well become part of an obsolete discipline; or they may witness the increasing imposition of practices that are inappropriate, and a transformation of their program against their will.

Nothing in the data, however, suggests that this need be so. There is strong evidence, on the other hand, that diversion programs must take a fresh look at their work and at the assumptions, policies and philosophies which shape their practices.

III. DESCRIPTIVE PROFILE OF PROGRAMS

This chapter describes the current status of pretrial diversion programs, including such factors as authority for their operations, organizational placement, scope and size (including primary service area, budget, staff size, numbers diverted), length of existence, and sources of funding. Wherever possible, the current descriptive profiles will be placed in historical perspective and compared with similar data from 119 pretrial release programs throughout the United States. 15/

A. Program Authority and Organizational Placement

HIGHLIGHTS

- Diversion programs operate under a wide variety of legal or administrative authority and organizational arrangements.
- Many diversion programs were started without any formal authorization conferred by statute or court rule. This fact -- and the fact that the statutes and court rules that do exist differ considerably in their philosophies, guidelines and criteria -- contribute to the variety of program practices, policies and philosophies discussed throughout the monograph.
- About 1/3 of all diversion programs are administered by prosecutors' offices, and another 1/4 (27%) by probation agencies (all but four of the probation programs are in two states, Florida and New Jersey -- the states with the largest numbers of diversion programs).
- The net growth in diversion programs since 1976 has occurred exclusively among criminal justice agencies; non-criminal justice programs (independent non-profit programs and those administered by manpower, human service and other public, non-criminal justice agencies) have declined substantially in numbers. Thus, diversion programs have increasingly become part of the system rather than alternatives to it, with significant implications for program practices.

15/ These release profiles appear in a Resource Center monograph similar to this one, dealing with pretrial release programs and their practices. See Donald E. Pryor, Program Practices: Release, Washington, DC: Pretrial Services Resource Center, February 1982.

Legal/Administrative Authority

The authority for the existence of diversion programs is typically either statutory or based on prosecutorial discretion, as seen below and in Table 1. More than 70% of all programs operate under such authority, with statutory authorization most prevalent. 16/

% OF PROGRAMS OPERATING UNDER STATUTORY AUTHORITY, PROSECUTORIAL DISCRETION OR OTHER LOCAL GOVERNMENT ADMINISTRATIVE DECISION:	
State statute	44.9%
State statute and court rule	2.4
Prosecutorial discretion	23.6
State statute and prosecutorial discretion	2.4
Local government administrative decision	9.4
TOTAL	82.7%

Although similar proportions (almost half) of release and diversion programs receive statutory authorization, diversion programs appear considerably less likely to receive their authorization through court rule. Almost 34% of all release programs indicated that the authority for their existence derives from either court rule or a combination of court rule and statute, compared with only about 7% of all diversion programs. Instead, diversion programs appear more likely to exist under less formal authorization from a local government administrative decision. Including prosecutorial discretion among such decisions, 42 programs (33%) are so authorized, compared with only about 8% of all release programs.

Some of these locally-authorized programs -- although initiated through federal grants without any formal authorization conferred by statute or court rule -- now exist de facto under permissive legislation or court rule adopted after the establishment of the programs, in effect affirming their existence. It has been suggested that "A partial explanation for...diverse and contrasting practices can be found in the lack of preexisting statutory or constitutional bases for their development." 17/

Organizational Placement (Type of Program)

Pretrial diversion standards and goals offer no specific recommendations concerning the best form of organizational placement for diversion programs. In

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16/ It should be noted that some program administrators interviewed were not always certain whether their authorizing statutes were mandatory or permissive. Thus, the mandatory vs. permissive breakdown in Table 1 should be interpreted with caution.

17/ Crohn, Supra note 1, p. 23. It is also likely, however, that even had there been such formal preexisting authorization, considerable variation in practices would have developed as a result of inherent variations in prosecutorial practices and discretionary policies in different jurisdictions.

discussing both staffing and organization of programs, the NAPSA standards indicate that support for any one "model format" is precluded by variations in communities, in the availability of local resources and funds, and in existing criminal justice systems. The standards suggest accordingly that "flexibility is not only understandable, but necessary" (NAPSA standards, pp. 131-32). The absence of a clear preference for organizational placement is reflected in the fact that diversion programs operate under a wide variety of organizational arrangements, as seen in Table 2 and in summary form below.

ORGANIZATIONAL PLACEMENT OF DIVERSION PROGRAMS

Type of Organization	% of Programs
Prosecutor	33.8
Probation	14.2
Probation under courts	12.6
Courts	16.5
Other public agency	8.7
Private non-profit	13.4
Other	.8
TOTAL	100.0

The NAPSA standards state, "The role of the prosecutor is central to the eligibility determination and enrollment process" (Standard 2.9, p. 59). Although this refers to the important role of prosecutors in the diversion process and was not intended as an endorsement of prosecutorial programs, it is perhaps not surprising that the largest concentration of diversion programs (about one-third) is administered by prosecutors' offices.

Probation departments administer the second largest number of programs -- a total of 34 (about 27% of the total). Sixteen of the 21 programs in New Jersey are under the overall authority of county assignment judges but administered directly by local probation departments, and are therefore included in this total. In addition, 14 of Florida's 19 programs are under the auspices of that state's probation department. Thus 30 of the 34 probation-run diversion programs are in two states.

Federal, state and local courts are responsible for 21 diversion programs (about 17%), not including the 16 probation/assignment judge programs. If they were to be included, the proportion of programs responsible to some branch of the courts would increase to 29%.

Overall, 86% of the 127 programs are administered directly by some type of public agency, with another 17 programs run by private non-profit organizations. 18/

18/ Comparison with the organizational profile of pretrial release programs indicates that programs administered by probation departments account for similar proportions of both release and diversion programs; the same is true of non-profit programs. The large increase (compared with release programs) in numbers of prosecutorial diversion programs is offset by a much smaller proportion of diversion programs administered by the courts (16.5% of the diversion programs are court-administered, compared with 35.3% of all release programs); and by a reduction from 19.3% of all release programs run by "other public agencies" (such as human services and manpower departments, departments of criminal justice, departments of labor, etc.) to a corresponding 8.7% of all diversion programs.

Between 1976 and 1980, substantial changes occurred in the organizational placement of diversion programs, as seen below and in Table 3. 19/

ORGANIZATIONAL PLACEMENT: 1976 AND 1980

Type of Organization	% of Programs 1976	1980	(% Change)
Prosecutor	22.7	33.8	(+11.1)
Probation	12.7	26.8	(+14.1)
Courts	12.7	16.5	(+3.8)
Other public agency	35.5	8.7	(-26.8)
Private non-profit	16.4	13.4	(-3.0)
Other	0.0	.8	(+0.8)
TOTAL	100.0	100.0	

In 1976, more than a third of all programs were administered by public agencies other than probation departments, courts, or prosecutors' offices. Many of these programs were under the auspices of a variety of manpower planning councils and agencies, departments of labor, and human services departments, consistent with the early federally-funded diversion Department of Labor model programs. 20/ By 1980, most of these programs either no longer existed or had been absorbed by other agencies. Meanwhile, there was a slight decrease in the numbers and proportions of non-profit, independent programs. According to information from a 1974 directory of 57 diversion programs, 23 independent programs had existed at that time; that number had dwindled to 17 by 1980. 21/

On the other hand, since 1976, probation agencies showed a net increase of 20 programs (eight of these were already-existing programs in Florida which simply shifted from administration by the state's Department of Offender Rehabilitation in 1976 to the Probation Department by 1980). Prosecutorial programs showed a net increase of 18 programs during the same period of time. The numbers of court-run programs also increased (by seven) between 1976 and 1980.

19/ The 1980 figures in the table are based on a grouping of data from Table 2. The 1976 figures are based on an analysis of the 110 programs in the Directory of Criminal Justice Diversion Programs 1976 which were not TASC diversion programs and were not exclusively limited to diverting juvenile defendants. See note 8, Supra. Because some operating programs were inevitably inadvertently overlooked by both the Resource Center canvass and the 1976 Pretrial Intervention Service Center compilation of programs, definitive statements about trends in organizational placement of programs are not possible, but the data in the table are nonetheless interesting and suggestive.

20/ For more on those programs and their growth, see Bellassai, Supra note 1, pp. 16-23.

21/ See Bellassai, op. cit., pp. 26-27 for a comparison of organizational placement of diversion programs in 1974 and 1976. His figures for 1976 differ from those cited in Table 3 and the related text in this monograph, since he included all 148 diversion programs in his calculations; our figures exclude 38 of those programs as not offering adult, non-TASC diversion.

It seems clear from the above data that the net growth in number of diversion programs since 1976 has occurred in the criminal justice area; the declines have been in independent, non-profit programs and in those administered by public agencies outside the criminal justice system. As stated in a review of the evolution of diversion programs: "Pretrial diversion switched from being an alternative to the criminal justice system to one within the criminal justice system. As such, it has become dominated by the priorities of the system under which it functions." 22/

The implications of these trends are not clear. Few if any studies have been completed which enable any conclusive statements to be made about what types of organizational structures are most appropriate and most conducive to the effective provision of pretrial diversion services. Individual programs appear able to operate with varying degrees of effectiveness under different structures; what is not certain is whether the probability of effective operations is greater under some types of organizations than under others. However, some indications are suggested by the analyses and discussion provided in Chapter V.

B. Scope and Size of Programs

Although the majority of diversion programs provide exclusively diversion-related services, 13 (10%) offer both pretrial release and diversion services. Another 10 provide, in addition to diversion, various other services such as victim/witness assistance and dispute resolution. As seen below, programs also vary considerably in terms of geographic areas covered, budget, staffing patterns, and numbers of defendants diverted.

HIGHLIGHTS

- Formal diversion programs typically serve moderate-sized, urbanized communities covering one or more counties.
- Programs tend to be relatively small operations, with annual budgets of less than $100,000 and fewer than five full-time non-secretarial staff persons.
- The large majority of programs make no use of either part-time paid staff or volunteers/students. Specialized use of such resources is suggested.
- Programs have better affirmative action records with regard to hiring women for professional and leadership positions than is the case with regard to hiring minorities in similar capacities.
- Consistent with relatively small budgets and staffs, relatively few defendants are diverted annually in most programs. More than half of the programs divert no more than 200 defendants per year (a maximum of about four per week).

22/ Crohn, Supra note 1, p. 33. On the other hand, it can legitimately be argued that the increasing criminal justice orientation of programs does not inherently suggest that defendant-oriented objectives will be sacrificed, or that non-criminal justice programs are necessarily preferable. For a statement of this point of view, see Diane L. Gottheil, "Pretrial Diversion: Putting Some Issues in Perspective", Pretrial Services Annual Journal, Vol. IV (1981), Washington, D.C.: Pretrial Services Resource Center, pp. 139-143. See especially the thoughtful comments concerning organizational placement, motives, practices, and flexibility on pp. 142-43.

Service Areas Covered by Programs

Table 4 indicates that most (87%) of the formal diversion programs are situated in areas with populations of more than 100,000; more than 40% are in areas with at least half a million residents. However, diversion programs are apparently somewhat more likely to be located in smaller communities and less likely to exist in larger areas than is true for release programs. For example, 16 diversion programs are operating in areas with 100,000 residents or less, compared with seven release programs; conversely, 34 release programs were surveyed in communities with more than a million residents, compared with 21 diversion programs.

Almost two-thirds of the diversion programs serve a full county, and another 23% offer diversion services to a multi-county area (12% serve an area comprising a city or one or more towns, but less than a full county area). The large majority of programs operate in urbanized areas: about 17% serve areas described as "primarily urban", and another 61% say they operate in areas which are "a mixture of urban and suburban". On the other hand, about 22% of the programs are in non-urbanized areas. These proportions are similar to corresponding proportions for pretrial release programs.

In addition to the primary areas served by the programs, most indicate that they are also "willing to supervise, monitor or work in other ways with defendants with charges pending in other jurisdictions (i.e., engage in inter-agency compacts)". More than 75% indicate such a willingness with no qualifications or limitations other than that the defendants meet the individual program's criteria for eligibility. Another 18% say they are willing "in certain circumstances". 23/

Program Budgets

As seen in Table 5, almost 30% of those programs for which budget information was available reported annual budgets of $50,000 or less; about 45% receive $75,000 or less; and about 60% operate with no more than $100,000 per year. Only about 13% of the programs have annual budgets of more than $200,000, with two programs over $500,000. Diversion budgets tend to be slightly smaller than release program budgets. For example, about 1/4 of all release programs have annual budgets in excess of $200,000. 24/

23/ The major qualifiers involve imposing some geographical limits, charge restrictions, and availability of personnel to supervise the referred defendant. Only about 5% of the programs say that they are unwilling under any circumstances to work with defendants with charges pending in other jurisdictions. Programs and jurisdictions are sometimes hampered in their ability to divert defendants who reside in communities which have no formal diversion programs and where no other existing agencies, such as probation departments, are willing to assume responsibility for supervising the person if diverted. There is no formal diversion interstate compact to facilitate such referrals and cooperative agreements.

24/ As seen in the table, budget information was available for 107 programs, about 84% of those interviewed. The remaining 20 were typically unable to separate diversion expenditures from a larger agency budget. An analysis of the staff size and of populations in the areas served by those 20 suggests that, if budget data had been available for them, there would have been a slightly higher proportion of all programs with budgets in excess of $200,000, although the overall proportions in Table 5 would not change significantly.

The only previous comparative data on diversion program budgets was derived from the National Center for State Courts survey of program directors, conducted in 1974. In contrast with the more current data in Table 5, that survey suggested that budgets then were considerably larger than today, despite the subsequent effects of inflation. 25/

More of the earlier programs were based on the department of labor manpower services model, with its emphasis on costly training for diverted defendants. Thus it is certainly logical that a higher proportion of programs may have had larger budgets earlier in the diversion movement than in today's more cost-conscious, less training-oriented environment, in which more emphasis is frequently placed on referrals to other agencies than on in-house services (see Chapter IV below).

Overall, the 21 programs serving the largest areas (in terms of population) tend to have higher annual budgets than other programs. Whether this in fact reflects appropriate and efficient use of available resources will be explored further in a subsequent section relating costs of operations to numbers of defendants diverted.

Program Staffing Patterns

Given the relatively low budgets of most diversion programs, the staffing patterns indicated in Table 6 and summarized below are somewhat of a paradox.

PROGRAM STAFFING PATTERNS

# and Type of Staff	% of Programs
Less than 3 full-time	28.4
3 or 4 full-time	28.3
5-10 full-time	32.5
More than 10 full-time	10.8
1 or more part-time	18.2
1 or more volunteer/student	27.6

On the one hand, it is not surprising that only 11% of the programs have more than 10 full-time non-secretarial/clerical staff, and that more than half (57%) operate with fewer than five. Moreover, more than 1/4 of all programs have

25/ See Stover and Martin, Supra note 8, pp. 8-9. Only 5% of the programs in that survey reported annual budgets of less than $50,000 and 30% less than $100,000. Half of the programs in 1974 indicated that their budgets exceeded $200,000, with 30% exceeding $300,000. However, those percentages were based on a total of only 20 programs, thus severely limiting any conclusions which can be drawn from the comparisons. Nonetheless, it must be noted that 6 of only 20 programs in that survey reported budgets in excess of $300,000, compared with only 7 of 107 programs in the most recent survey. Thus, there is the suggestion that if information had been available from all programs in 1974, it would have shown that a larger proportion of programs at that time had such larger budgets than among today's programs.

fewer than three full-time staff. 14% are one-person operations. and two have no full-time staff at all. 26/

On the other hand, it seems surprising, given the relatively low budgets, that more than 80% of the programs have no part-time paid non-secretarial personnel, and more than 70% indicate that they make no use of volunteers and/or student interns (although a few programs do use substantial numbers of such non-paid persons). 27/

NAPSA Standard 8.6 says. "The use of volunteers and students should be encouraged", and the commentary to the standards states: "Certain tasks can be effectively carried out by volunteers and students... for cost effective reasons (as well as involvement of the community) their recruitment should be encouraged" (pp. 131, 133). Many programs apparently resist (or have abandoned) the use of such resources because of the difficulties and time involved in their recruitment, training and supervision, coupled with anticipated high turnover rates among such persons. Nonetheless, it is possible that expanded use of part-time staff and/or volunteers/students for specialized tasks such as data gathering and in-house research support could make a significant contribution to more effective long-range planning, research and program evaluation and staff reflection upon the program and its policies and practices -- and to initiation of program changes where needed. (This issue is discussed further in Chapter IV).

NAPSA Standard 8.4 states, "Staffing and advancement should follow affirmative action guidelines..." (p. 131). Most programs (88%) have at least one woman on the professional staff, and in more than half of the programs (51%), at least 50% of the non-clerical staff are women. Women serve as directors of 28% of the programs. Although the NAPSA standards make clear that a variety of considerations are important in hiring staff, the commentary states that "Minority groups should receive particular attention in the recruitment process" (p. 135). Nonetheless, there are no minority professional staff in 46% of the programs, even though many of those served by the programs are minority defendants. 28/ About 14% of the programs have minority staff in as many as half of the full- and part-time professional positions. 29/

26/ No comparisons are possible with previous diversion program staffing patterns, since no such information has been published in earlier surveys or directories.

27/ The proportion of pretrial release programs using volunteers is about the same as for diversion programs; on the other hand, release programs are apparently more likely to use part-time staff (39% of all programs do so, compared to 18% of the diversion programs).

28/ The profile of proportions of minority defendants in diversion programs is indicated in Table 29.

29/ Pretrial diversion and release programs are similar in the extent to which they hire minority staff. Diversion programs, on the other hand, are more likely to hire women professionals and to be directed by women than are release programs: compared with the figures cited in the text, about 75% of the release programs have at least one woman professional on staff, about a third of the programs have at least 50% women, and 21% have women directors. No information was available on number of minority directors for either release or diversion programs.

Defendants Diverted by Programs

Consistent with the relatively small budgets and staffs of most diversion programs, the numbers of defendants diverted during a year are also relatively small in most programs, as shown below and in Table 7.

NUMBERS OF DEFENDANTS DIVERTED ANNUALLY

# Diverted	% of Programs
100 or less	26.5
101 - 200	24.5
201 - 250	12.7
251 - 500	20.6
501 - 1000	8.8
More than 1000	6.9
TOTAL	100.0

The majority of programs (51%) divert no more than 200 defendants annually, a maximum of only about four per week. More than 1/4 of the programs divert no more than 100 per year, and seven divert an average of fewer than one defendant per week. About 16% of the programs divert more than 500 persons annually (about 10 per week or more), with seven of those diverting more than 1000 defendants. 30/ No comparisons are available from earlier years.

Although the numbers diverted per program are relatively small, the total number of defendants diverted in a year by the 102 programs providing this information exceeded 34,000. Even though this does not represent a large proportion of cases in those jurisdictions (as discussed further in Chapter IV), it does provide some indication of the substantial numbers of individuals who are affected by the practices employed by diversion programs across the country.

There is general consistency between numbers diverted and program and jurisdictional size. Those programs diverting the smallest numbers of defendants are for the most part those in smaller jurisdictions -- and those with smaller budgets and staffs -- than is the case for those programs diverting larger numbers of people. However, some programs that divert relatively few defendants have -- in comparison with other programs -- high budgets and staffs. This ratio suggests either that the level of service provision is more intense, or that the efficiency of resource allocation should be questioned. Determination of cause and effect relationships is not possible from the data presented in this section, and it cannot be conclusively determined whether programs could divert more defendants with existing staff. Many other factors must be considered; this issue will be addressed further in Chapter IV.

C. Program Age, Stability, and Sources of Funding

The establishment of many pretrial diversion programs in the United States during the past 15 years has been accompanied by considerable turnover among programs during this period. Both the nature and stability of programs and the sources of their funding appear to be changing in ways which could have significant implications for the diversion field in the future.

30/ Analysis of populations of the jurisdictions served, budgets and staff size for the 25 programs with no reported data on numbers of diverted defendants indicates that there are few differences of note between programs with such data and those without. Thus, the overall proportions of all 127 programs would likely be little different from the 102-program profile presented in Table 7.

HIGHLIGHTS

- There has been considerable volatility among diversion programs, with large numbers of new programs, accompanied by considerable program attrition. On the other hand, there has been a gradual "settling-in" process in which a number of programs seem to have become relatively stable components of their criminal justice systems. The overall effect has been a net increase in numbers of programs since 1976.

- Almost 1/4 of all diversion programs are vulnerable in their dependence for primary funding on non-permanent LEAA and CETA resources. More generally, with funding in most programs heavily dependent on one source, and that source almost always public funds, the almost inevitable budget tightening at all levels of government in the future could lead to diversion programs becoming even more vulnerable in subsequent years.

- Startup funding for new programs in the future is uncertain. Local and state units of government have assumed complete or primary responsibility for funding of 58% of all diversion programs. But without the impetus provided in the past by LEAA funding of new programs, it is unclear whether state and local governments will be willing or able to assume the burden of startup funding in the future.

Growth, Attrition and Stability Among Programs

As indicated below and in Table 8, only 14% of the interviewed programs existed prior to 1973, and about 62% of the programs have started since 1974. 31/ Twenty-eight percent have begun since 1976. 32/

BIRTHDATES OF PROGRAMS

Year Program Began	% of Programs
1972 or earlier	14.2
1973 - 74	23.6
1975 - 76	33.9
Since 1976	28.3
TOTAL	100.0

31/ Most programs began between 1973 and 1976, at a time when LEAA startup funds were available and when the ABA's Pretrial Intervention Service Center was in existence as a national clearinghouse designed in part to help communities interested in establishing diversion programs.

32/ As indicated earlier, several new diversion programs have been added to the 1980/81 Directory of Pretrial Services; the information on these programs was not complete enough to include them in this monograph. Some of these began operations prior to 1976, but only recently came to our attention. Most, however, have begun operations within the past two or three years. Thus, had these additional programs been included here, the proportions of new programs noted above would be higher.

In comparison with pretrial release programs, diversion programs are newer and appear to be increasing at a more rapid rate. To illustrate, 61% of the interviewed release programs existed by the end of 1974; by contrast, 62% of the diversion programs did not exist at that time. Only 14% of the release programs have been started since 1976, compared with the corresponding 28% rate among diversion programs (most of which have been initiated in probation departments or prosecutors' offices, as indicated in Chapter V).

As shown earlier in Table 3, some of these increases in new programs have been offset by attrition, particularly among programs administered by other public agencies (mostly non-criminal justice) and by non-profit, independent agencies. Moreover, only 62 of the 110 programs in the 1976 ABA diversion directory were also included in the 1979/80 canvass. Thus, almost 44% appear to have ceased to exist since 1976, at least as formal diversion programs (although a few may continue to exist informally or without the knowledge of the Resource Center). 33/

This considerable volatility among diversion programs (with the large numbers of both "births" and "deaths") has been accompanied to some extent by a "settling-in" process whereby a number of programs seem to have become relatively stable components of the criminal justice system. In contrast to the finding in the small 1974 National Center for State Courts survey which showed that only 22% of the programs had been in operation for three years or more, 34/ 72% of those in the 1979/80 canvass had existed at least that long (i.e., had been in operation before the end of 1976).

In short, there has been some entrenchment among diversion programs over the years, but this trend appears to be less significant than the more dominant, though partially offsetting, parallel trends of program attrition and the development of new programs.

Funding Sources and Future Program Stability

What is unclear is how stable today's programs will be in the future. The programs for the most part seem to feel reasonably confident that they have "made it" as part of the system. When asked to assess themselves in terms of future stability, 86.5% described themselves as "an established institutionalized function, with continued financial support reasonably well assured"; only 10% said they were "an established function, but with future financial support uncertain", and another 3% described themselves as "an experimental demonstration project".

33/ It is recognized that no canvass or directory is 100% complete. A number of the programs we interviewed had been in existence when the 1976 ABA directory (Supra note 8) was compiled, but were inadvertently overlooked at that time. We realize that we also inadvertently missed some programs, perhaps overlooking a few of the 48 programs not included from the 1976 directory. Nonetheless, the extent of attrition seems significant, even though it has been more than offset by 36 new programs established since 1976 and another 19 begun in 1976 but too late to be included in the ABA directory. In addition, as just indicated, some of the apparent increase in numbers of programs is due to "finding" some programs overlooked before.

34/ Stover and Martin, Supra note 8, p. 7. It should be recalled that this survey included only 22 programs.

An examination of program funding sources sheds some further light on the likelihood of future program stability. Table 9 suggests both the relative stability and the potential vulnerability of program funding. As seen in the last two columns of the table, 65 programs (52%) receive all their funds from a single source (in contrast, 74% of all pretrial release programs are funded in their entirety by a single source).

The table and the chart below indicate the extent to which local and state governments have assumed responsibility for funding diversion programs.

% OF PROGRAMS RECEIVING MAJORITY FUNDING FROM:	
County government	37.9%
Municipal government	5.6
State government	14.5
LEAA	18.5
CETA	5.6

Seventy-two programs (58% of the total) receive the majority of their funding from either county, municipal, or state units of government, including 39.5% which are funded completely by such jurisdictions. (By contrast, 77% of all release programs receive majority funding, and 61% complete funding, from one of these sources.)

In the 1974 National Center for State Courts survey of 22 diversion programs, 36% said that the primary source of their funds was LEAA. 35/ This has been reduced in the more recent canvass, as shown above; but it is significant that 23 programs (18.5%) are vulnerable in their dependence for primary funding on non-permanent LEAA money. In addition, seven programs (5.6%) receive the majority of their funds from CETA. In contrast, only 6% of the pretrial release programs receive the majority of their funds from these two non-permanent sources.

Another way of emphasizing changes in funding patterns is to compare current sources with original funding sources for the same programs. This is done below and in more detail in Table 10.

SELECTED SOURCES OF PRIMARY PROGRAM FUNDING: CURRENT VS. ORIGINAL

Funding Source	% of Programs Current	% of Programs Original	(% Change)
LEAA	18.5	64.9	(-46.4)
CETA	5.6	5.4	(+0.2)
State government	14.5	6.3	(+8.2)
County government	37.9	8.1	(+29.8)
Municipal government	5.6	.9	(+4.7)

35/ Ibid., p. 9.

It is instructive and thought-provoking to realize that 64.9% of the programs received the majority of their funds from LEAA when they were first established; that, although 14.5% of the programs now receive primary funding from state units of government, only 6.3% received such majority funding initially; and that although 43.5% of all programs now receive a majority of their funds from either county or municipal units of government, only 9% did so initially. Clearly, LEAA was often successful in meeting its objective of starting programs the responsibility for which was eventually assumed at the local level. However, without the impetus provided in the past by LEAA funding of new programs, it is not clear whether state and local units of government will be willing or able to assume the burden of this startup funding role in the future.

Although local governmental units have shown substantial financial support for ongoing diversion programs, that level of support is considerably less than the comparable support provided for pretrial release programs (64.6% of which receive primary funding from county or municipal units of government, compared with the corresponding 43.5% for diversion programs). On the other hand, a higher proportion of diversion programs (35.5%) 36/ receive at least some support from state government funds (see Table 10) than is the case for release programs (17.6%). Nonetheless, although both state and local governments have provided significant amounts of secondary funding to help start diversion programs in the past, as shown in the table, it is less certain whether they will be willing or able to increase the proportions of startup funds in the future to compensate for the loss of the LEAA and CETA funds which have helped initiate so many programs in the past.

Moreover, with the high rate of program attrition in the past, there is a question of what will happen to the 34 programs which have been receiving LEAA funds and the 15 receiving CETA funding, particularly those 30 which are primarily funded through those sources.

More generally, with funding in most programs heavily dependent on one source, and that source almost always public funds, the almost inevitable budget tightening at all levels of government in the future could lead to a greater degree of financial vulnerability among diversion programs in subsequent years.

And finally, as programs become more institutionalized, and more a part of the criminal justice system -- with fewer independent non-profit programs and fewer public programs operating in agencies outside the criminal justice system -- there is the danger that the field may become increasingly cautious in approach. It may become further removed from the goals that led to the initial establishment of pretrial diversion programs, and more accepting of various practices rather than raising questions about them and being open to change where needed. 37/ These potential dangers, and the extent to which they do or do not seem to apply to programs today, will be at least implicit in the discussions of program practices and policies throughout the next chapter.

36/ Including 79% of the Florida programs and 28% of all others.

37/ Others argue that this scenario is not necessarily accurate and that increased institutionalization can have many positive effects. For example, see Gottheil, Supra note 22, pp. 139-43, especially 142-43.

IV. PROGRAM PRACTICES, POLICIES AND PHILOSOPHIES

The discussion in this chapter focuses primarily on the specific practices and policies of individual diversion programs, and, where appropriate, contrasts those practices with recommended standards and goals. It is clearly recognized that no program operates in a vacuum separate from practical constraints imposed (directly or by implication) by forces outside the program itself, such as policies imposed by funding sources, prosecutors and judges, etc. Thus the emphasis of the discussion which follows is on program practices, but it is understood that the responsibility for those practices is often shared by both program staff and other officials outside the program.

The chapter addresses practices and philosophies concerning: program exclusions, the extent to which protections are afforded defendants to help assure that diversion decisions are voluntary and do not lead to "expansion of the net", the screening and intake process, requirements for program entry, the nature of the actual diversion experience, termination procedures, the implications of successful program completion, the impact of programs, and the extent of program emphasis on data analysis and program evaluation. Differences in practices between different types of programs (e.g., prosecutorial, probation, etc.) will be addressed in Chapter V.

Analyses indicate the proportions of programs with particular characteristics. Large and small programs are treated equally in the analyses, with no added weightings assigned to larger programs.

A. Automatic Exclusions from Program Eligibility

One of the dilemmas concerning diversion is deciding who should not be allowed to be diverted. "Blanket" exclusion policies of programs fall generally into three categories: exclusions by (1) specific types of charge, (2) prior criminal record, or (3) various defendant characteristics. As seen below, most programs automatically exclude a variety of categories of defendants from eligibility for diversion.

HIGHLIGHTS

- Almost all programs have automatic charge-related exclusions from diversion eligibility.
- Almost 85% of all programs divert at least some felonies, and almost 1/3 deal exclusively with defendants charged with felonies. However, most programs (80%) exclude all violent felony charges.
- 71% of the programs have some uniform, automatic exclusions based on prior record, including 27% which exclude on the basis of prior arrests alone.
- Programs are urged to experiment with diverting some categories of defendants now automatically excluded and to monitor the effect of such changes as a possible way of expanding their impact on defendants and the criminal justice system.

Exclusions on the Basis of Charge

Although the NAPSA standards emphasize the importance of making case-by-case decisions about diversion eligibility, Standard 2.2 also recognizes two charge-related categories of exclusions: "Non-serious charges and defendants for which less penetration into the system routinely occurs" and "Those cases for which the community demands full prosecution" (p. 46).

On the other hand, in a landmark case in New Jersey, that state's Supreme Court struck down a portion of a court rule which had allowed exclusions from a statewide network of diversion programs based on charge alone. In ruling that diversion decisions must be based on all relevant factors, and not just the charge, the Court stated:

> "We find that the exclusionary criteria accord misplaced emphasis to the offense with which a defendant is charged and hence fail to emphasize the defendant's potential for rehabilitation. By restricting their initial consideration to an evaluation of the charges brought against defendant, the criteria ignore such important factors as the defendant's willingness to avoid conviction and its attendant stigma, the motivation behind the commission of the crime, the age and past criminal record of the defendant and his current rehabilitative effort." 38/

As seen below and in Table 11, few programs are in accord with the New Jersey Supreme Court guidelines.

% OF PROGRAMS AUTOMATICALLY EXCLUDING SELECTED CHARGES FROM ELIGIBILITY FOR DIVERSION:	
All misdemeanors	31.4%
All felonies	16.5
Violent felonies	80.2
No automatic exclusions	3.2

Only four programs indicate that they have no automatic charge-related exclusions. Even the New Jersey programs exclude those charged with non-indictable offenses, although some programs may begin to experiment with accepting some of these cases as well in the future.

Not surprisingly, most programs (80%) exclude by policy those charged with violent felonies (presumably the types of cases which most exemplify those NAPSA had in mind in recognizing the legitimate exclusions of cases "for which the community demands full prosecution").

38/ State v. Leonardis 71 N.J. 85, 94-95 (1976).

A number of the exclusions listed in Table 11 seem consistent with the portion of the NAPSA exclusion referring to "non-serious charges", but it is not possible from these data to determine to what extent these are also cases "for which less penetration into the system routinely occurs". This issue is addressed further in Section B below.

It is interesting to note that only 16.5% of the programs automatically exclude all felonies from consideration for diversion, i.e., almost 85% of all programs admit at least some defendants charged with felonies. 39/ In fact, programs are more likely to exclude all misdemeanors than to exclude all felonies (31.4% deal only with defendants charged with felony offenses). It should be noted that definitions of felony offenses vary across jurisdictions and that many of these represent relatively non-serious charges; furthermore, such charges may reflect "overcharging" practices at the pre-diversion level in some jurisdictions. Nonetheless, given the fact that one of the criticisms often leveled against diversion programs is that they often only admit non-serious, "low-risk" cases, the fact that there are not more exclusions for felony charges is surprising. (For more information on the extent to which programs divert felonies, see Table 29 and Section H later in this chapter.)

The newer programs of those surveyed are even more likely to concentrate exclusively on defendants charged with felony offenses than are the more established ones (slightly over half of the programs begun since 1977 divert only felony cases, compared to 31% of the total sample). Newer and older programs are similar in their automatic exclusions of those charged with violent felonies.

Whether automatic exclusions by policy are justified is, in the final analysis, an unresolved question. The New Jersey Supreme Court has stated that they are not. NAPSA standards have suggested that they can be justified in some cases. Perhaps the most rational assessment of the issue was provided by the Pretrial Intervention Service Center of the American Bar Association in two publications in the 1970s. The first stated: "There is little evidence to support the proposition that multiple offenders or especially those charged with more serious crimes are less susceptible to early and relevant rehabilitation or any of the other goals advanced by the intervention concept"; however, it went on to note the importance of programs' being aware of the "legitimate public concern with personal safety", and that this should enter into eligibility decisions in order for programs to "maintain complete credibility in the public mind". 40/

Based on the logic spelled out in the first publication, the Service Center went on to conclude in a later policy guide: "Projects might do well to reexamine any of their entry criteria focused on the offense, rather than the offender, keeping in mind, of course, that local community attitudes must be dealt with before any expansion of the criteria is implemented". 41/ That advice to programs remains appropriate today, especially the implicit notion that programs should be willing to experiment with modifications of program eligibility criteria, consistent with community safety concerns and accompanied by careful assessment of the effects of any changes.

39/ This is consistent with corresponding proportions of programs in 1976, as indicated in the ABA diversion directory of that year (see note 8, Supra).

40/ Michael R. Biel, Legal Issues and Characteristics of Pretrial Intervention Programs, Washington, DC: American Bar Association Pretrial Intervention Service Center, April 1974, pp. 40-41.

41/ Pretrial Intervention Legal Issues: A Guide to Policy Development, Washington, DC: ABA Pretrial Intervention Service Center, February 1977, p. 5.

Exclusions on the Basis of Prior Record

Exclusions from diversion on the basis of a record of prior convictions receives some support from the NAPSA standards: "To the extent that these exclusions are based on prior conduct which has been adjudicated as law violations, they are more defensible than exclusions based on present, unadjudicated offenses charged" (Commentary, p. 48).

Further support for such exclusions comes from a U.S. Supreme Court case, Marshall v. United States, in which the Court upheld the constitutionality of excluding drug-dependent defendants with two or more prior felony convictions from drug treatment in lieu of incarceration. 42/ The Court concluded that it was reasonable to assume that defendants with such a criminal record would be less likely to benefit from rehabilitative treatment than those without such records, and that the exclusionary criteria were therefore appropriate. Although the ruling was not directly related to pretrial diversion, the rationale has been used to support similar prior-record exclusions in diversion programs: "To the extent that Marshall by analogy legitimizes prior offense exclusions to federal pretrial diversion for addicts, it has been viewed by many as a 'green light' for including (or retaining) similar eligibility exclusions in non-federal diversion programs, both drug and non-drug". 43/

Ironically, despite the support for prior record exclusionary criteria from national diversion standards and from the Supreme Court, programs are less likely to employ automatic exclusions from diversion on the basis of criminal record than on the basis of the instant charge, as seen below and in Table 12.

% OF PROGRAMS AUTOMATICALLY EXCLUDING DEFENDANTS FROM DIVERSION ELIGIBILITY BASED ON SELECTED PRIOR RECORDS:	
Any prior conviction	32.3%
More than one prior conviction	11.8
Any prior felony conviction	9.4
Other combinations of prior convictions	14.2
Prior arrests alone (various combinations)	26.8
No automatic exclusions for prior record alone	29.1

Although almost all programs exclude defendants on the basis of charge alone, as seen above, 29% have no such automatic exclusions on the basis of prior record alone (and an additional 3% exclude only if there is a pending charge). Two-thirds of the programs exclude on the basis of prior convictions; 41 programs (32%) exclude by policy all defendants with any previous conviction, with others limiting the exclusions to various combinations of multiple convictions or prior felony convictions.

42/ Marshall v. United States 414 U.S. 417 (1974).

43/ Bellassai, Supra note 1, p. 22. See also NAPSA Diversion Standards, Supra note 1, pp. 47-48; Biel, Supra note 40, pp. 41-42; Pretrial Intervention Legal Issues, Supra note 41, pp. 4-5.

Such restrictions on eligibility appear to be generally consistent with the NAPSA standards and the Supreme Court ruling in the Marshall case. However, both of those justify exclusions based on a record of prior convictions. Despite this, 27% of the programs automatically exclude defendants from diversion eligibility on the basis of prior arrests alone, whether or not they ultimately result in convictions.

Even in their justification for program exclusions based on prior conviction records, the NAPSA standards question whether "hard and fast prior conviction exclusions" should be imposed: "It is the position of these Standards that no benefit is derived from uniform exclusions that cannot be realized from selective exclusions, after preliminary review, on a case-by-case basis" (Commentary, p. 48). As seen above, only 29% of the programs appear to operate in accord with such a policy as it pertains to prior records. (For more information on the actual extent to which programs divert defendants with various combinations of prior arrests and convictions, see Table 29 and Section H later in this chapter.)

Exclusions for Other Reasons

No programs automatically exclude any defendants on the basis of gender or race. As seen in Table 13, most programs by policy exclude juveniles, and seven limit their services to those under a particular age, apparently on the assumption that younger defendants have the greatest need for services and are most likely to benefit from the diversion experience. 44/

As seen in the table, one-third of the programs exclude defendants with pending charges, and more than 60% exclude those on probation or parole. 45/ At least 29% of the programs limit diversion to those who have had no, or at most one, previous experience with a diversion program. Most of the other restrictive criteria, even though automatic, at least imply that some case-by-case individualized assessment has occurred in order to invoke the basis for the exclusion.

B. Program Protections to Insure Informed Diversion Decisions

Advocates of diversion stress the voluntary nature of diversion decisions, and voluntary participation in programs is one of the characteristics used in this monograph to define diversion programs (see Chapter I). 46/ However, the definition or measure of "voluntariness" is often rather elusive. 47/

It is suggested here not only that a defendant's decision to participate in diversion must be voluntary (NAPSA Standard 1.3), but that this can only happen if it is based on knowledge of the probable consequences of the decision and of any other alternative decisions that could be made. The Commentary to NAPSA

44/ See Pretrial Intervention Legal Issues, op. cit., pp. 3-4, 5-6; NAPSA Diversion Standards, op. cit., pp. 48-49.

45/ One of the persons who critiqued the draft of this monograph was particularly surprised that this number was not closer to 100%. The comment expressed was: "The individual on probation or parole already has at least one conviction, so why bother to place them through a program to avoid a conviction on a subsequent charge, and duplicate probation or parole services at the same time?"

46/ See also selected diversion definitions in Crohn, Supra note 1, p. 21, at note 1.

47/ See note 3, Supra.

Standard 1.3 states: "The accused's choice to participate in pretrial diversion must be an informed one in order to be truly voluntary" (p. 38).

The NAPSA standards also indicate that such an informed and voluntary decision is primarily predicated on defendant knowledge of the charges formally filed against him/her and on the person's having access to the advice of legal counsel before making the decision. 48/ As stated in Standard 1.1, "Potential divertees should be eligible for pretrial diversion from the time of the filing of formal charges until the time of final adjudication. They should not enroll in such programs unless they have had the opportunity to consult with counsel" (p. 27). As seen below, actual program practices do not always strictly adhere to this standard, although the spirit of compliance may be present more frequently than the absolute letter of compliance.

HIGHLIGHTS

- Programs typically divert defendants only after formal charges have been filed; nonetheless, almost half the programs (and 58% of the non-New Jersey programs) divert at least some defendants prior to filing of formal charges, despite the potential for abuses in such practices.

- Although problems with pre-charge diversion programs can be partially eliminated by various practices and safeguards for defendants, post-charge diversion combined with early prosecutorial screening and charging procedures appears to more effectively provide those safeguards.

- Defense counsel are typically involved in decisions to divert defendants; however, in more than 40% of the programs (and almost 60% of the programs not part of the Florida and New Jersey statewide systems), there is no requirement that counsel must formally be consulted on and agree to diversion decisions.

- Only 18% of the exclusively pre-charge diversion programs require formal defense counsel approval of diversion decisions, compared to 73% of the exclusively post-charge programs.

- Despite apparent constitutional mandates that counsel assistance be provided in post-charge diversion programs, 17 of those programs do not require attorney involvement in and approval of the diversion decision.

- Programs are urged to make legal advice available to any potential divertee who does not have and/or cannot directly afford an attorney.

48/ Commentary in the NAPSA standards states, "It is the position of these Standards that absent knowledge of the precise charge(s) being faced, obtainable only after the filing of a prosecutor's information, and absent access to counsel, the diversion decision on the part of the accused cannot be considered voluntary" (p. 10).

Pre-Charge vs. Post-Charge Diversion

The Commentary to NAPSA Standard 1.1 says, "Requiring the filing of formal charges prior to diversion eligibility is essential so that the choice on the part of the defendant to be diverted is truly an informed one and, in that sense, voluntary" (p. 30). These and other national standards emphasize that diversion prior to the filing of formal charges is premature. Formal filing of charges helps assure that the diversion process is not used as a "dumping ground" for those cases which lack sufficient merit to support full prosecution. 49/ It also helps prevent diversion of cases in which evidence would support formal charges, but which would not be considered a high enough priority to be prosecuted (minor nature of the charge, various extenuating circumstances, etc.) 50/ The standards argue that diversion is, after all, designed to be an alternative to full prosecution, and that if such prosecution would not otherwise occur, there is no need for the alternative to be offered. 51/

Only after the filing of formal charges can a defendant be aware of what the prosecutor is likely to do and therefore of the full range of options and their likely consequences. 52/ As implied by the NAPSA standards, this formalization of charges is especially important in light of the differences which often exist between initial police charges and the formal charges for which a defendant is ultimately prosecuted (NAPSA Commentary, p. 31 and note 8).

The extent to which defendants have been diverted prior to filing of formal charges is indicated below and in Table 14. 53/

49/ The NAPSA commentary says, "It is axiomatic that if non-meritorious cases should not be prosecuted, they also should not be funneled into the diversion process" (p.29).

50/ See also National Advisory Commission, Report on the Courts, Supra note 2, pp. 24-26.

51/ However, for an alternative point of view, see Gottheil, Supra note 22, pp. 140-141. She notes that often cases are dismissed, "not because of lack of evidence or because they are viewed as 'weak', but rather because given limited resources prosecutors cannot deal with their entire caseload". She adds that although minimizing intervention in defendants' lives is a legitimate goal, dropping all such cases is not necessarily always for the best: "We should seriously question the assumption that 'doing nothing' is a good disposition even of minor cases. Moreover, doing something may indeed involve extending social control, but it need not be punitive and it frequently can have positive consequences for defendants, their families, and victims."

52/ For further discussion of some of the legal problems with pre-charge diversion, see Pretrial Intervention Legal Issues, Supra note 41, pp. 12, 20-21.

53/ Based on program-estimated figures. It is not known how accurate the estimates are, although within the categories and ranges in the table, the total numbers of programs are thought to be reliable.

% OF PROGRAMS DIVERTING DEFENDANTS PRE-CHARGE:	
No more than 1/4 of all diverted cases are pre-charge	64.2%
No cases diverted pre-charge	52.0
However:	
More than half of all diverted cases are pre-charge	30.1
More than 3/4 of all diverted cases are pre-charge	25.2
All cases diverted pre-charge	8.9

More than half (52%) of all programs divert only after formal charges have been filed, i.e., they do not divert anyone prior to the filing of formal charges. Including those, almost 65% of all programs divert fewer than 1/4 of their participants pre-charge. On the other hand, almost half (48%) of the programs divert at least some defendants prior to filing of formal charges, despite the potential for abuses inherent in such practices; moreover, 1/4 of the programs divert more than 75% of their cases prior to charges being filed, and 9% divert all defendants prior to formal charging.

These figures are even more dramatic if only those programs outside New Jersey are examined. All 21 New Jersey programs divert only post-charge. If they are excluded from the analyses, 58% of all other programs divert at least some defendants pre-charge, including all 14 of the Florida programs under the auspices of the state probation department. Thirty percent of the non-New Jersey programs divert at least 3/4 of their cases pre-charge, including 11% which divert all defendants prior to formal charging.

The interviewed programs which have been started since 1977 are more likely than their older counterparts to divert at least some defendants prior to filing of charges (63% vs. 45% of the pre-1978 programs), although none of the newer programs divert all defendants pre-charge.

In short, the practice of diverting defendants prior to the filing of formal charges is an extensive one.

Some have argued that diversion pre-charge is not the inherent problem suggested by national standards, and that it is possible to avoid most abuses associated with such practices. While agreeing that filing of charges helps prevent "weak cases" from "being dumped on diversion programs", a criminal justice planner and former diversion program director argues that this does not mean that pre-charge diversion cannot also work, with proper safeguards: "Some programs have sought to practice pre-charge referral to diversion and deter 'dumping' by requiring that the assistant prosecutor who actually made the referral be responsible for the prosecution of any case returned due to program failure." 54/ A current program director from the same state makes a similar argument in favor of pre-charge diversion. He states that any defendant returned for any reason by the program "must" be prosecuted "by the assistant who sent the case over [to the diversion program]". The director adds:

54/ Gottheil, Supra note 22, pp. 146-47.

"This assures that only prosecutable cases are referred...and thus diversion does not become a dumping ground. In this way, Deferred Prosecution is an alternative to full prosecution...After studying both options carefully (pre-charge and post-charge) we truly feel that pre-charge has many more advantages to the tax payers, clients, and local criminal justice system. We further feel that we have eliminated the potential for...abuses." 55/

Certainly programs can compensate for some of the problems with diverting pre-charge -- and thereby attempt in good faith to assure that cases not be diverted which would otherwise have little or no penetration into the criminal justice system. However, even such "safeguards" may be insufficient. For example, they do not provide the defendant with adequate knowledge about what will happen if s/he fails to successfully complete the diversion experience (e.g., what charges would be filed at that point) to make the informed choice urged above. Also, in many prosecutors' offices, relatively inexperienced assistants are responsible for screening cases, and these are often not the persons who would actually handle any subsequent processing of the cases if they were returned for prosecution. Thus the procedure described above is not likely to act as a complete safeguard, at least in many programs.

One of the advantages emphasized by the above-mentioned program director is that pre-charge diversion can occur quickly following arrest 56/ (a goal recognized by NAPSA and other national standards). This may in fact be an advantage over post-charge programs (see Section H below), but it is not necessarily so: many prosecutors' offices have early screening and charging policies and practices which make it possible for post-charge diversion to occur at least as rapidly as in pre-charge programs. Therefore, early prosecutorial screening and filing can enable early diverting of cases while maintaining the safeguards associated with post-charge diversion. 57/

The problems with pre-charge diversion can indeed be minimized by conscientious programs; but even in such programs, it does not appear that the safeguards mentioned can completely eliminate the problems. Furthermore, no such procedural safeguards even exist in many of the pre-charge programs. 58/ On balance, post-charge diversion with early prosecutorial screening and charging would seem to be the preferable option wherever possible.

Involvement of Counsel in Diversion Decision

The value of requiring the filing of formal charges prior to diversion is somewhat diminished without a similar requirement that a defendant have access to legal counsel.

55/ Letter to author from Gary E. Gonigam, director of Deferred Prosecution diversion program in Pekin, Illinois, June 18, 1980.

56/ Ibid.

57/ However, it is recognized that this would require fundamental changes in charging practices in some jurisdictions. For example, the charges filed in court are often filed by the police, with the prosecutor not becoming involved with the case for days or even weeks in some jurisdictions.

58/ This statement is accurate, based on Resource Center knowledge of many such diversion programs. However, the specific proportions of programs which do and do not have such safeguards is not known, as no related questions were asked in the program interviews.

NAPSA and other national standards take the position that the assistance of counsel is essential: in helping the defendant understand the legal issues involved as well as the potential consequences of the choice to opt for diversion or, alternatively, the choice to face possible prosecution of the case. Involvement of counsel helps assure that the defendant's decision to enter a diversion program is voluntary and is as informed and responsible a choice as possible. Of particular importance are the waiver of specific constitutional rights such as the right to speedy trial, the right to trial by jury, and other rights that must often be waived prior to entry into a diversion program. 59/

Assistance of counsel appears to be constitutionally mandated in post-charge diversion programs. 60/ In particular, in the case of United States v. Ash, the Supreme Court ruled that counsel's role is vital in pretrial proceedings in helping the defendant understand complex legal issues and protecting the accused against overreach by the prosecutor. The combined effect of the Kirby and Ash decisions appears to make "certain that post-charge diversion requires assistance of counsel at the diversion decision-making stage" (NAPSA Commentary, p. 33).

It is less clear that availability of counsel is constitutionally required in pre-charge diversion programs. 61/ In fact, it is the absence of a definitive ruling on the question of counsel availability at diversion intake per se (as opposed to post-charge only) that "is a major consideration prompting these Standards to recommend that diversion decisions be made after the formal charge has been settled upon" (NAPSA Commentary, p. 10).

Regardless of what is or is not mandated, the Pretrial Intervention Service Center guide on legal issues related to diversion offers the following summary assessment: "Whether there is a constitutional requirement of counsel, it is nevertheless advisable to have counsel present to protect the defendant..." 62/ The extent to which this occurs is seen below and in Table 15.

INVOLVEMENT OF DEFENSE COUNSEL IN DIVERSION DECISIONS

Extent of Involvement	% of Programs
Always involved in decision	63.8
Formal approval required	58.3

59/ See the helpful discussions in Pretrial Intervention Legal Issues, Supra note 41, pp. 25-32, and in the NAPSA Diversion Standards, Supra note 1, pp. 39-41, 56-57.

60/ See Kirby v. Illinois 406 U.S. 682 (1972) and United States v. Ash 413 U.S. 300 (1973).

61/ See differing interpretations in Pretrial Intervention Legal Issues, Supra note 41, pp. 25-26, and NAPSA Diversion Standards, Supra note 1, p. 34.

62/ Pretrial Intervention Legal Issues, op. cit., p. 26.

Defense counsel are always involved in the diversion decision in 64% of the programs, and may be upon request of the defendant in the other 36%. Formal approval of counsel is required for a defendant to be officially diverted in 58% of the programs, including all Florida and New Jersey statewide programs. Counsel involvement is thus possible in all diversion decisions. However, in 42% of the programs, there is no formal requirement that counsel agree to a decision to divert a defendant. This increases to 58% among all programs not part of the New Jersey and Florida statewide systems.

In light of the distinctions made above concerning required counsel in post-charge vs. pre-charge programs, it is interesting to note that counsel must formally agree to diversion in only 18% of the exclusively pre-charge programs. By contrast, counsel must agree in 73% of the exclusively post-charge programs. Nonetheless, it is significant that, despite the apparent constitutional mandate for post-charge programs, 17 of them do not require counsel agreement.

One can argue that all programs at least offer the defendant the opportunity to have counsel present to discuss the diversion decision and its potential ramifications -- and that as a result, if a defendant then knowingly waives this option, any legal requirements or recommended standards would be satisfied. Moreover, some program officials point out that mandating consultation with an attorney may be "forcing an additional expense onto the client that is often exorbitant". 63/ These programs point out that program staff can do much to make defendants aware of their rights, and that in some cases legal advice can be provided through the program at no charge to the defendant. 64/

These points are pragmatic and important ones. Staff indeed can be helpful in making defendants aware of their rights, and costly legal advice should not be mandated. On the other hand, it is questionable whether staff can, or should even attempt to, objectively discuss with defendants the range of legal options and their implications, and whether truly informed diversion decisions can be made by defendants without legal advice. Accordingly, it is recommended that programs make arrangements for no- or low-cost competent legal advice to be available to any potential client who does not have and/or cannot afford his/her own attorney.

It is recognized that attorneys have differing degrees of knowledge about pretrial alternatives; differing assessments of probable consequences of various defendant options; and differing motivations concerning defendants, processing of cases, and their own levels of involvement (and payment) in particular cases. All of these affect (sometimes adversely) the quality and value of legal advice provided a defendant; the provision of legal assistance per se is therefore not automatically beneficial to a defendant concerning the diversion decision. However, keeping in mind these important limitations, it is nonetheless assumed here that on balance a defendant is in a better position to make an informed decision about diversion with such counsel than without it.

63/ Gonigam letter, Supra note 55.

64/ Ibid. See also, for example, Gottheil, Supra note 22, p. 141.

C. Initial Screening and Intake Process

HIGHLIGHTS

- Primary screeners and sources of referrals of potential diversion candidates are prosecutors, defense attorneys, and program reviews of arrest and court dockets.
- Pretrial release programs are rarely used as an initial screening resource by diversion programs, and are thus perhaps overlooked as a potentially valuable means of making efficient use of scarce pretrial programmatic resources.
- Although enrollment in diversion typically occurs within three weeks of initial defendant contact with a program, more than four weeks typically elapses in 22% of the programs.

As seen below and in Table 16, programs rely on a variety of resources for initial screening and direct referrals (as distinct from final approval of actual diversion decisions, which is discussed in Section D below).

PRIMARY PROGRAM SCREENING/REFERRAL SOURCES*

Source	% of Programs
Prosecutor	74.0
Defense attorney	48.0
Program identifies from arrest or court records	38.6
Judge	18.1
Police	7.1
Release program	5.5

* Each program could indicate up to three sources.

The NAPSA standards make little reference to the initial screening and intake process, except indirectly. Standard 2.9 refers to the "eligibility and enrollment process", but the standard primarily relates to the actual final determination of who is ultimately approved for diversion. The prosecutor's "central role" is emphasized in initiating diversion eligibility (NAPSA, p. 59). Beyond that, little is said about screening except in a legal issues guide published by the Pretrial Intervention Service Center, which suggests that "the court would not ordinarily have a role in the initial decision to divert a particular defendant if it occurs prior to the charge decision". 65/

65/ Pretrial Intervention Legal Issues, Supra note 41, p. 12.

Not surprisingly, prosecutors are among the primary screeners/referral sources in almost 3/4 of all programs. Defense attorneys are a primary source of referrals in almost half of the programs, either directly or in conjunction with the prosecuting attorney. Almost 40% of the programs identify potential cases on their own initiative through review of arrest dockets, court schedules, etc. Judges make referrals in only about 18% of the programs. That rate is no lower for exclusively pre-charge programs. Thus, the courts appear to have no greater or lesser role in initiating diversion in such programs, despite the comments of the Service Center mentioned above.

What is perhaps most surprising is the fact that release programs do not do more direct initial screening of cases for diversion eligibility. Only seven diversion programs (5.5%) identified release agencies as a primary source of potentially eligible defendants (while at least 55 of the diversion programs are in communities which also have formal pretrial release programs).

Rather than spending staff time to review dockets and records to determine initial eligibility (as 49 programs do), it may be more efficient to work out arrangements whereby release staff initially "red flag" defendants who meet general diversion eligibility criteria. Admittedly, this may not always be feasible: there are no formal release agencies in some jurisdictions, release programs which do exist may have staffing restrictions, and there are potential problems associated with such cooperation which would need to be addressed carefully before implementing such initial release screening procedures. 66/ Nonetheless, with proper cautions taken, it seems appropriate for some jurisdictions and programs to consider such cooperative efforts. In many cases, little or no additional time and effort should be needed on the part of release staff, once they become familiar with diversion criteria, to simply check whether someone appears to meet those criteria based on information they would already be obtaining as part of the release interview.

The NAPSA standards indicate that diversion "should occur as soon as possible after arrest" (p. 28). As seen in Table 17, the operational definition of "as soon as possible" varies considerably across programs. In 39% of the programs, official program enrollment is generally initiated within two weeks of initial contact (initial interview); for another 19%, three weeks are necessary. More than four weeks typically elapses in 22% of the programs, with more than eight weeks delay typical in a few. In New Jersey, more than four weeks normally elapses in 76% of the programs. Otherwise, diversion typically occurs within three weeks around the country. (Diversion initiation times are in addition to elapsed time between the arrest and the initial program contact with the defendant, which was not determined in the interviews. It should also be noted in reviewing the data that, prior to formal acceptance, programs are often providing some form of supervision and counseling in the process of developing a formal diversion contract. Thus at least "unofficial acceptance" may occur in some programs sooner than the formal acceptance indicated in the table.)

D. Requirements for Formal Program Enrollment

A variety of specific requirements are set by programs as conditions of enrollment. The most significant of these are discussed in this section.

66/ For example, the added volume of paperwork could be excessive, particularly in larger jurisdictions. Moreover, the criteria and screening functions for release and diversion are different, thereby complicating a dual screening role.

HIGHLIGHTS

- One-third of all programs require an informal admission of guilt and 7% require a guilty plea as conditions of program entry; yet almost half of these programs require no defense counsel involvement in the decision whether or not to enter diversion.
- Although various safeguards are used by programs to minimize possible negative consequences, there is a presumption in most programs that restitution and/or community service will be part of an individual's service plan, even though recommended practices favor more limited use. More than two-thirds of the programs require one or the other (or both) as a condition of program entry.
- At least 10% of the programs require payment of fees as a condition of program enrollment.
- Just under half of the programs require court approval of diversion decisions. Court approval is rarely required in programs which divert primarily prior to filing of formal charges.

Pleas, Informal Admissions of Guilt and Waivers of Rights

NAPSA Standard 2.3 states: "Enrollment in diversion programs should not be conditioned on a plea of guilty. In rare circumstances an informal admission of guilt or of moral responsibility may be acceptable as part of a service plan" (p. 49).

Although some have viewed the admission of guilt as having "therapeutic value" (NAPSA, p. 50) and as an important step "in the rehabilitation of the offender", 67/ most of those who have studied the issue have opposed making a guilty plea a condition of entry into diversion. 68/ Concerns have been raised that such pleas may be entered by defendants without full awareness of the consequences and without knowledge that Fifth Amendment rights are being waived. Such preconditions may also create the "potential for diversion to become merely a form of plea bargaining rather than an alternative to prosecution in its own right" (NAPSA, p. 50). Moreover, this could involve "the type of subtle coercion or promise of immunity which the Constitution may render suspect. In a significant sense, it is not voluntary, for the plea must be made to gain entrance into a program which, potentially at least, promises dismissal of charges and thus immunity from further prosecution." 69/

The NAPSA standards go even farther in stating that even "the use of informal admissions of guilt or moral responsibility are devices to be used only with great caution" (p. 51). In some cases, such an admission may be allowable as

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67/ Pretrial Intervention Legal Issues, Supra note 41, p. 28.

68/ Ibid., pp. 28-32; NAPSA Standards, pp. 50-51 and note 30.

69/ Pretrial Intervention Legal Issues, op. cit., p. 28.

part of a specific client service plan, but the circumstances would be "atypical". Others, however, have indicated that such an informal acknowledgment of responsibility can be an important step in developing an appropriate service plan for a defendant, but without the need for waiving any Fifth Amendment privileges. 70/ In such cases, it is generally agreed that such admissions must not be legally binding: "...under no circumstances should that admission later be admissible into evidence if the defendant is returned to court for prosecution". 71/

As seen below and in Table 18, most programs (57%) require neither a guilty plea nor an informal admission of guilt or moral responsibility as a condition of program entry. More than a third of the programs do require an informal admission, and nine programs (7%) -- despite the strong reservations expressed above -- do condition diversion upon a guilty plea.

% OF PROGRAMS REQUIRING GUILTY PLEA OR INFORMAL ADMISSION OF GUILT AS CONDITION OF PROGRAM ENTRY:	
Guilty plea	7.1%
Informal admission	35.7
No admission required	57.1

As suggested above, one of the chief concerns about requiring a guilty plea or an informal admission of guilt/moral responsibility is that they may not be informed, voluntary decisions. In this context it is important to note that of those programs with such requirements, only slightly over half require defense attorney involvement in the decision to enter diversion (5 of the 9 programs requiring a guilty plea and 23 of 45 requiring an informal admission of guilt). Furthermore, the programs requiring such formal or informal admissions of guilt are considerably more likely to divert defendants prior to filing of formal charges. 72/ Given this combination of circumstances, it is questionable how informed and voluntary a defendant's decisions can be.

Program requirements concerning waiver of certain rights are generally considered acceptable, as long as defendants are made aware of the consequences. 73/ Most programs require defendants to formally waive the right to a speedy trial (84%), and 10% require a waiver of the right to a trial by jury. However, no legal counsel is required by many of these programs at the point where such decisions must be made.

70/ Ibid., p. 29; Gottheil, Supra note 22, p. 141; Monograph on Pretrial Criminal Justice Intervention Issues Relating to Screening and Diversion Programs, Chicago: National District Attorneys Association, November 1975, pp.8-9.

71/ NAPSA Standards, p. 51; see also Pretrial Intervention Legal Issues, op. cit., p. 29 ("extra court acknowledgment") and Gottheil, op. cit.

72/ Of the programs requiring a guilty plea or an informal admission of guilt/moral responsibility, 65% divert at least some defendants prior to filing formal charges against them, compared with 36% of those programs with no such requirements. Moreover, of the 11 programs which divert all defendants pre-charge, 9 require pre-enrollment admissions of guilt.

73/ See NAPSA, pp. 7, 34-35, 39, 57; Pretrial Intervention Legal Issues, Supra note 41, pp. 22-26.

Restitution and Community Service

A number of questions have been raised concerning the appropriateness of using financial restitution and community service in a pretrial diversion setting. 74/ The NAPSA standards provide partial support for both, "in limited circumstances,...so long as they are not pre-conditions of program eligibility" (p. 76, emphasis added).

In requiring either financial restitution or community service (unpaid volunteer work in a variety of settings) as a condition of diversion eligibility, programs may force defendants, at least by implication, to admit guilt, thereby raising many of the same questions as those raised in the preceding discussion on pleas. Mandated agreements to make restitution or perform community service could negatively affect the disposition of the defendant's case if diversion is not successfully completed and the case is returned to court.

Little is known concerning what positive impact restitution and community service have on particular types of diverted defendants. Restitution requirements may also, if not administered with safeguards to assure equal protection for all defendants, exclude indigents from program participation. Although not involving the payment of money, even community service requirements can potentially be used in a discriminatory fashion. In addition, mandating community service may be subject to challenge on Thirteenth Amendment (involuntary servitude) grounds. 75/

Despite these concerns, more than two-thirds (69.8%) of all programs require financial restitution, community service, or a combination of both as a condition of program entry, as seen below and in Table 19. This includes all programs in the Florida statewide system.

% OF PROGRAMS REQUIRING RESTITUTION AND/OR COMMUNITY SERVICE AS CONDITION OF PROGRAM ENTRY:	
Restitution	37.3%
Restitution and/or community service	31.7
Community service	.8
No such requirement	30.2

It should be noted that programs can initiate safeguards to minimize the potential negative aspects of these requirements. For example, assuring defense counsel involvement in decisions concerning restitution/community service can help make defendants aware of the implications of those decisions. Although only 47% of all programs say that they always involve counsel in those decisions, 73% of the programs which require restitution/community service say they do so.

74/ See, for example, Pretrial Intervention Legal Issues, op. cit., pp. 33-35; NAPSA, pp. 51-52, 76-78. See also the Resource Center publication by Elizabeth Gaynes on restitution in the Pretrial Issues series, published in March 1982.

75/ Ibid.

The requirements can also be waived or modified in some cases. For example, symbolic or partial restitution may be acceptable in some instances, with payment plans tailored to the defendant's ability to pay, thereby helping to avoid discrimination against indigents. To protect against the admission of guilt if the case is returned to court, policies can be developed which prohibit the restitution agreements from being admissible in court. Programs may also elect not to invoke the requirements in some cases, such as where the alleged crime did not specifically involve money or property being stolen or any indication of vandalism. (No data are available on the extent to which programs build in these various safeguards.)

Thus, the use of restitution and community service in a pretrial context is sometimes appropriate (see Section E below), and some safeguards are possible to minimize some of the problematic aspects of their use. Nonetheless, the most effective safeguard would seem to be to make restitution/community service decisions only "on a case-by-case basis" (NAPSA, pp. 51-52), as a part of service plans determined by individual needs and circumstances. 76/ However, the fact remains that restitution and/or community service is more typically a condition for acceptance into the program.

Payment of Fees

The NAPSA standards do not deal with the issue of charging fees for entry into diversion. However, it is an issue which seems likely to become more significant in the future, as public funds become tighter at all levels of government. As seen in Table 19, at least 10% of the programs now require payment of fees as a condition of program entry. This is probably an underestimate, as the questionnaire did not include a specific question about fees, and the 13 programs volunteered that they have such entry requirements. Had such a question been specifically asked, it is likely that additional programs would have indicated that they also have such requirements. 77/

The requirement of fees for admission, while perhaps seen as necessary for survival by some programs, raises equal protection issues, i.e., whether the requirement may have the effect of excluding otherwise-eligible indigents from the program. The magnitude of the fees, and the extent to which provisions are made for "sliding scale" pay schedules or waiver of fees in some cases to accomodate low-income defendants, was not determined.

Formal Agreement Required

There is little question but that, as stated in NAPSA Standard 2.9, "The role of the prosecutor is central to the eligibility determination and enrollment process" (p. 59). 78/ What has been less clear, both in theory and in case law, is what role the court has in the diversion process. 79/ The rationale for including the courts as an active participant in the diversion decision has been generally accepted in post-charge diversion.

76/ NAPSA, pp. 51-52, 76; Pretrial Intervention Legal Issues, op. cit., p. 35; Gottheil, Supra note 22, p. 146.

77/ The new statewide diversion programs in South Carolina (established since the interviews were conducted) also require payment of fees as a condition of program admission. It should also be noted that 8 of the 13 interviewed programs requiring fees also require a combination of restitution and/or community service.

78/ See also NAPSA Standards, pp. 59-60; and Pretrial Intervention Legal Issues, pp. 11-15.

79/ Pretrial Intervention Legal Issues, op. cit.; for a more thorough discussion, see NAPSA standards, pp. 59-70.

Despite questions about the role of the judiciary in pre-charge programs, the NAPSA Standards make it clear that pre- and post-charge distinctions should have no relevance. Although the prosecutor's role remains "central" in the diversion process, the judicial role is also important, regardless of the point at which diversion occurs. As stated in the second part of Standard 2.9, "Courts have a legitimate role in monitoring the fair application of diversion eligibility and enrollment guidelines, regardless of whether local law also accords the judiciary an active role in the diversion enrollment process" (p. 59).

As seen in Table 20, virtually all diversion programs (97%) do require the prosecutor to formally agree to any diversion decision. On the other hand, the variety of opinions noted above concerning the appropriate role of the courts is reflected in the fact that less than half (47%) of the programs require formal judicial approval for diversion to occur (all New Jersey programs require judicial approval, compared with only 36% of all programs outside that state).

Most of the programs requiring judicial approval are those which divert only post-charge. Although only 52% of all programs divert exclusively after formal charges have been filed, 72% of the programs requiring judicial approval do so. Moreover, of the 31 programs which divert most (more than 75%) of their cases pre-charge, only two require court approval. Thus, the broad judicial role advocated in the standards is typically not reflected in program practices. 80/

As also seen in Table 20, several programs state that they require formal agreement from victims (17% of the programs) and/or the police (8%) before an individual can be diverted. The NAPSA standards do not address this issue, but the Pretrial Intervention Service Center's guide to program policy development takes a strong position against allowing victims and police to have such power over the diversion decision:

> "A final problem arises out of the practice of some programs of giving veto power over the diversion decision to persons other than the prosecutor or judge, i.e., the arresting officer or crime victim. Conditioning the decision to divert on the concurrence of others raises serious issues of due process, as well as the doctrine of separation of powers. It makes the fate of an otherwise eligible defendant dependent on the unfettered exercise of the subjective discretion of individuals who never have had the constitutional authority to determine which individuals are to be charged once an arrest is made." 81/

Requiring such approval may be appropriate or even necessary in some jurisdictions for political reasons. It is not known how rigidly this requirement is followed and how extensively the "veto power" is actually invoked. However, experience of Resource Center staff with specific programs suggests that, although victims and the arresting officer may be contacted prior to diversion, there are few cases in which diversion is actually denied solely on their unwillingness to give their approval.

80/ The role of defense counsel in formally agreeing to diversion is also referenced in Table 20, and was discussed earlier in Section B.

81/ Pretrial Intervention Legal Issues, op. cit., p. 15.

E. Services Offered and Duration of Diversion Period

HIGHLIGHTS

- Most programs make substantial use of existing community resources through referrals as means of providing participants with needed services.
- Restitution and community service are used exclusively on a case-by-case basis, as part of a service plan, without being required as a condition of program entry, by 24% and 29% of all programs, respectively.
- The diversion period is typically longer for felony divertees than for those diverted on misdemeanor charges.
- The maximum period of diversion may exceed one year in 17% of the programs diverting defendants on misdemeanor charges; diversion may be extended for two years or more in about 1/4 of the programs diverting felonies and even in 12% of the misdemeanor programs.

Services Offered

NAPSA Standard 3.1 emphasizes the need for the development of an individualized service plan for each program participant and adds that "it is essential that the divertee be actively involved in the formulation of such plan" (p. 72). When asked if "a detailed service plan [is] worked out for program participants, including specific goals and objectives, which must be agreed to and signed by the participant", 80% of the programs said they always do so, 11% said "yes, but not always", and 8% indicated that such individualized service plans are never developed in such a formalized fashion. 82/

The Standards go on to indicate that programs should be able to provide services which can meet a wide variety of individual needs: "[A] good, comprehensive, multi-service program should provide services directly and act as a referral agency as well, matching defendants with other services in the area" (p. 74). As seen in Table 21, programs typically directly offer or have access through referrals to the suggested wide range of services.

82/ For more information on the development of service plans, see Delores Fitzgerald, Services 1: Developing the Service Contract in Pretrial Diversion Programs, Washington, D.C.: Pretrial Services Resource Center, September 1978. Programs were also asked what proportion of their participants receive only "basic supervision", with no direct services (as recommended in NAPSA Standard 3.3 for certain cases). Because this was defined in so many different ways by so many different programs, the responses are not considered reliable enough to present, except to say that they suggest that a number of programs appear to have a substantial proportion of participants in the "no service need" category.

Virtually every service listed in the table is offered, directly and/or by referral, by almost every program. No indication was available concerning the basis for program determination of whether a specific service (e.g., family counseling) should be provided in-house or by referral for a particular defendant. But there does appear to be a strong emphasis on providing services wherever possible through referrals.

This is consistent with the efficient use of existing resources and expertise which is advocated in NAPSA Standard 8.2 and its accompanying commentary: "Diversion programs should include no more direct in-house services than are necessary to accomplish their mandate. When other programs exist in the community and can adequately provide certain services, duplication should be avoided" (pp. 131, 132).

However, there is no indication as to the quality of the services or of the extent to which referrals are made. 83/ Also unknown are the extent to which these services are actually provided once a referral is made and how carefully they are monitored by the diversion programs. Greater efficiencies may be possible in the future through reductions in the overlap in services being offered both in-house and through referral by the same program, but that cannot be determined from these data. 84/

In light of the earlier discussion about restitution and community service, it is interesting to note that 31 programs (24% of all programs) use restitution only on an individualized case-by-case basis, without requiring it as a condition of entry to diversion; similarly, 36 programs (29%) use community service in the same way. These programs would appear, in the absence of other information, to use restitution/community service in ways which are more consistent with the practices recommended in the NAPSA Standards.

Duration of Diversion Period

Diversion standards provide ambivalent guidance concerning the duration of the diversion process and how that length should be established. For example, the NAPSA Standards propose that the "routine time limit for pretrial diversion be the shortest possible" (Commentary, p. 55), yet recognize that "the standard term should be long enough to permit change sufficient to minimize likelihood of additional arrests" (Standard 2.5, pp. 54-55). The Standards also say that the length of the diversion period should not be governed by the charge (in part because of the danger of overcharging by police or prosecutors) but should

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83/ Programs were asked to indicate the extent to which they provide services and supervision strictly in-house and through outside referrals, but the information obtained was not considered reliable enough to present.

84/ It should be noted that programs would need to exercise caution to assure that they not become overly dependent on outside agencies, to the extent that if the capability of one or more such agencies were exceeded it could perhaps prevent some defendants from being diverted in the future.

rather be based on the needs of the defendant (pp. 73-75); yet, they state that "the duration of the service plan should not exceed the authorized sentence for the crime charged" (Standard 3.2, p. 72) and "a program diverting only misdemeanants will not ordinarily have lengthy service plans for its divertees" (p. 55). NAPSA Standard 2.5 suggests that diversion periods can be extended "in extraordinary circumstances" (p. 54), but the earlier standards developed by the National Advisory Commission on Criminal Justice Standards and Goals recommended a flat maximum diversion period regardless of charge or other circumstances: "Suspension of criminal prosecution for longer than one year should not be permitted". 85/

Table 22 and the chart below indicate that length of diversion is in part a function of the severity of charge, and is also not necessarily bound by such a one-year limit, presumably reflecting individualized decisions, to some extent at least. In New Jersey, however, there is a one-year limit, regardless of the charge (consistent with the National Advisory Commission recommendation).

TIME SPENT IN DIVERSION PROGRAMS

Length of Time	% of Programs Diverting Misdemeanors	% of Programs Diverting Felonies
Typical time 6 months or less	74.7	49.0
Maximum more than 1 year	17.1	39.0
Maximum 2 years or more	12.2	26.0

Many programs (54% of those diverting defendants charged with misdemeanors and 36% of those diverting those charged with felonies) have minimum diversion periods of 3 months or less, as seen in Table 22. However, that length of time is apparently not considered sufficient in most cases to enable goals of diversion to be satisfactorily accomplished, as only 20.5% of the misdemeanor programs and 4% of the felony programs indicate that 3 months or less is the typical diversion period. 86/

Time spent on diversion is clearly longer, on the average, for defendants with felony charges than for those charged with misdemeanors. For example, the typical diversion period for misdemeanors is six months or less in 75% of the programs diverting such cases; but six months or less is the typical period in only 49% of the felony diversion programs (in 85% of the New Jersey and Florida statewide programs, but only 30% of all other programs diverting felonies).

85/ National Advisory Commission, Report on the Courts, Supra note 2, Standard 2.2, p. 39.

86/ The difficulty in accomplishing major change in the lives of defendants in such a short period is acknowledged in NAPSA Standards, pp. 17 and 55; see also Gottheil, Supra note 22, p. 144.

Substantial numbers of programs allow diversion to extend for two years or more, although the frequency of such lengthy periods is not known. More than 1/4 of all programs diverting felony cases can extend the diversion period to two years or more, and even 12% of the programs diverting misdemeanors can divert for that long a period of time. Furthermore, 17% of the misdemeanor programs have maximum diversion periods of more than one year, and one program says that is typical, even though the maximum jail sentence for a misdemeanor crime typically does not exceed one year. Programs which can divert misdemeanors for more than a year are more likely than other programs to divert defendants prior to filing formal charges.

F. Unfavorable Termination from Programs

NAPSA Standard 5.2 states: "The diversion program should retain the right to terminate service delivery when the participant demonstrates unsatisfactory compliance with the service plan" (p. 96). Grounds for such unfavorable termination from the program and the extent to which programs provide opportunities for defendants to challenge termination decisions are discussed below.

HIGHLIGHTS

- A new arrest while a defendant is enrolled in diversion is grounds for automatic termination, with no hearing or appeal, in 17% of all programs; conviction on that arrest leads to automatic termination in 54% of the programs.
- Failure to make restitution payments leads to automatic termination from 38% of the programs.
- Well over a third (38%) of all programs never hold termination hearings; about half of those that do hold hearings routinely involve defense attorneys in them.

Grounds for Unfavorable Termination

The commentary to the NAPSA Standards notes that one of the general requirements for successful completion of diversion is "the existence of a modicum of cooperation between the defendant and the program in addressing his own needs." However, "a divertee who does not achieve all the goals stated in his service plan has not necessarily been uncooperative with the diversion program in a way that warrants unfavorable termination" (pp. 83-84). The Standards suggest that among the circumstances which could justify termination are a pattern of failure to keep scheduled appointments and "chronic noncooperation...in trying to achieve the goals enumerated in the service plan" (p. 96).

Table 23 and the chart below indicate the extent to which programs use various circumstances and judgments as reasons for terminating participants.

SELECTED GROUNDS FOR AUTOMATICALLY TERMINATING PARTICIPANTS FROM DIVERSION PROGRAMS

Reason for Termination	% of Programs
Rearrest alone	16.5
Conviction on rearrest	54.3
Failure to make restitution payments	37.8

NAPSA Standard 5.4 specifically addresses one of the more common and directly measurable reasons given for terminating a defendant from a program: "Rearrests which occur during the course of diversion program participation should not be automatic grounds for termination" (p. 99). The rationale is that the decision to terminate should be based not on the rearrest alone, but also on the facts and circumstances surrounding the arrest and the person's record of performance while in the program. "No administrative or therapeutic justification appears for regarding all re-arrested divertees alike as a disfavored class". 87/ Even a conviction on that rearrest should never automatically be grounds for termination without review proceedings which consider a range of factors.

Nonetheless, more than half (54%) of the programs do in fact automatically terminate program participants based on a conviction for a rearrest while in the program (including 16.5% which terminate on the basis of the rearrest alone). Other programs may terminate defendants if there is a rearrest or conviction, but the final decision is only made after reviewing that event in the context of all circumstances relevant to the individual and the particular charge(s). There are no automatic grounds for termination in the New Jersey programs. Excluding them, 65% of the remaining programs automatically terminate based on a conviction (and 79% of the Florida statewide programs do so).

About 38% of the programs say that they automatically terminate a defendant for failure to make restitution payments. Excluding the New Jersey programs, which have no such automatic terminations, the corresponding figure for all other programs is 45% (and is 79% among the Florida statewide programs). As discussed above, one of the concerns about the use of restitution in a pretrial setting is that it may unfairly discriminate against certain defendants on economic grounds having nothing to do with actual personal characteristics, motivations, or performance. If programs find that a participant who has agreed to pay restitution as part of his/her service plan subsequently refuses to do so without a valid reason, there may be cause for considering termination. However, there may be extenuating circumstances which would make termination inappropriate. Unless those circumstances are considered, defendants may be unnecessarily and unfairly terminated.

More than half the programs indicate that termination decisions about defendants who fail to make restitution payments are made on such an individualized basis. There would appear to be little valid reason why the 48 programs which now automatically presume termination in such cases could not just as easily retain the termination option, but without automatically invoking it prior to a review of all the related circumstances.

87/ Pretrial Intervention Legal Issues, Supra note 41, p. 45.

The other reasons listed in Table 23 are generally considered valid grounds for termination in some cases, but usually discretion is allowed. Relatively few programs automatically terminate participants on grounds of missed appointments, inability to successfully complete some established goals, and unwillingness to work on certain problems. This may be due to the difficulty in subjectively deciding how these are measured in individual cases and when they reach the point at which there is little likelihood that continuation in diversion can have any value. Nonetheless, even with the subjectivity involved, a few programs apparently do allow arbitrary termination decisions to be made in such cases, with no apparent means of appeal by the defendant of the automatic decision (see also the discussion below on termination hearings).

Termination Hearings

To reduce the possibility of arbitrary and inappropriate termination decisions, national standards recommend that programs hold hearings prior to making final decisions to terminate participants. NAPSA Standard 5.5 states: "Whenever a program participant faces termination he should be afforded an opportunity to challenge that decision, with his attorney if he so chooses, prior to its implementation" (p. 101). 88/

Two U.S. Supreme Court cases have ruled that constitutional due process requires a hearing prior to revoking parole or probation, 89/ and various commentators have suggested that the same principles may require termination hearings in diversion programs. 90/ Nonetheless, as seen below and in Table 24, most programs do not routinely hold such hearings in conjunction with termination decisions.

PROGRAMS SCHEDULING FORMAL HEARINGS IF DEFENDANT UNFAVORABLY TERMINATED:

Hearings Scheduled	% of Programs
Never	37.8
Always	24.4

88/ For a general discussion of the rationale behind such hearings, see Pretrial Intervention Legal Issues, op. cit., pp. 41-45.

89/ Morrissey v. Brewer 408 U.S. 471 (1972) (parole) and Gagnon v. Scarpelli 411 U.S. 478 (1973) (probation).

90/ See NAPSA, pp. 101-2 and Pretrial Intervention Legal Issues, Supra note 41, pp. 41-42. The latter presents the case in especially strong terms: "Indeed, there is a strong argument that pretrial intervention termination proceedings should be surrounded by even more stringent procedural safeguards than those observed in the revocation of parole or probation. Where the latter are both post-sentencing procedures, and thus not considered part of the criminal trial process, diversion and its termination are pre-adjudication measures. Therefore, the divertee should enjoy the same procedural and substantive safeguards as any pre-trial defendant" (p. 42, note 5).

Well over a third of all programs never hold termination hearings, including all of the Florida statewide programs. Only about 1/4 of the programs always hold hearings prior to terminating a participant. The rest sometimes hold hearings, depending on the circumstances. In many cases, however, such hearings are only provided if specifically requested by the participant, who may not even realize that this is an available option. Without access to an attorney, there may be even less likelihood of a participant realizing that such an option exists.

Even though no absolute constitutional right to legal counsel has been established and even though the standard quoted above does not argue that presence of counsel should be mandated ("with his attorney if he so chooses", emphasis added), counsel's involvement in any termination decision is clearly considered preferable. The Pretrial Intervention Service Center's guide on legal issues goes even further, stating, "even if there is no right to counsel, the need for his/her assistance may be imperative". 91/

Nevertheless, only about half (51%) of the programs which provide termination hearings say that attorneys are always involved (including all New Jersey programs), and 10% say they never are; the remainder only involve attorneys if requested by the defendants. And, of course, another 48 programs have no termination hearings at all (as shown in Table 24).

The combination in many programs of no required termination hearings and no required legal assistance would seem to virtually assure that few hearings would occur. The commentary to NAPSA Standard 5.2 suggests that ideally programs should follow this approach: "Prior to finalizing the termination decision, counsel should be informed of the tentative decision and have an opportunity to contact his client and review the possible consequences of remand to traditional court proceedings", and to see whether there are factors justifying the client remaining in the program (p. 97).

G. Implications of Successful Termination from Diversion

HIGHLIGHTS

- Successful completion of diversion requirements leads in most programs to automatic dismissal of charges.
- However, in 16 programs, there are exceptions to the automatic dismissals, with no formal appeal procedures available to the defendants. In 10 of these 16, there is no legal advice routinely provided to defendants whose cases are not dismissed.
- Three-fourths of all programs indicate that diversion-related records are not automatically sealed or expunged, including 20% of the programs in which this never happens. The initiative for assuring protection of the records typically must be taken by the defendant and/or defense attorney.

91/ Pretrial Intervention Legal Issues, op. cit., p. 44 (emphasis added).

National standards recommend that successful completion of diversion should automatically lead to dismissal of the charges against the defendant. The underlying assumption is that pretrial diversion is predicated in large part on the removal of the defendant's case from the criminal justice system. Accordingly, to offer the successful program participant anything less than a dismissal of the pending charge(s) makes the diversion option "no alternative to prosecution at all" (NAPSA, p. 82). Instead, under such policies, diversion becomes merely a step which may or may not affect the subsequent processing of the case -- regardless of performance during the program.

As seen in Table 25, successful completion of diversion requirements does lead in most programs to automatic dismissal of charges, including those programs in which diversion occurs prior to the filing of formal charges and where, given the successful completion of the program, no charges would be formally filed. 92/

Despite the general compliance of programs in routinely dismissing charges, it is of some concern that there are several jurisdictions which do not automatically dismiss the current charge(s) upon successful completion of diversion. In some cases programs even hold open the possibility of charges being reinstituted if there are subsequent rearrests within some period of time after the program has been successfully completed. This would seem to potentially violate the agreement made at the beginning of the diversion period (unless in some cases it was agreed initially that charges would be reduced but not dismissed upon successful completion of the program). As stated in the NAPSA commentary, "A participant in a diversion program who successfully completes that program has kept his part of the bargain and should be able to consider the matter closed and final and be able to plan on that basis without fear that the matter will arise again" (p. 83).

In those cases where charges are not dismissed, NAPSA Standard 4.3 recommends that "It should be the responsibility of defense counsel to challenge prosecutorial or court refusal to dismiss charges where program requirements have been met" (p. 85). In the 20 New Jersey programs in which the prosecutor may in rare cases initiate a formal hearing if the program recommendation is not accepted, defense counsel is always involved. However, in 10 of the other 16 programs where charges are not always routinely dismissed, defense attorneys are only involved in challenges if requested by the defendant. As suggested in an earlier discussion, defendants may not be aware of the options available to them if they have no attorney, and may not think to request or engage one in such

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92/ The emphasis of NAPSA is on dismissal with prejudice, since that provides the only legal assurance that any charges cannot at a later time be instituted against the defendant. The total number of programs in which automatic dismissal follows successful completion of diversion includes those in which charges are dismissed with and without prejudice; the interviews did not attempt to differentiate the extent to which charges are actually dismissed with prejudice. Thus it is conceivable, even among the 87% of the programs "automatically dismissing" charges, that some cases could be reopened in the future, since it is unlikely that all charges are dismissed with prejudice in all 111 of those programs. For more discussion of this issue, see NAPSA, pp. 81-83. See also the supporting rationale in the National Advisory Commission Report on the Courts, Supra note 2, Standard 2.2, p. 39.

circumstances. It may be that programs should routinely accept a more direct responsibility for educating defendants in such situations, even to the point of making defense counsel available to those defendants who have no attorney and/or are unable to afford one (see earlier discussion of this recommendation in Section B in the context of providing legal advice in the decision whether to enter diversion).

Beyond the dismissal of charges, NAPSA Standard 4.4 recommends that "Records relating to arrest, diversion participation, and final disposition should be sealed upon successful completion of the diversion program" (p. 88). The assumption is that successful completion of a diversion program should leave the participant with no criminal record of any kind related to the charge(s) that led to diversion. 93/

Table 26 indicates the extent to which programs either expunge or seal records upon dismissal. Only about 1/4 of all programs indicate that records are always sealed or expunged. About 20% of the programs say that this never happens, thereby suggesting that the privacy of these documents is questionable. More than half of the programs indicated that records may be expunged/sealed (often subject to conditions set by state legislation), although that typically means that the burden for accomplishing this rests with the defendant and/or his or her attorney. In most cases a formal court motion must be filed in order for the records to be protected -- frequently at some cost to the defendant. Formal motions must be filed in all programs in the two statewide systems. Thus in most programs, provisions are made for assuring the protection of the records, but some initiative by the defendant is necessary, rather than the sealing/expungement occurring automatically.

H. Program Performance Data

The program interviews were not designed to yield clear statements either of the quality of services provided by diversion programs or of program impact. Some insights were gained, however, through an analysis of selected program-supplied information on the numbers and proportions of cases diverted, characteristics of program participants, and the proportions of diverted defendants who (a) are rearrested and (b) successfully complete the diversion requirements.

93/ See NAPSA, pp. 88-91. The NAPSA standards make a distinction between expungement and sealing of the records, suggesting that expungement alone does not assure the privacy of the arrest and program participation information. For further discussion which does not make a distinction between expungement and sealing of records, see Pretrial Intervention Legal Issues, Supra note 41, p. 37. Programs were not asked to distinguish between the two in the interviews.

HIGHLIGHTS

- In 61% of the programs, the majority of diverted defendants are charged with felonies; however, there is considerably less willingness to admit defendants with prior criminal records.
- Overall, the potential impact of diversion programs is limited by selection practices which appear to be more restrictive than necessary, either through explicit exclusions or through less formal individualized diversion decisions.
- Programs are urged to experiment with expanded eligibility criteria.
- There are indications that programs which divert prior to filing of formal charges may be more likely than post-charge programs to "expand the net" of control by diverting more defendants who would otherwise not be prosecuted.
- More than three of every four participants successfully complete diversion in more than 85% of the programs.
- Most programs reported rearrest rates of 5% or less, even one year after program entry, although several significant cautions and qualifications must be placed on the data.

Numbers and Proportions of Cases Diverted

As stated in Chapter III, more than half of the programs divert no more than 200 defendants annually, and more than 1/4 divert a maximum of only 100 persons per year. In order to put these figures in perspective, an attempt was made to compare them to the total defendant populations in the respective jurisdictions. However, reliable data on arrests or cases processed through the courts was unknown by most programs, thus precluding a systematic assessment of any impact programs may have on court caseloads in their jurisdictions.

As a partial (and far less satisfactory) substitute for such information, most programs (more than 75%) were able to provide information on the numbers of cases referred to them for possible diversion, the numbers interviewed for possible acceptance, and the numbers formally diverted. From these data, the proportions of referrals and of interviews which resulted in formal diversion were calculated. The information is summarized below and in more detail in Table 27.

PROPORTIONS OF REFERRALS AND OF PROGRAM INTERVIEWS WHO ARE ACTUALLY DIVERTED

Proportions Diverted...	% of Programs ...of Referrals	...of Interviewees
Half or less	43.8	23.5
25% or less	24.0	9.6
More than 75%	25.0	39.3

One-fourth of the programs divert more than 75% of all defendants referred to them, but many programs are far more selective. About 44% divert no more than half of those referred, including 24% which divert no more than one of every four referrals. Even of those defendants who are interviewed (a second round of screening after the initial referral in many programs), less than one in four is actually diverted in 10% of the programs. 94/

The interpretation of these data must be undertaken with caution. For example, a program with a low ratio of divertees to numbers of referrals or interviews is not necessarily more selective or cautious in its intake procedures than one with a higher proportion of enrolled defendants, i.e., a high proportion of divertees is not necessarily an indication of an "ideal" program. 95/ Any judgments would require information on overall eligibility criteria, restrictive criteria (automatic exclusions from eligibility), the point at which those exclusions are invoked (e.g., prior to or following the point at which initial referrals are made to the program), prosecutorial charging practices, etc.

94/ In 43% of the programs, the numbers referred and interviewed are the same, i.e., everyone referred is interviewed. In the others, at least some defendants referred to the program are never interviewed (in 18% of the programs, fewer than half of the referrals are interviewed). As a result, the numbers of diverted defendants in such programs represent a higher proportion of interviews than of referrals.

95/ In effect, a referral and/or interview is tantamount to diversion in some programs. At the other extreme, a referral may be little more than an inquiry from a defense attorney concerning possible eligibility for a client, or an identification from arrest or court dockets of potentially eligible defendants, with no subsequent contact between program and defendant. Many of these referrals/identifications may be inappropriate given program eligibility criteria. Furthermore, the referral and interview data include some programs in which the various exclusionary criteria (see Section A in this chapter) are applied before the interviews (or even before the referral in some cases), and others in which they are applied post-interview.

To the extent allowed by the available data, a series of analyses was undertaken in order to gain a better understanding of the factors associated with high and low "selection ratios". These analyses are discussed below. They are by no means definitive, and do not indicate program impact. They do, however, raise questions about comparative practices, shed considerable light on intake procedures and policies in diversion programs, and suggest ways in which programs may begin to take fresh looks at how those procedures and policies could and perhaps should be modified in the future. 96/

Those diverting high proportions of defendants take much less time to make the diversion decision than is typically the case in the lower-ratio programs. Typical elapsed time between initial program interview and official acceptance into the program is two weeks or less in 79% of the high-ratio programs, but it is more than a month for 47% of the low-ratio programs.

However, some of the high ratios appear to simply reflect the fact that various automatic exclusions have already been applied prior to the referral or interview, whereas such exclusions do not exist in many of the low-ratio programs. About 29% of the high-ratio programs, for example, exclude all felonies from diversion, compared with only 4% of the low-ratio programs. That is, programs appear to be more likely to divert relatively high proportions of defendants -- and divert them in a relatively short period of time -- if the initial pool of eligibles does not include felonies. Similarly, those programs with seemingly high diversion ratios are also more likely to have automatically excluded defendants with varying degrees of prior criminal records. In short, a "high" selection or diversion ratio in many cases seems to mean little more than that various exclusions have previously been imposed, without being reflected in the bases on which the proportions are calculated. 97/

Furthermore, the high-ratio programs are considerably more likely to divert defendants prior to having formal charges filed against them. 98/ The strength of that relationship suggests that if charges have been filed, there may be less likelihood that an agreement will ultimately be reached to divert the defendant, as the prosecution option remains a valid alternative. The suggested corollary is that, where no charges have been filed, diversion may look more attractive to a prosecutor, who is perhaps more willing to divert rather than lose control of a case that might otherwise not be prosecuted. It may also look more attractive to the defendant, who may have less knowledge of his/her options in the absence of formal charges, and who may therefore opt for diversion without considering

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96/ It should be noted that throughout this discussion of diversion intake decisions, it is recognized, if not always explicitly stated, that "program" decisions to divert or not are typically affected, and often directly made, by others outside the program (e.g., judges, prosecutors, victims, police, the defendant). The term "program" is used, but with the recognition that it is meant in this larger context.

97/ No information is available on numbers of defendants screened out by the various automatic exclusions imposed by the programs.

98/ One-third of the programs diverting a high proportion of interviewed defendants divert more than 75% of their defendants prior to filing of formal charges, compared with only 4.5% of the programs diverting a low proportion of defendants. Looked at from a different perspective, only 28% of the high-proportion (high-ratio) programs divert all defendants after formal charges have been filed, compared with 77% of the low-proportion programs.

other possibilities. None of this can be conclusively proved from these data: thus, "dumping" of cases into diversion may or may not be typical. But there are clear differences in charging patterns between programs with high- and low-diversion ratios; and the most serious cases (felony charges and defendants with prior records) are least likely to even be considered for diversion in the high-ratio programs, leaving primarily less serious cases to begin with. Accordingly, there appear to be grounds for suggesting that programs which divert pre-charge may be most susceptible to the danger of diverting cases that would otherwise not have a high probability of being prosecuted.

Programs in the high-ratio group are more than twice as likely to require guilty pleas or informal admissions of guilt or moral responsibility prior to approving diversion than are programs in the low-ratio group. Programs appear more willing to divert a higher proportion of defendants where such a requirement exists.

In short, many of those programs which appear to divert high proportions of eligible defendants have previously screened out substantial categories of defendants from even being considered for diversion. On the other hand, many of the programs with few overt policy restrictions on who can be diverted are nonetheless also highly, and perhaps unnecessarily, selective in their individual diversion decisions. Thus a wide variety of programs appear to employ -- or have employed for them by other criminal justice officials -- intake procedures which may be unnecessarily restrictive, thereby limiting the potential impact such programs can have on defendants and the local criminal justice system.

It would therefore seem appropriate for most programs to examine their selection criteria (both formal criteria and those employed informally, even though not included in official diversion policies for the jurisdiction), with an eye to the possibility of expanding eligibility criteria on an experimental basis and monitoring the outcomes over a period of time in order to determine whether the changes should be made permanent (see Section I below).

Characteristics of Program Participants

Table 28 provides an indication of the characteristics of those defendants who are currently diverted by programs. The numbers of programs reporting information on defendant characteristics varied considerably, from a high of 89 programs (70% of the total) providing aggregate information on the gender of the participants to a low of 55 (43%) providing data on prior felony arrests. It is not known to what extent the reported information is representative of the defendant profiles of the non-reporting programs. Thus any conclusions are limited to those reporting the data.

All programs divert at least some women, minority defendants, and defendants under the age of 21; and no programs are limited to accepting only defendants from just those categories. The extent to which these distributions correspond to the overall profiles of all eligible defendants within the jurisdictions is not known, so there is no way of ascertaining whether any patterns of discrimination exist.

In light of the criticism of diversion programs that they too frequently admit primarily or exclusively non-serious, "low-risk" cases, it is significant that the majority of diverted defendants are charged with felonies in 61% of the programs providing this information, as seen in the chart below. In about half of the programs, more than three-fourths of the defendants are diverted on felony charges; and about a third of the programs deal exclusively with felonies. These include police charges as well as formal filed charges, and may include some "overcharging" in some jurisdictions. Nonetheless, many programs do appear to be diverting more than a token number of felony cases.

PROGRAMS DIVERTING DEFENDANTS CHARGED WITH FELONIES

Proportion of Defendants	% of Programs
None	12.6
More than half	60.9
More than 75%	50.6
100%	34.5

On the other hand, programs appear to be more resistant to admitting defendants with prior records. As seen below, about 78% of the programs indicate that more than three of every four persons in the program have no prior convictions, including 24% which say that none of their participants have any adult convictions prior to being diverted. 99/ About 57% of the programs say that more than three-fourths of their participants have not even been arrested before, including 8% of the programs which say that none have a prior arrest record.

PROGRAMS DIVERTING DEFENDANTS WITH NO PRIOR RECORD

	% of Programs	
Proportion of Defendants	No Prior Arrests	No Prior Convictions
Half or less	14.3	7.3
More than 75%	57.1	78.1
100%	7.9	24.4

99/ As seen earlier in Section A, about 32% of the programs by policy exclude all defendants with any prior conviction. The difference between that figure and the 24% shown here is likely to be attributable in part to two factors: there may be a higher proportion of programs providing no statistical data which have such restrictions; and there may be some programs which have such policies but allow a few exceptions, which would be reflected in defendant profiles.

Nonetheless, there are a few programs which indicate that a majority of their participants do have a prior record (14% say a majority have one or more prior arrests, and 7% say that more than half of their divertees have previously been convicted). Furthermore, as seen in Table 28, about 55% of the programs do have a few participants with more than one prior felony arrest, and 38% have a few with more than one previous felony conviction. The proportion of defendants in these categories is typically no more than 2% or 3% in each of the programs.

In half of the programs, more than 1/4 of all participants are considered to be neither employed nor in school. In almost 2/3 of the programs, the majority of defendants are single. Although nearly all programs have at least some divertees on public assistance, the proportions are typically small (less than 25%). On the other hand, in 36% of the programs, a majority of the defendants qualified for representation by a public defender or court-appointed attorney. It is not known to what extent these distributions correspond to overall profiles of defendants potentially eligible for diversion, so it cannot be determined whether any program imbalances exist.

Successful Termination and Defendant Rearrest Rates

In more than 85% of the programs which reported rates of successful terminations, more than three of every four participants successfully completed the diversion requirements, as seen in Table 29. Success rates of more than 90% were reported in 41% of the programs.

It is not clear whether the programs with the lowest rates (75% or less) have problems with the services provided to the participants, whether the criteria for successful completion are stricter in these programs, or whether this simply reflects the fact that a few "failures" carry greater weight when computing percentages on the basis of relatively small numbers. Whatever the reason(s), analyses indicate that the lower success rates do not appear to be the result of particular program eligibility criteria, high proportions of defendants with felony charges or prior records, either insufficient or excessive time in diversion, or automatic termination provisions.

One of the goals of most diversion programs has been to reduce rearrest rates for those who are diverted. 100/ Table 30 provides an indication of the rearrest rates (and in some cases the conviction rates on those rearrests) reported by programs, both for defendants while in the programs and for a one-year period subsequent to admission to diversion.

100/ See, e.g., NAPSA, pp. 11, 15, 75, 123; Rovner-Pieczenik, Supra note 8; Mullen, Supra note 8; Crohn, Supra note 1; Michael Kirby, Findings 2: Recent Research Findings in Pretrial Diversion, Washington, DC: Pretrial Services Resource Center, January 1978.

The comparisons offered here are presented with caution and only in the aggregate. They are considered suggestive rather than definitive conclusions. 101/

The most reliable of the rates presented in Table 30 are the in-program rearrest rates, since subsequent arrests are most likely to be monitored closely while a defendant is active in a program. On the other hand, these rates do not take into account the different lengths of typical program participation. Thus a 6-month program rearrest rate is not differentiated from a 12-month in-program rate. Also, programs are less likely to maintain data on convictions and on subsequent criminal activity of any type once the defendant leaves diversion. Nonetheless, the data presented are internally consistent and logical: conviction rates are lower than overall rearrest rates, and one-year rates are higher than within-program rates.

Most programs report rates of 5% or less, with rates in excess of 10% relatively rare, even on a one-year follow-up basis. It is likely, however, that this is in part a reflection of the fact that programs have tended to be somewhat cautious in their selection of participants, and that research involving careful systematic follow-up of cases has typically not been done in most programs. 102/

Programs which accept fewer defendants with felony charges and those which accept fewer defendants with prior convictions appear to have somewhat lower rearrest rates. However, assuming that these data are accurate, it is not known whether the higher rates for programs diverting more serious defendants are nevertheless perhaps lower than would be the case for comparable defendants not exposed to a diversion program. 103/

101/ Caution should be exercised in interpreting program-supplied data which have not been subjected to independent verification. In particular, comparisons of one program's rearrest rate with another's should generally be avoided, due to differences in: characteristics of program participant groups; types of diversion services and length of diversion period from program to program; and definitions, accuracy and completeness of the rearrest data recorded by or made available to various programs. Moreover, even though most of the reported rates are relatively low, it is not known whether these rates are due to efforts of the programs, or whether they would have been the same for the defendants even in the absence of the programs. The absence of any comparison data on similar defendants not exposed to diversion precludes any impact assessment in this area. The importance of comparison data is emphasized at various points in the publications cited in note 100, Supra.

102/ Generally rates are shown to be higher, particularly on a post-program follow-up basis, when careful research is done. See the forthcoming publication by the Pretrial Services Resource Center on updated research findings in pretrial diversion and dispute mediation, to be published in the spring of 1982.

103/ For contrasting findings in this area, see Donald Pryor, Pluma Kluess, and Jeffrey Smith, "Pretrial Diversion in Monroe County, NY: An Evaluation of Program Impact and Cost Effectiveness," Pretrial Services Annual Journal, 1978, Washington, DC: Pretrial Services Resource Center, pp. 68-92 (which indicates that rearrest rates are lower for those in a diversion program than for comparable non-program defendants); and Sally Hillsman Baker and Susan Sadd, Diversion of Felony Arrests: An Experiment in Pretrial Intervention, Summary Report, Washington, DC: National Institute of Justice (study conducted and report written at Vera Institute of Justice), June 1981 (which indicates that there is no difference in rearrest rates for those diverted and those in a randomly-assigned control group).

I. Data Maintenance and Research Capability of Programs

HIGHLIGHTS

- Systematic data collection, monitoring, analysis and formal evaluation -- and the use of the results of such efforts to promote internal program and/or system-wide change -- are all too infrequent within diversion programs.
- The impact of most program practices and screening procedures has not been systematically evaluated in most programs.
- Only 20% of the programs have had a cost effectiveness evaluation conducted within the past three years.
- Program evaluations may be required increasingly as jurisdictions attempt to maximize the value obtained from the investment of limited public resources. Evaluations and data monitoring need not -- and with budget cutbacks, will not be able to -- involve sophisticated, costly procedures to be useful. There is much that programs can and should do in order to evaluate their own practices -- and much that can be done with existing resources and/or with the support of volunteers and/or students.

NAPSA Standard 7.1 states: "Pretrial diversion programs should monitor, research, and evaluate the performance and practices of their programs" (p. 117). National standards, sound management practices, and current fiscal realities emphasize the need for careful research and evaluation to determine how effectively pretrial diversion programs operate, what impact they have on their participants and their respective criminal justice systems, and how cost effective they are.

Data Tracking and Monitoring

Unfortunately, the types of systematic data collection, monitoring and analysis necessary to make the assessments referred to above are all too rare within diversion programs.

Very few programs could provide relevant data concerning the program jurisdiction's annual overall arrest totals (by types of charges) and numbers of cases of various types processed through the courts. This information is essential in order for a program to realistically determine its impact on caseloads. Not only could few programs provide such information, but those that could were typically able to provide only estimates or partial data. This is in part due to the unreliability of such data in many communities. For whatever reasons, most programs have little adequate ability to systematically assess their overall impact in comparison with the potential need for their services within the jurisdiction.

Although most programs which provided at least some statistical data did indicate successful termination rates and rates of in-program rearrests, it is significant that 11% of the responding programs did not indicate their successful termination rates, nor did about 23% indicate their rearrest rates (see chart below). Perhaps these programs do routinely maintain such information and were simply unable to provide it at the time it was requested, but since they were asked to supply it for "the last full year", it is somewhat revealing and disturbing that so many programs were apparently unable to do so.

% OF PROGRAMS WHICH DO NOT TRACK SELECTED DATA ON AN ONGOING BASIS:

Successful termination rates	10.8%
In-program rearrest rates	23.5
Charge disposition: successful terminees	17.1
Charge disposition: unfavorable terminees	56.9
Impact data by types of participants	74.8
Impact of specific services	83.7

Knowledge of the disposition of the original charge would also seem to be basic information which should be routinely maintained by programs, and 83% do track that indicator for successful terminees from the program (see chart and Table 31). Programs may take this information for granted, since dismissal of charges is routine in most cases; but, as seen earlier, such dismissal is not automatic in several programs, so the tracking and monitoring of the extent of non-dismissal (or other dispositions) of charges should be systematically undertaken, at least for those programs.

Moreover, only 43% of the programs indicate that they track and analyze information on dispositions of unfavorably-terminated participants. The consequences of an unfavorable termination and possible return to court should be carefully understood by programs, to help assure that defendants are not treated more harshly by the courts after "failing" diversion than they would have been had they simply been processed routinely through the courts without entering diversion initially. Furthermore, programs should have this information to effectively discuss options and potential consequences with defendants, and also to be able to provide such feedback to judges, defense attorneys, and prosecutors. (This of course also implies that either the program or some other agency within the jurisdiction must maintain data on what happens to "similar" defendants not originally diverted.)

As already noted above, large proportions of programs maintain no information on post-program rearrests of former participants. This may reflect a realistic assessment of what can and cannot be done with limited program resources, and the desire for more comprehensive data collection of this type may simply be an unattainable ideal for many programs. On the other hand, without such information there is no ongoing means of assessing what long-term impact a program is having in meeting one of the primary objectives frequently stated for diversion. As suggested below, use of volunteers and/or students may be one way of enabling programs to more carefully track these and other types of important data.

It is especially revealing and significant that only 1/4 of the programs indicate that they track and analyze any kind of program impact data by particular characteristics of participants and/or their cases (e.g., by charge or prior record). The lack of such information is significant because, as noted earlier, most programs automatically exclude some defendants from eligibility for diversion on the basis of such factors -- yet typically with no objective basis of knowledge as to whether or not such exclusions are justified on empirical grounds.

The commentary to NAPSA Standard 7.1 discusses the "constraints" often placed by courts, prosecutors, and "community sentiment" on the types of defendants who can be diverted. In response, the commentary suggests that "specialized research can be used to examine the impact which diversion has or can have on defendants charged with more serious crimes" (p. 119). To that statement could be added "and those with more serious prior records". Such research and experimentation would not obligate a program to any permanent changes; it would simply allow an assessment of the impacts of certain existing practices or of modifications made on a trial basis. If they do not work well, they can be deleted from subsequent practices; if they do work, they can be incorporated on an ongoing basis. Even though the risks would be minimal and benefits significant for a program, the data clearly indicate that such efforts are rarely if ever undertaken in most programs at this time.

Table 31 also indicates that only 20 programs (16%) attempt on an ongoing basis to track and analyze data on the impact different types of services or service delivery mechanisms have on various program/defendant outcomes. Systematic information on what types of approaches work best for what types of defendants has rarely been developed by programs, or even analyzed by independent evaluations. 104/ However, in order to assure that scarce resources are being most effectively and efficiently used in the future, an increase in such research at the program level seems almost mandatory.

Formal Program Research and Evaluation Efforts

It is not surprising, given the relative lack of basic information collection, maintenance and monitoring, that formal research and evaluation efforts are also infrequent among diversion programs, as indicated below and in Table 32.

% OF PROGRAMS CONDUCTING SELECTED TYPES OF FORMAL EVALUATIONS IN PAST THREE YEARS:	
None conducted	53.2%
Program impact (no comparison group):	
In-house	6.3
External	10.3
Program impact (with comparison group):	
In-house	7.1
External	10.3
Cost effectiveness	19.8

104/ See e.g., Kirby, Supra note 100, pp. 24-5, 29; Rovner-Pieczenik, Supra note 8, pp. xiv-xx.

More than half (53%) of the programs reported that they had had no formal evaluations whatsoever, even of an in-house nature, over the past three years. And those that have occurred have been, for the most part, evaluations which addressed questions of how well the program operates, rather than program impact and cost effectiveness. After eliminating overlap in evaluations, only 37 programs (29%) have had some type of impact evaluation during the past three years, and only 18 programs (14%) have used a comparison group to provide a more realistic assessment of the effect, if any, the program has had on defendants. Without a comparison group against which to contrast the performance of program participants, few valid definitive statements of the program's impact can be made. 105/ Moreover, only about 20% of the programs have had a cost effectiveness evaluation conducted within the past few years.

Program evaluation is an area which cannot always be completely controlled by individual programs, because of funding and staffing constraints. On the other hand, evaluations are often avoided because of "fear" of what they might reveal. However, the NAPSA standards place evaluations in perspective by emphasizing their importance to program administrators and to the larger criminal justice system: "Evaluation can measure the effectiveness of the organization and lead to suggestions for modification in program activities....The systematic use of research and evaluation can dramatically improve the delivery of services to defendants and program impact on the courts" (p. 119). Such evaluations may become particularly crucial as jurisdictions assess ways of assuring that limited resources are used in ways that will have the greatest impact in the future. 106/

Such impact and cost effectiveness evaluations need not be sophisticated, costly research conducted by expensive outside consultants; and realistically, budget cutbacks make it highly unlikely that there will be many such comprehensive program evaluations in the near future, no matter how desirable. Yet it is important that research of program practices and impact be done according to sound research techniques, in order that results and their implications can be trusted. There is much that programs can and should do in order to evaluate their own practices -- and much that can be done with existing resources and/or with the support of volunteers and/or students. With the will and careful planning, sound internal evaluations can be undertaken which can have significant impact on future program operations and on a jurisdiction's overall diversion practices. Several programs have conducted such research on their own, frequently with the support and consultation of various agencies, including the Pretrial Services Resource Center. Many more could -- and should -- do so in the future. 107/

105/ See e.g., Kirby, Ibid., pp. 7-8; NAPSA, pp. 117-130.

106/ A summary of national diversion research conducted in the past three years, and a discussion of its implications for jurisdictions throughout the country and for the future of the diversion movement, will be included in the forthcoming Resource Center publication cited in note 102, Supra.

107/ To aid local programs and jurisdictions in developing appropriate data collection and maintenance approaches, and in conducting research on various aspects of program practices and impact, the Resource Center will be publishing in 1982 a "how-to manual". This will include various suggestions and techniques designed to help assure that programs can confidently undertake and benefit from data analysis and evaluation efforts conducted internally and/or with the support of existing, low-cost outside resources. In the meantime, the Center can also provide a description of a model data collection/information system for use of diversion programs.

V. SYSTEMATIC DIFFERENCES BETWEEN TYPES OF PROGRAMS

Throughout the monograph, overall findings have been presented without reference to differences in practices or policies between different types of programs. In this chapter, those differences -- to the extent that they exist -- are addressed. They are organized and discussed in the same order in which issues and practices were covered in Chapters III and IV.

Types of Programs refers to their organizational placement or locus, as discussed in Section A of Chapter III. The primary groupings are Prosecutor, Probation, Courts, Private/non-profit, and Other Public (including publicly-funded programs responsible to such governmental units as departments of corrections, human services departments, county boards, etc.). In addition, where there are distinct patterns associated with the statewide programs in New Jersey and Florida, these are spotlighted.

Only significant variations from the overall national profiles are discussed and summarized. To put these summaries in perspective, the reader should refer to the appropriate tables and related discussions in the earlier text.

Scope and Size of Programs

Although there are relatively few significant deviations in the nature of jurisdictions served (primary service areas), programs run by the state probation department in Florida are likely to serve more than one county. On the other hand, programs administered by local courts are more likely than other types of programs to serve city/town jurisdictions.

% OF PROGRAMS SERVING DIFFERENT TYPES OF JURISDICTIONS:			
Multi-county areas:	Florida probation		71%
City/Town jurisdictions:	Local courts		28
	All programs:	Multi-county:	23%
		City/Town:	12%

In terms of size of communities served, 58% of the prosecutorial programs exist in areas with moderate populations (between 100,000 and 500,000), compared with 46% of all programs. Relatively few (28%) are in areas with higher populations. By contrast, the majority of non-profit independant programs exist in larger areas.

% OF PROGRAMS SERVING AREAS WITH POPULATIONS OF MORE THAN 500,000:		
Most likely:	Non-profit	56%
Least likely:	Prosecutor	28
	All programs (Table 4):	41%

All probation programs express a willingness to cooperate with other agencies in working with defendants charged in other jurisdictions. By contrast, although 79% of all prosecutorial programs express such a willingness, it is also true that four of the six programs saying that they would never do so are administered by prosecutorial offices.

% OF PROGRAMS STATING UNCONDITIONAL COOPERATION:		
Most likely:	Probation	100%
	All programs:	77%

Programs currently administered by prosecutors' offices are most likely to have annual budgets of $50,000 or less. Non-profit programs are least likely to have such small budgets. These findings appear to be consistent with those reported above which suggested that non-profit programs are more likely to exist in larger areas.

% OF PROGRAMS WITH SMALL BUDGETS:		
Most likely:	Prosecutor	40%
Least likely:	Non-profit	6
	All programs (Table 5):	29%

Consistent with the findings concerning budgets and size of communities served, prosecutorial programs tend to have smaller staffs (less than five full-time professionals) than other types of programs. Programs operated by Other Public agencies, the courts and non-profit agencies typically have staffs of five or more. Whether those reflect differences in levels of services offered cannot be determined.

% OF PROGRAMS WITH LESS THAN 5 FULL-TIME STAFF:

Most likely:	Prosecutor	74%
Least likely:	Non-profit	47
	Courts	33
	Other Public	30

All programs (Table 6): 57%

Non-profit programs, as well as those operated by Other Public agencies, are most likely to make use of volunteers and/or students.

% OF PROGRAMS USING VOLUNTEERS/STUDENTS:

Most likely:	Non-profit	60%
	Other Public	50

All programs (Table 6): 28%

There are relatively few differences between the different types of programs in terms of affirmative action hiring practices. The exceptions: all non-profit programs have at least some women on the professional staff; non-profit and court-administered programs are most likely to be directed by women; probation-administered programs (particularly those in New Jersey) are least likely to be directed by women; and probation programs are least likely to have minority professional staff.

HIRING PRACTICES OF PROGRAMS:

Women on staff	- Most likely:	Non-profit	100%
Woman Director	- Most likely:	Courts	50
		Non-profit	44
	- Least likely:	Probation	18
		(New Jersey Probation)	0
Minority on Staff	- Least likely:	Probation	38

All programs: Women on staff: 88%
Woman director: 28%
Minority on staff: 54%

Consistent with resources available and with size of communities served, non-profit programs proportionately divert higher numbers of defendants than other types of programs. Similarly, prosecutorial programs, which exist primarily in moderate-sized communities, are typically in the middle range of numbers of defendants diverted, with relatively few large programs. Probation programs are most likely to divert relatively small numbers of defendants. (More than half divert 150 or fewer per year, with several of these in relatively small jurisdictions, although several are also in multi-county areas with moderate populations.)

% OF PROGRAMS INTERVIEWING LARGE AND SMALL NUMBERS OF DEFENDANTS:

More than 750:	Non-profit	27%
More than 300:	Non-profit	54
150 or less:	Probation	53

All programs (Table 7): More than 750: 11%
More than 300: 28%
150 or less: 38%

Program Age, Stability and Sources of Funding

Of the 36 interviewed programs which have begun since 1976, 15 are administered by probation departments (44% of the 34 probation programs have been started since 1976). During the same time period, the next-largest influx of new programs has been among those administered by prosecutors' offices (7), followed in order by courts (6), non-profit agencies (5), and Other Public agencies (2). But as noted in Section A of Chapter III, the new programs of these last two categories were more than offset by attrition of other programs, leading to net declines in the numbers of such programs and more concentration of criminal justice programs (those administered by prosecutors' offices, probation departments, and courts). 108/

NET CHANGE IN % OF PARTICULAR TYPES OF PROGRAMS FROM 1976-1980:

Net Decline:	Other Public	-26.8%
	Non-Profit	- 3.0
Net Increase:	Criminal justice agency programs	+29.0

This trend appears to be continuing. In addition to these increases among interviewed programs, of those programs established since the interviews were completed (additional programs included in the Resource Center's 1980/81 Directory), half are administered by prosecutors (several as part of a new statewide diversion program established in South Carolina), and about 21% are probation-administered. The remainder are split among courts, Other Public agencies, and non-profit agencies.

Despite the net decrease in the numbers and proportions of non-profit programs over time (see Table 3 and the accompanying discussion), most of the independent programs that exist today have been in operation for several years. Of all the different types of programs, they are proportionately more likely than the others to have been in existence since 1972 or earlier (35% had begun by then, compared with only 14% of all diversion programs), and 59% have operated since 1974 or earlier (compared with 38% of all programs). By contrast, only 26% of all probation-administered programs have existed since 1974.

108/ Where the numbers of new programs seem to be fewer than would be expected from the 1976-1980 comparisons shown in Table 3 (discussed in Section A of Chapter III), it should be noted that an additional 19 programs (mostly prosecutorial and probation) were begun during 1976 but too late to be included in the ABA Pretrial Intervention Service Center diversion directory published that year.

LENGTH OF EXISTENCE OF PROGRAMS:

Existed prior to 1975:	Non-profit	59%	
	Probation	26	
Begun since 1976:	Probation	44	
All programs (Table 8):		Pre-1975:	38%
		Post-1976:	28%

Several existing programs may be especially vulnerable to funding cutbacks. For example, 14 of the 23 programs with primary funding from LEAA are probation-administered, and five of the seven programs receiving primary funding from CETA are non-profit programs: will those programs be able to continue, and if so for how long, as those non-permanent funds disappear? Interestingly, those programs do not profess to be especially concerned, as each of the 19 indicated that "continued financial support (is) reasonably well assured", in response to a question about their perceived future stability.

By contrast, although only 13 programs expressed any uncertainty about future financial support, nine of those are administered by prosecutors. It is not clear whether this represents potential financial vulnerability alone, or possible questioning of diversion itself within the prosecutor's office in those jurisdictions. It may be that in some jurisdictions, the level of support for diversion may change as new prosecutors with different philosophies are elected.

% OF PROGRAMS EXPRESSING UNCERTAIN FUTURE FINANCIAL SUPPORT:

Most likely to express uncertainty:	Prosecutor	21%
All programs:		10%

Automatic Exclusions from Program Eligibility

No programs administered by probation agencies exclude all felony cases from diversion eligibility. To the contrary, probation programs are most likely to concentrate solely on felony cases (56%, compared with 31% of all programs). Programs administered by courts or by non-profit agencies are most likely to exclude all felonies. On the other hand, the non-profit programs are least likely to automatically exclude those charged with violent felonies from consideration for diversion. Prosecutorial programs rarely exclude defendants charged with felonies from diversion, but almost always exclude violent felonies from eligibility.

% OF PROGRAMS EXCLUDING FELONY CASES FROM DIVERSION ELIGIBILITY:

Exclude all felonies	- Most likely:	Courts	42%
		Non-profit	41
	- Least likely:	Prosecutor	7
		Probation	0
Exclude violent felonies	- Most likely:	Prosecutor	95
	- Least likely:	Non-profit	70
All programs (Table 11):		All felonies:	16.5%
		Violent felonies:	80%

No New Jersey programs automatically exclude defendants from diversion eligibility based on prior record alone. At the other extreme, nearly all probation programs outside New Jersey automatically exclude defendants on the basis of prior record. Other Public, prosecutorial, and court programs are also likely to use such exclusions. Court-administered programs are most likely to exclude on the basis of prior arrests only. New Jersey, Other Public, and probation programs are least likely to do so.

% OF PROGRAMS EXCLUDING CASES FROM DIVERSION ELIGIBILITY ON BASIS OF PRIOR RECORD:

Prior convictions -	Most likely:	Probation (non-New Jersey)	94%
		Other Public	90
		Prosecutor	86
		Courts (non-New Jersey)	79
	Least likely:	New Jersey (Probation + Courts)	0
Prior arrests -	Most likely:	Courts (non-New Jersey)	42
	Least likely:	Probation	9
		Other Public	0
		New Jersey	0

All programs (Table 12): Convictions: 68%
Arrests: 27%

Program Protections to Insure Informed Diversion Decisions

Programs administered under prosecutors' offices are relatively likely to divert defendants prior to filing formal charges (including 8 of the 11 programs which indicated that all cases are diverted pre-charge). Most of the probation programs outside New Jersey divert at least some defendants pre-charge. By contrast, all probation programs in New Jersey divert only post-charge. Programs administered by courts and by Other Public agencies are also prone to divert only following formal charges.

% OF PROGRAMS DIVERTING ONLY AFTER FORMAL CHARGES FILED:

Most likely:	Probation (New Jersey)	100%
	Other Public	70
	Courts	67
Least likely:	Prosecutor	41
	Probation (non-New Jersey)	11

All programs (Table 14): 52%

Prosecutorial programs are relatively unlikely to require either defense counsel involvement in the diversion decision (51%, compared with 64% of all programs) or formal counsel approval of the decision. This would appear to represent a considerable potential for expansion of control at the expense of defendants' rights, through the lack of provision in many cases of a significant safeguard -- one which seems especially important in prosecutorial programs. Non-profit programs and court programs outside New Jersey are also not as likely to insist on formal counsel approval. By contrast, all Florida and New Jersey statewide programs and 91% of all probation programs require such approval.

% OF PROGRAMS REQUIRING DEFENSE COUNSEL APPROVAL OF DIVERSION DECISIONS:

Most likely:	New Jersey	100%
	Florida statewide	100
	Probation	91
Least likely:	Non-profit	41
	Prosecutor	37
	Courts (non-New Jersey)	36

All programs (Table 15): 58%

Initial Screening and Intake Process

Programs administered by probation departments are most likely to have initial screening done by either prosecutors (85% of the programs) or defense attorneys (79%). Not surprisngly, most cases in prosecutorial programs are initiated in-house, although 16% do not cite the prosecutor as one of the primary sources of referrals/screening. Non-profit programs are most likely to have cases initiated primarily by judges or defense attorneys (59% each), with fewer than half (47%) citing prosecutors as a primary referral source. Primary screening in Other Public programs is from review of records and from prosecutorial referrals (60%) each). No clear referral pattern is apparent in court programs. (For overall referral patterns, see Table 16.)

Despite their status outside the criminal justice system, the non-profit agencies are fastest at processing defendants to the point of formal enrollment: Most say they typically initiate diversion within two weeks of the initial contact, and none take longer than four weeks. Even prosecutorial programs do not as a group initiate diversion as quickly, although 72% of those programs enroll defendants within three weeks (compared with 58% of all programs). 109/ Probation programs take a relatively long time to officially enroll defendants into their programs.

109/ It may be that total elapsed time from arrest to diversion is shorter for prosecutorial programs than for any others, however, since they are presumably in a position to make the initial contact with the defendant earlier by virtue of routine prosecutorial screening and charging practices. On the other hand, since there are variations in the timing and nature of those practices, this may not be the case. There is no way to assess this from the data.

SPEED OF TYPICAL OFFICIAL ACCEPTANCE AFTER INITIAL PROGRAM CONTACT:

Within 2 weeks	- Most likely:	Non-profit	62%	
	- Least likely:	Probation	15	
More than 4 weeks	- Most likely:	Probation (New Jersey)	81	
	- Least likely:	Non-profit	0	
	All programs (Table 17):	Within 2:		39%
		More than 4:		22%

Requirements for Formal Program Enrollment

The nine programs requiring a guilty plea prior to enrollment in diversion are not concentrated among any particular type of program. But, those requiring an informal admission of guilt or moral responsibility as a condition of program entry are most likely to be prosecutorial programs. Half of the probation programs outside New Jersey also require an informal admission. By comparison, none of the New Jersey programs and few of the non-profit or courts programs have such a requirement.

% OF PROGRAMS WHICH REQUIRE INFORMAL ADMISSION OF GUILT:

Most likely:	Prosecutor	63%
	Probation (non-New Jersey)	50
Least likely:	Courts	16
	Non-profit	6
	New Jersey	0
	All programs (Table 18):	36%

All probation programs outside New Jersey require restitution and/or community service as a condition of entry. Most prosecutorial programs also have such requirements. In contrast, programs in New Jersey have no such requirements (the state has separate restitution programs which often focus on the same types of defendants). Non-profit programs are relatively unlikely to require either. Other types of programs vary little from the overall proportions shown in Table 19.

% OF PROGRAMS WHICH REQUIRE RESTITUTION/COMMUNITY SERVICE:

Most likely:	Probation (non-New Jersey)	100%
	Prosecutor	88
Least likely:	Non-profit	47
	New Jersey	0

All programs (Table 19): 70%

Of the 13 programs known to require fees, the largest concentration (7) is among prosecutorial programs.

In order for a defendant to be officially diverted, judicial approval is required in all New Jersey programs. Otherwise it is most likely to be required in non-profit programs and -- although to a surprisingly small extent -- in programs under the courts. It is least likely to be required in Other Public programs and particularly in those administered under prosecutors' offices.

% OF PROGRAMS WHICH REQUIRE JUDICIAL APPROVAL:

Most likely:	New Jersey	100%
	Non-profit	71
	Courts	58
Least likely:	Other Public	30
	Prosecutor	14

All programs (Table 20): 47%

Fifteen of the 21 programs saying they require victim approval pre-diversion are administered by probation programs. There was no particular concentration of the 10 programs requiring approval from the police.

Services Offered and Duration of Diversion Period

Except in New Jersey, where no one can be diverted for longer than a year, programs which can divert misdemeanors for more than a year are no more likely to be administered by one type of agency than another. On the other hand, programs which can divert felonies for long periods of time (two years or more) are most likely to be prosecution-administered (39% can divert that long, compared with 26% overall, as seen in Table 22). Such long diversion is relatively unlikely in probation programs (9%).

Unfavorable Termination from Programs

There is considerable variation among the different types of programs concerning approaches to termination under different circumstances. Programs differ especially in their termination policies concerning rearrests (and related convictions) and failures to make restitution payments. Programs in New Jersey (whether administered by probation departments or under the courts) make only case-by-case decisions, with no automatic terminations. On the other hand, those probation- and court-administered programs outside New Jersey are relatively likely to automatically terminate defendants if convicted on a new arrest (or even on the rearrest alone). The probation programs outside New Jersey are also likely to automatically terminate participants who fail to make restitution payments. Court programs are least likely to do so. Prosecutorial programs are among the most likely to automatically terminate defendants with convictions on new arrests (although not on the arrest itself) and those who fail to pay restitution. A similar pattern exists among programs run by Other Public agencies.

% OF PROGRAMS WHICH AUTOMATICALLY TERMINATE:

No automatic terminations:		New Jersey	100%
Terminate on conviction	- Most likely:	Probation (non-New Jersey)	72
		Prosecutor	67
		Courts (non-New Jersey)	64
		Other Public	64
Terminate on rearrest	- Most likely:	Courts (non-New Jersey)	43
		Probation (non-New Jersey)	28
Terminate on restitution failure	- Most likely:	Probation (non-New Jersey)	72
		Other Public	54
		Prosecutor	49
	- Least likely:	Courts (non-New Jersey)	21

All programs (Table 23): Conviction: 54%
Rearrest: 16.5%
Restitution: 38%

About 38% of all programs never hold termination hearings (see Table 24). The extremes: 78% of the probation programs outside New Jersey never do, compared with only 21% of the court-administered programs. All programs in New Jersey say they always involve attorneys in termination decisions. There were few other differences of note between different types of programs in terms of use of counsel in termination hearings.

Implications of Successful Termination from Diversion

Twenty programs in New Jersey indicate that the prosecutor may in rare cases fail to accept a program recommendation and opt to take a successfully terminated case to a formal hearing (see note 1 in Table 25). Beyond these, half of the remaining 16 programs which indicate that dismissal is not automatic are run by non-profit agencies. There are no significant deviations from the overall profile in Table 25 among other types of programs.

Most prosecutorial programs fall into two distinct categories concerning expungement or sealing of records. Thirty-one percent indicate that records are always expunged or sealed (compared with 25% of all programs). By contrast, 17 of the 24 programs in which this never occurs are administered by prosecutors' offices. Probation programs almost always require a formal motion by the defendant or his/her attorney. Protection of records is most likely in programs administered by Other Public agencies and those run by independent non-profit agencies.

PATTERNS OF EXPUNGEMENT OR SEALING OF RECORDS:

Never:	Prosecutor	39.5%
With formal motion:	Probation	94
Always:	Other Public	67
	Non-profit	43

All programs (Table 26): Never: 20%
Motion: 40%
Always: 25%

Program Performance Data

It was expected that prosecutorial programs would have relatively high diversion ratios since many do the initial screening and thus can, in theory at least, control the referral and interview process more directly than some other types of diversion programs. However, such programs in fact are proportionately only slightly more likely to divert high percentages of defendants than any other type of program (see Table 27). Probation programs and the New Jersey programs (both court- and probation-administered) are most likely to have low ratios of divertees to referrals and interviews. Otherwise, there were no differences of note in diversion ratios between different types of programs.

Because of the amount of missing data concerning various personal characteristics of diversion participants, no reliable breakdowns could be provided of differences in profiles for different types of programs.

There appear to be relatively few differences between types of programs in reported rearrest rates. The only exceptions: probation-administered programs are more likely to report lower rates, and prosecutorial programs report comparatively few low or high rates, with most in the moderate range. It cannot be determined whether these represent real differences, or differences in accuracy of recording data -- or are attributable to other factors. Moreover, the numbers of programs for which data on such rates were available are too small for these results to be considered completely reliable.

Data Maintenance and Research Capability of Programs

Diversion programs administered by courts are relatively unlikely to undertake post-program follow-up on defendant rearrest rates (e.g., only 42% track and analyze such data, compared with 63% of all programs). Programs administered by probation departments are not likely to follow-up on what happens to those unfavorably dismissed (only 18% track dispositions for such defendants, compared with 43% overall). No probation programs monitor impact-related data by types of participants or types of services. Prosecutorial programs are most likely to track dispositions of unfavorably-terminated defendants (56% do so). Non-profit programs are most likely to monitor differential impact data (47% by types of participants, compared with 25% of all programs; and 35% on impact of different types of services, compared with 16%). Otherwise, there were no other basic differences from the Table 31 profiles on data monitoring practices.

Programs most likely to have conducted (or have had conducted for them) various types of formal evaluations are those administered by private non-profit agencies and by prosecutors' offices. These include a number of impact and cost effectiveness evaluations. On the other hand, very few probation-run programs have been evaluated. Only one court-administered program (5%) has had a cost effectiveness evaluation conducted (compared with 20% of all programs). Other Public programs, on the other hand, are proportionately most likely to indicate that they have assessed their cost effectiveness (40%). It should be noted that no statements can be made here about the quality and value of those evaluations which have been undertaken by various programs.

Summary

The following chart summarizes, for the major "types" of programs, the extent to which the practices of each differ from each other and from the overall national program profiles. There are some clear differences between types of programs, although there are also many individual program exceptions to the patterns.

Certainly some types of programs are more likely than others to have adopted particular characteristics and practices. But it cannot be conclusively determined from these data whether these differences are attributable simply to the chance cumulative effect of the historical traditions, personnel, and jurisdictional differences and idiosyncrasies which help shape individual program practices. Or, alternatively, whether there is a more inherent probability that such patterns are likely to continue in each type of program in the future and as new programs are established -- and whether the probability of effective provision of diversion services is greater under some types of programs than under others. More research is needed before such questions can be conclusively answered.

However, it must be recognized that the likelihood of such research being conducted in the future in a systematic fashion is becoming ever more unlikely, given current fiscal realities. In the absence of such research, it does seem fair to say that prosecutorial diversion programs are less likely to insist on the kinds of protections for defendants which are called for by most national standards, and which seem necessary to prevent uninformed diversion decisions and resulting "expansion of the net" of control over defendants who would otherwise not be prosecuted. Such protections are present in a number of prosecutorial programs, so their relative absence is not inherent in them. But the data are clear in pointing out that the absence of protections is certainly more likely in prosecutorial programs than in other types of diversion agencies. Given the unique role of the prosecutor in the processing of criminal cases, it is particularly important that defendants being screened for possible diversion in prosecutorial programs be assured of such protections, in order that their decisions be voluntary and informed.

This summary is intended to provide some guidance to policymakers and program practitioners concerning needed changes in existing programs -- and issues to be aware of as decisions are made about the organization of new diversion programs in the future.

SUMMARY OF MAJOR DIFFERENCES BETWEEN TYPES OF PROGRAMS*

Prosecutor

Program Description

Relatively small programs in moderate-sized jurisdictions
Moderate numbers of defendants diverted
Net increases in numbers of programs since 1976
Some uncertainty concerning future financial support

Practices: More likely to...

Exclude all violent felonies
Exclude on basis of prior convictions
Divert prior to filing of formal charges
Require informal admission of guilt/moral responsibility
Require restitution/community service
Require payment of fees
Automatically terminate defendants convicted of in-program arrests and/or for failure to make restitution payments
Never seal or expunge records
Conduct formal evaluations

Practices: Less likely to...

Exclude all felonies from diversion
Require defense counsel approval of diversion decision
Require judicial approval of diversion decision

Probation

Program Description

More likely to operate in more than one county (Florida programs)
Divert relatively small numbers of defendants
More likely to cooperate with other programs
Less likely to be directed by women or have minority staff
Relatively new programs, with substantial net increases since 1976 (although several with non-permanent LEAA funds)

Practices: More likely to...

Exclude on basis of prior convictions (non-New Jersey programs only)
Divert after filing of formal charges (New Jersey)
Divert prior to filing of formal charges (non-NJ)
Require defense counsel approval of diversion decision
Require victim approval of diversion decision
Require informal admission of guilt/moral responsibility (non-NJ)
Require restitution/community service (non-NJ)
Take more time to officially enroll defendants in diversion (especially in NJ)

(cont'd)

Automatically terminate defendants with in-program arrests and/or for failure to make restitution payments (non-NJ)
Require formal motion by defendant or defense counsel to have records expunged or sealed
Have relatively low ratios of numbers diverted to numbers referred and interviewed
Report relatively low rearrest rates

Practices: Less likely to...

Exclude all felonies from diversion (and most likely to divert exclusively felonies)
Exclude on basis of prior arrests alone (without convictions)
Hold formal termination hearings (non-NJ)
Track and analyze data on ongoing basis
Conduct formal evaluations

Court

Program Description

More likely to operate in city/town jurisdictions
Relatively larger programs
More likely to have women directors
Net increases in numbers of programs since 1976

Practices: More likely to...

Exclude all felonies from diversion (non-NJ)
Exclude on basis of prior arrests and convictions (non-NJ)
Divert after filing of formal charges
Require judicial approval of diversion decision
Automatically terminate defendants with in-program arrests (non-NJ)
Hold formal termination hearings

Practices: Less likely to...

Require defense counsel approval of diversion decision (non-NJ)
Require informal admission of guilt/moral responsibility
Automatically terminate defendants who fail to make restitution payments
Conduct cost effectiveness evaluations

Non-profit

Program Description

More likely to operate in relatively large jurisdictions with larger budgets and staffs
Divert relatively large numbers of defendants
More likely to use volunteers and students
More likely to be directed by women
Slight net decrease in numbers of programs over time, though existing programs relatively stable

(cont'd)

Practices: More likely to...

Exclude all felonies from diversion
Require judicial approval of diversion decision
Divert within 2 weeks
Expunge or seal records automatically
Monitor and analyze on an ongoing basis data on program impact
Conduct formal evaluations

Practices: Less likely to...

Exclude all violent felonies
Require defense counsel approval of diversion decision
Require informal admission of guilt/moral responsibility
Require restitution/community service
Automatically dismiss charges upon successful completion of program

Other Public

Program Description

Relatively large staffs
More likely to use volunteers and students
Substantial decline in numbers of programs since 1976

Practices: More likely to...

Exclude on basis of prior convictions
Divert after filing of formal charges
Automatically terminate defendants convicted of in-program arrests and/or for failure to make restitution payments
Expunge or seal records automatically
Conduct cost effectiveness evaluations

Practices: Less likely to...

Exclude on basis of prior arrests alone
Require judicial approval of diversion decision

New Jersey (Courts and Probation)

Practices: More likely to...

Divert after filing of formal charges
Require defense counsel approval of diversion decision
Require judicial approval of diversion decision
Have relatively low ratios of numbers diverted to numbers referred and interviewed
Involve attorneys in termination hearings

(cont'd)

Practices: Less likely to...

Exclude all felonies (none do so)
Exclude on basis of prior record (none do so)
Require informal admission of guilt/moral responsibility
Require restitution/community service
Automatically terminate defendants (none do so)

Though rare, successful terminations can be challenged by prosecutors, i.e., charges not automatically dismissed

* These are the characteristics and practices which differ significantly from the overall national program profiles. Thus, for example, "more likely" means that a particular type of program is proportionately more likely than most other types of programs to do something.

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Table 1

LEGAL/ADMINISTRATIVE AUTHORITY FOR PROGRAMS

Type of Authority	# of Programs	% of Programs
State statute -- mandatory	24	18.9
State statute -- permissive	33	26.0
Court rule -- permissive	6	4.7
Court rule + state statute	3	2.4
Administrative decision by state or federal agency	6	4.7
Administrative decision by local government	12	9.4
Prosecutorial discretion	30	23.6
State statute + prosecutorial discretion	3	2.4
Special grant	2	1.6
Non-profit agency/contract with government agency	5	3.9
Independent agency	2	1.6
Miscellaneous	1	.8
TOTAL	127	100.0

Table 2

ORGANIZATIONAL RESPONSIBILITY FOR OPERATING PROGRAMS

Type of Organization	# of Programs	% of Programs
Probation department -- state	17	13.4
Probation department -- local	1	.8
Court -- federal	2	1.6
Courts -- state	1	.8
Courts -- local	18	14.2
Local probation + county assignment judge	16	12.6
Prosecutor	43	33.8
Law enforcement agency	1	.8
Other public agency	10	7.9
Private non-profit agency (independent)	17	13.4
Miscellaneous	1	.8
TOTAL	127	100.1*

* Rounding error

Table 3

ORGANIZATIONAL RESPONSIBILITY FOR OPERATING PROGRAMS: 1976, 1980 1/

	# and % of Programs			
	1976		1980	
Type of Organization	#	%	#	%
Probation	14	12.7	34	26.8 2/
Courts	14	12.7	21	16.5 3/
Prosecutor	25	22.7	43	33.8
Other public agency	39	35.5	11	8.7
Private, non-profit agency	18	16.4	17	13.4
Miscellaneous	0	0.0	1	.8
TOTAL	110	100.0	127	100.0

1/ Based on the 110 non-TASC, adult diversion programs listed in the Directory of Criminal Justice Diversion Programs 1976, published by the ABA Pretrial Intervention Service Center (see note 8, Supra); and the Pretrial Services Resource Center interviews conducted in 1979 and updated in 1980.

2/ Including the 16 probation/county assignment judge programs separately listed in Table 2.

3/ Not including the 16 probation/county assignment judge programs.

Table 4

ESTIMATED POPULATION OF PROGRAMS' PRIMARY SERVICE AREAS

Population	# of Programs	% of Programs
Less than 50,000	0	0.0
Between 50,000 and 100,000	16	12.6
More than 100,000 and less than 500,000	59	46.5
Between 500,000 and 1 million	31	24.4
More than 1 million	21	16.5
TOTAL	127	100.0

Table 5

SIZE OF PROGRAM BUDGETS

Budget Amounts ($)	# of Programs	% of Programs
$25,000 or less	11	10.3
25,001 - 50,000	20	18.7
50,001 - 75,000	17	15.9
75,001 - 100,000	16	15.0
100,001 - 150,000	17	15.9
150,001 - 200,000	12	11.2
200,001 - 300,000	7	6.5
300,001 - 400,000	4	3.7
More than 400,000	3	2.8
TOTAL	107	100.0

Table 6

PROGRAM STAFFING (FULL AND PART-TIME PAID STAFF AND VOLUNTEERS/STUDENTS) 1/

# of Staff	Full-time # of Programs	Full-time % of Programs	Part-time # of Programs	Part-time % of Programs	Volunteer/Student # of Programs	Volunteer/Student % of Programs
None	2	1.7	98	81.7	86	72.3
1	17	14.2	13	10.8	5	4.2
2	15	12.5	1	.8	7	5.9
3	16	13.3	3	2.5	2	1.7
4	18	15.0	3	2.5	3	2.5
5	12	10.0	1	.8	2	1.7
6-7	16	13.3	0	0.0	1	.8
8-10	11	9.2	0	0.0	3	2.5
11-15	6	5.0	0	0.0	2	1.7
16-20	4	3.3	0	0.0	1	.8
21-25	2	1.7	0	0.0	1	.8
26-50	1	.8	1	.8	3	2.5
More than 50	0	0.0	0	0.0	3	2.5
TOTALS	120	100.0	120	99.9*	119	99.9*

* Rounding error

1/ Excluding secretarial and clerical staff.

Table 7

NUMBERS OF DEFENDANTS DIVERTED AND ENROLLED ANNUALLY BY PROGRAMS

Number Diverted	# of Programs	% of Programs
50 or less	7	6.9
51 - 75	11	10.8
76 - 100	9	8.8
101 - 150	12	11.8
151 - 200	13	12.7
201 - 250	13	12.7
251 - 300	8	7.8
301 - 400	9	8.8
401 - 500	4	3.9
501 - 750	5	4.9
751 - 1000	4	3.9
1001 - 1500	3	2.9
More than 1500	4	3.9
TOTAL	102	99.8*

* Rounding error

Table 8

AGE OF PROGRAMS

Year Program Began	# of Programs	% of Programs
Prior to 1969	2	1.6
1969-70	2	1.6
1971-72	14	11.0
1973-74	30	23.6
1975-76	43	33.9
1977-78	31	24.4
1979-80	5	3.9
	127	100.0

Table 9

PROPORTIONS OF CURRENT PROGRAM FUNDING FROM VARIOUS SOURCES

	# and % of Programs Receiving Specified Amount of Funding From Each Source [1]											
	None		1-25%		26-50%		51-75%		76-99%		100%	
Funding Source	#	%	#	%	#	%	#	%	#	%	#	%
LEAA grants	90	72.6	5	4.0	6	4.8	4	3.2	18	14.5	1	.8
CETA funds	109	87.9	4	3.2	4	3.2	1	.8	2	1.6	4	3.2
Other federal funds	114	91.9	0	0.0	0	0.0	3	2.4	0	0.0	7	5.6
State government	80	64.5	22	17.7	4	3.2	2	1.6	1	.8	15	12.1
Municipal government	109	87.9	4	3.2	4	3.2	0	0.0	1	.8	6	4.8
County government	55	44.3	14	11.3	8	6.5	12	9.7	7	5.6	28	22.6
Private contributions	124	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
United Way	118	95.2	2	1.6	1	.8	1	.8	0	0.0	2	1.6
Fees/fines	116	93.5	3	2.4	1	.8	0	0.0	2	1.6	2	1.6

1/ Table should be read across rows, with each row totalling 124 programs and 100% (with some minor rounding errors). Source of funding was unavailable for three programs. Thus, for example, 90 of the 124 programs (72.6%) received no funding in 1979 from LEAA, five received 1-25% of their funding from LEAA, six received 26-50% from that source, four received 51-75%, etc. By contrast, only 55 programs (44.3%) received no funding from county government, whereas 22.6% received all their funding from that source. Note that 119 programs have one funding source which provides a majority of all funds for the particular program (the sum of the numbers of programs in the 51-75%, 76-99%, and 100% columns). Thus, only five programs have no single majority source of funding (i.e., have two or more funders, neither of which contributes as much as 51% of the total program budget).

Table 10

COMPARISON OF CURRENT AND ORIGINAL FUNDING SOURCES

% of Programs Receiving Specified Amount of Funding from Each Source 1/

	Current		Original	
Funding Source 2/	Primary 3/	Secondary 3/	Primary 3/	Secondary 3/
LEAA grants	18.5	8.9	64.9	3.6
CETA funds	5.6	6.4	5.4	.9
Other federal funds	8.1	0.0	10.8	0.0
State government	14.5	21.0	6.3	28.8
County government	37.9	17.7	8.1	32.4
Municipal government	5.6	6.4	.9	3.6

1/ Percentages based on 124 programs for Current Funding Sources and on 111 programs for Original Funding Sources.

2/ Only the major sources of program funding from those listed in Table 9 are included here.

3/ If a program received at least 51% of its funding from the specified funding source, it is recorded under Primary funding; if it received some funding from the source, but not a majority, it is recorded under Secondary funding. The remaining programs received no funding from that source. Thus, currently, 18.5% of all programs receive the majority of their funding from LEAA, another 8.9% receive some funding from that source, and the remainder receive all their funding from some other source(s). When the programs were started, however, 64.9% received the majority of their funds from LEAA, with another 3.6% receiving partial funding.

Table 11

PROGRAMS AUTOMATICALLY EXCLUDING DEFENDANTS FROM ELIGIBILITY FOR DIVERSION, BASED ON CHARGE ALONE

Types of Exclusions	# of Programs	% of Programs
None -- everyone is eligible	1	.8
Some exclusions, but none based on charge alone	3	2.4
All misdemeanors	4	3.1
All misdemeanors + violent felonies	36	28.3
All felonies	21	16.5
Violent felonies only	45	35.4
Other miscellaneous charges 1/	17	13.4
TOTAL	127	99.9*

*Rounding error

1/ In addition to the 17 programs which exclude on the basis of various miscellaneous charges, most of the programs in the other categories listed above also exclude defendants charged with various other crimes. They are indicated below, with percentages based on 127. Programs often exclude on the basis of more than one of the listed charges.

Types of Exclusions	#	%
Prostitution	31	24.4
Other sex-related offenses	33	26.0
Minor traffic violations	48	37.8
Sale of drugs	58	45.7
Certain other drug-related offenses	26	20.5
Alcohol-related offenses	11	8.7
Certain personal misdemeanors	8	6.3
Victimless crimes (other than those listed)	4	3.1
Non-indictable offenses 2/	21	16.5
Non-third degree felonies 3/	14	11.0
White collar crime, corruption, etc. 4/	9	7.1
Miscellaneous 4/	9	7.1

2/ All New Jersey programs.

3/ The Florida programs under the state system exclude those felonies more serious than third degree charges.

4/ Not included in original list of potential exclusions (see questionnaire in Appendix). Thus actual numbers may be higher.

Table 12

PROGRAMS AUTOMATICALLY EXCLUDING DEFENDANTS FROM ELIGIBILITY FOR DIVERSION, BASED ON PRIOR RECORD ALONE 1/

Reasons for Exclusions	# of Programs	% of Programs
No exclusions for prior record alone	37	29.1
Those with charges pending (no overall exclusions for prior record, except pending charge) 2/	4	3.1
Prior convictions 3/	86 4/	67.7 4/
Any prior convictions	(41)	(32.3)
More than one prior conviction	(15)	(11.8)
More than two prior convictions	(10)	(7.9)
Any prior felony convictions	(12)	(9.4)
Excessive prior felony convictions 5/	(8)	(6.3)
TOTAL	127	99.9*

*Rounding error

1/ These programs may also exclude on the basis of charge alone, as indicated in Table 11.

2/ Not including 39 other programs (30.7%) which exclude defendants with pending charges as well as for other indications of prior record.

3/ 34 of these programs (26.8%) also exclude on the basis of various combinations of arrests alone. Five of these exclude automatically for any prior arrest record, seven allow one prior arrest, 11 allow two, and 11 exclude on the basis of prior arrests alone, but the number was unspecified.

4/ The specific categories of prior conviction exclusions which follow in parentheses sum to 86 programs (67.7%).

5/ The specific number allowed varied. Some allow one prior conviction, some two, etc.

Table 13

OTHER REASONS FOR PROGRAMS AUTOMATICALLY EXCLUDING DEFENDANTS FROM ELIGIBILITY FOR DIVERSION 1/

Types of Exclusions 2/	# of Programs	% of Programs
Substance (drug) abusers	39	30.7
Alcohol abusers	21	16.5
Juveniles	112	88.2
Adults exceeding a specified age	7	5.5
On probation or parole	79	62.2
Charges pending 3/	43	33.9
Severe mental or emotional problems	32	25.2
Those who will not accept moral responsibility for their behavior	40	31.5
Those judged by program to be unmotivated	29	22.8
Exclusions based on prior diversions 4/	37	29.1
Miscellaneous 4/	5	3.9

1/ These programs may also exclude on the basis of charge and/or prior record, as indicated in Tables 11 and 12.

2/ Programs may exclude defendants for more than one of the following reasons. Thus totals exceed 127, which is the basis for the percentages.

3/ See Table 12 and footnote 2 in the table.

4/ Not included in original list of potential exclusions provided in the questionnaire (see Appendix). Thus actual numbers may be higher.

Table 14

EXTENT TO WHICH PROGRAMS DIVERT DEFENDANTS PRIOR TO FILING OF FORMAL CHARGES

Proportion of Cases Diverted Before Formal Filing of Charges	# of Programs	% of Programs
None	64	52.0
1 - 25%	15	12.2
26 - 50%	7	5.7
51 - 75%	6	4.9
76 - 99%	20	16.3
100%	11	8.9
TOTAL	123	100.0

Table 15

EXTENT TO WHICH DEFENSE ATTORNEY IS INVOLVED IN DEFENDANT DECISION TO ENTER DIVERSION PROGRAM

Extent of Involvement	# of Programs	% of Programs
Always involved in the decision	81	63.8
Involved if requested by defendant	46	36.2
TOTAL	127	100.0

NOTE: 74 programs (58.3%) require formal agreement of counsel for a defendant to be officially diverted.

Table 16

PRIMARY SOURCES OF INITIAL SCREENING OF CASES AND DIRECT REFERRALS TO PROGRAMS 1/

Screening/Referral Source	# of Programs	% of Programs
Judges	23	18.1
Prosecutors	94	74.0
Defense attorney	61	48.0
Release program	7	5.5
Police	9	7.1
Program identifies directly from arrest docket, court files, etc.	49	38.6

1/ Programs were asked to indicate as many as three primary screeners (i.e., those who "make initial determination of potential program eligibility") or referral sources. Thus totals exceed 127, which is the basis for the percentages.

Table 17

AVERAGE TIME BETWEEN INITIAL PROGRAM CONTACT WITH DEFENDANT AND OFFICIAL ACCEPTANCE INTO PROGRAM

Elapsed Time	# of Programs	% of Programs
Within 1 week	16	12.8
1 - 2 weeks	33	26.4
2 - 3 weeks	24	19.2
3 - 4 weeks	24	19.2
4 - 8 weeks	19	15.2
More than 8 weeks	6	4.8
Miscellaneous	3	2.4
TOTAL	125	100.0

Table 18

PROGRAMS REQUIRING GUILTY PLEA OR INFORMAL ADMISSION OF GUILT AS A CONDITION OF PROGRAM ENTRY

Required Admission	# of Programs	% of Programs
Guilty plea	9	7.1
Informal admission of guilt or moral responsibility	45	35.7
No admission required	72	57.1
TOTAL	126	99.9*

*Rounding error

Table 19

PROGRAMS REQUIRING FINANCIAL RESTITUTION, COMMUNITY SERVICE, AND/OR PAYMENT OF FEES AS A CONDITION OF PROGRAM ADMISSION

Requirement 1/	# of Programs	% of Programs
Financial restitution	47	37.3
Financial restitution and/or community service	40	31.7
Community service	1	.8
Payment of fees 2/	13	10.3

1/ Percentages are based on 126 programs. The first three categories listed are mutually exclusive.

2/ Of the 13 programs requiring payment of fees, five also require payment of financial restitution, and three require restitution and/or community service. Five have no additional restitution/community service requirements. The number of programs requiring payment of fees may be understated, since this question was not specifically asked in the survey. This information was "volunteered" by the 13 programs.

Table 20

PROGRAMS REQUIRING FORMAL AGREEMENT FROM VARIOUS INDIVIDUALS PRIOR TO DIVERSION 1/

Individuals Who Must Agree	# of Programs	% of Programs
Judge	59	46.8
Prosecutor	122	96.8
Defense attorney	73	57.9
Victim	21	16.7
Police	10	7.9

1/ Since agreement is typically required from more than one, totals exceed the total of 126 responding programs, which is the basis for the percentages.

Table 21

PERCENT OF PROGRAMS PROVIDING SPECIFIC SERVICES, IN-HOUSE OR THROUGH REFERRAL TO OTHER AGENCIES 1/

Services	In-House 2/	Referral 3/
Employment counseling	67.7%	66.7%
Job training	11.0	85.7
Job placement	45.7	75.4
Educational upgrading	25.2	83.3
Drug counseling	40.2	85.7
Personal counseling	91.3	46.8
Family counseling	66.9	79.4
Group counseling	39.4	63.5
Housing assistance	31.5	73.8
Financial assistance	26.0	75.4
Health services	10.2	88.1
Mental health services	21.3	92.9
Restitution	90.6	2.4
Community service	54.3	6.3
Miscellaneous	10.2	15.9

1/ Some programs offer certain services on both an in-house and referral basis.

2/ Percentages based on all 127 programs.

3/ Percentages based on 126 programs.

Table 22

MINIMUM, MAXIMUM, AND TYPICAL TIME SPENT IN DIVERSION PROGRAMS, FOR MISDEMEANORS AND FELONIES

Length of Time in Diversion	% of Programs in each Category 1/ Minimum 2/	Maximum 3/	Typical 4/
		Misdemeanors	
3 months or less	54.4	1.2	20.5
4 - 6 months	38.0	19.5	54.2
7 - 12 months	6.3	62.2	24.1
13 - 18 months	0.0	3.7	0.0
19 - 24 months	1.3	12.2 5/	1.2
More than 2 years	0.0	1.2	0.0
TOTAL	100.0	100.0	100.0
		Felonies	
3 months or less	35.7	0.0	4.0
4 - 6 months	36.7	7.0	45.0
7 - 12 months	26.5	54.0	46.0
13 - 18 months	1.0	12.0	4.0
19 - 24 months	0.0	24.0 6/	1.0
More than 2 years	0.0	3.0	0.0
TOTAL	99.9*	100.0	100.0

*Rounding error

1/ For example, 54.4% of all programs serving defendants charged with misdemeanors have a minimum diversion period of 3 months or less; and for 20.5% of those programs, that is also the typical length of diversion period. By contrast, 35.7% of the programs diverting felonies have a minimum period of 3 months or less, with that as the typical diversion period in only 4% of the programs.

2/ Percentages based on 79 programs for misdemeanors and 98 for felonies.

3/ Percentages based on 82 programs for misdemeanors and 100 for felonies.

4/ Percentages based on 83 programs for misdemeanors and 100 for felonies.

5/ 11% are exactly 24 months.

6/ 23% are exactly 24 months.

Table 23

GROUNDS FOR UNFAVORABLY TERMINATING PARTICIPANTS FROM DIVERSION PROGRAMS

Reason for Termination	% of Programs in each Category 1/	
	Can be Terminated	Must be Terminated
Rearrest while in program (no conviction)	78.0	16.5
Conviction on rearrest	44.9	54.3 2/
Failure to keep appointments	85.0	11.8
Inability to successfully complete at least some goals	81.9	5.5
Unwillingness to work on particular problems	79.5	15.7
Failure to make restitution payments	53.5	37.8

1/ For example, 78% of all programs may terminate a person for being rearrested while in the program, and another 16.5% automatically terminate such a person. By contrast, if there is a conviction on the rearrest, 44.9% of the programs still may terminate, but 54.3% indicate they must do so by policy at that point. Percentages based on all 127 programs.

2/ Including the 16.5% who must be terminated for a rearrest only.

Table 24

EXTENT TO WHICH PROGRAMS PROVIDE FORMAL HEARINGS IF A DEFENDANT IS UNFAVORABLY TERMINATED

Termination Hearings Scheduled	# of Programs	% of Programs
Never	48	37.8
Always	31	24.4
Under certain circumstances 1/	48	37.8
TOTAL	127	100.0

1/ Most prominent among these circumstances are 21 programs which indicate than an in-house administrative hearing is first held, followed by a court hearing if not resolved at that point; another 14 programs provide hearings if specifically requested by defendants. Other programs say the opportunity exists but is rarely used, internal hearings are held, etc.

Table 25

DISPOSITION OF CHARGES UPON SUCCESSFUL COMPLETION BY DEFENDANT OF PROGRAM REQUIREMENTS

Disposition of Charges	# of Programs	% of Programs
Charges automatically dismissed 1/	111	87.4
Charges generally dismissed, but with rare exceptions 2/	6	4.7
Charges generally dismissed, but could be reopened 3/	8	6.3
Charges not generally dismissed 4/	2	1.6
TOTAL	127	100.0

1/ Although this includes 20 programs (all in New Jersey) which indicate that the prosecutor can take a case to a formal hearing if he does not accept the program recommendation. However, this is extremely rare.

2/ Including program recommending reduced charge/sentence; judge choosing not to dismiss, despite successful completion and program recommendation to dismiss, etc.

3/ Such as if rearrest occurs within specified period of time (e.g., 6 months, 18 months).

4/ Dismissal not routine, with substantial numbers of cases sentenced, in many cases to continue to attend the program.

Table 26

EXTENT TO WHICH RECORDS ARE EXPUNGED OR SEALED UPON DISMISSAL OF CHARGES

Extent of Expungement/Sealing	# of Programs	% of Programs
Never	24	19.8
Always	30	24.8
Upon formal motion of defense attorney	48	39.7
Under certain circumstances 1/	19	15.7
TOTAL	121	100.0

1/ Including, e.g., if no prior record, can apply after one year, judicial discretion, etc.

Table 27

EXTENT TO WHICH THOSE REFERRED TO AND INTERVIEWED BY PROGRAMS ARE ACTUALLY DIVERTED

Proportion of Defendants Who Are Diverted	% of Programs in each Category 1/ Diverted as Proportion of Referrals	Diverted as Proportion of Interviewees
1 - 25%	24.0	9.6
26 - 50%	19.8	13.9
51 - 75%	31.2	37.2
76 - 99%	21.9	34.0
100%	3.1	5.3
TOTAL	100.0 (N=96)	100.0 (N=94)

1/ For example, 24% of the programs divert 1/4 or fewer of the defendants initially referred to them as possible candidates for diversion; only 9.6% of the programs divert 1/4 or fewer of the defendants they actually interview. In other words, since many programs do not interview everyone referred as a potential divertee, the aggregate proportions of interviewees diverted are higher than the proportions of referrals.

Table 28

EXTENT TO WHICH PROGRAMS DIVERT DEFENDANTS WITH VARIOUS CHARACTERISTICS

% of Programs With Specified Proportions of Defendants With Particular Characteristics 1/

Proportion of Defendants	Age 20 or Under	Female	Ethnic Minority	Charged with Misdemeanor	Charged with Felony	No Prior Adult Arrests	No Prior Adult Convictions	More Than One Prior Felony Arrest	More Than One Prior Felony Conviction	Unemployed and Not in School	Receiving Public Assistance	Single	Represented by Public Defender or Court-Appointed Attorney
None	0.0	0.0	0.0	34.5	12.6	0.0	0.0	45.5	62.0	0.0	1.6	0.0	8.6
1 - 25%	18.4	53.9	49.4	16.1	14.9	4.8	1.2	49.1	35.4	50.0	93.4	8.8	36.2
26 - 50%	54.0	41.6	34.5	10.3	11.5	9.5	6.1	3.6	2.5	31.2	1.6	26.3	19.0
51 - 75%	19.5	4.5	14.9	11.5	10.3	28.6	14.6	1.8	0.0	12.5	3.3	45.6	17.2
76 - 99%	8.0	0.0	1.1	14.9	16.1	49.2	53.7	0.0	0.0	4.7	0.0	17.5	17.2
100%	0.0	0.0	0.0	12.6	34.5	7.9	24.4	0.0	0.0	1.6	0.0	1.8	1.7
TOTAL	99.9*	100.0	99.9*	99.9*	99.9*	100.0	100.0	100.0	99.9*	100.0	99.9*	100.0	99.9*
(N)	(87)	(89)	(87)	(87)	(87)	(63)	(82)	(55)	(79)	(64)	(61)	(57)	(58)

*Rounding error.

1/ For example, ¼ or fewer of the program participants are 20 or less in 18.4% of the programs; between 51 and 75% are 20 or less in 19.5% of all programs. 62% of the programs have no participants with more than one prior felony conviction, and 35.4% of the programs have between 1 and 25% of their participants with such a prior record. The percentages in each column are based on the number of programs (N) providing each type of information.

Table 29

SUCCESSFUL TERMINATION RATES REPORTED BY PROGRAMS

Reported Successful Termination Rate	# of Programs	% of Programs
50.1 - 75%	13	14.3
75.1 - 90%	41	45.0
90.1 - 99%	37	40.7
TOTAL	91	100.0

Table 30

REARREST AND REARREST CONVICTION RATES REPORTED BY PROGRAMS, BY SEPARATE PERIODS OF TIME 1/

	% of Programs with Specified Rates Under Each Definition 2/			
	While in Program		Within Year of Program Entry	
Reported Rate	Rearrests	Convictions on Rearrests	Rearrests	Convictions on Rearrests
2% or less	33.3	39.1	20.5	26.9
2.1 - 3.0%	16.7	8.7	10.3	3.8
3.1 - 4.0%	7.7	17.4	10.3	15.4
4.1 - 5.0%	12.8	17.4	17.9	26.9
5.1 - 7.5%	10.3	8.7	10.3	3.8
7.6 - 10.0%	11.5	8.7	15.4	11.5
10.1 - 12.0%	2.6	0.0	2.6	3.8
12.1 - 15.0%	3.8	0.0	2.6	7.7
More than 15%	1.3 3/	0.0	10.3 4/	0.0
TOTAL	100.0	100.0	100.2*	99.8*
(N)	(78)	(46)	(39)	(26)

* Rounding error

1/ Reported proportions of program participants who were rearrested and, where data are available, convicted on those rearrests. Rates separately reported for rearrests and convictions, and for rearrests while in program and within one year of entry into diversion. In some cases, where defendants are typically diverted for a year or more, the in-program and one-year rates would be the same.

2/ For example, 33.3% of the reporting programs indicated in-program rearrest rates of 2% or less, with 39.1% reporting conviction rates of 2% or less. Not surprisingly, the comparable proportions of programs with 1-year rates that low are smaller, 20.5% and 26.9%, respectively. Proportions are based on the numbers of programs providing each type of rate (N at the bottom of each column).

3/ The highest was 20%.

4/ The highest was 25%.

Table 31

PROGRAMS WHICH TRACK AND ANALYZE CERTAIN DATA ON AN ONGOING BASIS

Types of Data 1/	# of Programs	% of Programs
Disposition of original charge for successful terminees	102	82.9
Disposition of original charge for unfavorably-terminated participants	53	43.1
Rate of successful terminations from program	91 2/	89.2 2/
Rearrest data while in program	78 2/	76.5 2/
Post-program rearrest data for successful participants	77 3/	62.6
Post-program rearrest data for unfavorably-terminated participants	42 3/	34.1
Conviction data on post-program rearrests for successful participants	61 3/	49.6
Conviction data on post-program rearrests for unfavorably-terminated participants	29 3/	23.6
Program impact data for different types of participants (by age, prior record, charge, etc.)	31	25.2
Impact of different types of services and/or service delivery mechanisms (in-house vs. referral) on program outcomes	20	16.3

1/ Programs may maintain more than one of these types of data. Thus numbers exceed the 123 programs which responded to this question. Percentages are based on 123 except where otherwise noted.

2/ Out of 102 programs providing at least some statistical data concerning their programs.

3/ Although these programs indicated that they track and analyze such data "on an ongoing basis", only 39 programs actually provided post-program rearrest data, and 26 provided conviction data on those rearrests.

Table 32

TYPES OF FORMAL PROGRAM EVALUATIONS CONDUCTED IN THE PAST THREE YEARS

Type of Evaluation 1/	# of Programs	% of Programs
None	67	53.2
In-house: program operations	24	19.0
External: program operations	35	27.8
In-house: program impact, no comparison group	8	6.3
External: program impact, no comparison group	13	10.3
In-house: program impact, with comparison group	9	7.1
External: program impact, with comparison group	13	10.3
Cost effectiveness evaluation	25	19.8

1/ Some programs have had more than one type of evaluation, so the numbers exceed the 126 programs which responded to the question. Percentages based on 126.

APPENDICES

APPENDIX A

LOCATION OF DIVERSION PROGRAMS INTERVIEWED

APPENDIX A
Location of Diversion Programs Interviewed

ALABAMA
- Selma

ALASKA
- Anchorage

ARIZONA
- Phoenix
- Tempe
- Tucson

ARKANSAS
- Little Rock

CALIFORNIA
- Hayward
- Millbrae
- Richmond
- San Francisco
- San Jose
- Santa Rosa

COLORADO
- Boulder
- Denver (2)
- Golden

DISTRICT OF COLUMBIA

FLORIDA
- Bartow (2)
- Daytona Beach
- Ft. Lauderdale (2)
- Ft. Pierce
- Gainesville
- Jacksonville
- Miami (2)
- Orlando
- Pensacola
- St. Petersburg
- Sanford
- Sarasota
- Tallahassee
- Tampa
- Titusville
- West Palm Beach

GEORGIA
- Atlanta
- Savannah

ILLINOIS
- Geneva
- Oregon
- Ottawa
- Pekin
- Rock Island
- Urbana
- Waukegan

INDIANA
- Evansville
- Indianapolis

KENTUCKY
- Louisville

LOUISIANA
- Baton Rouge (2)
- New Orleans

MARYLAND
- Baltimore

MASSACHUSETTS
- Fall River
- Lowell
- Revere
- Salem

MICHIGAN
- Detroit (2)
- Flint (2)
- Jackson
- Kalamazoo
- Lansing
- St. Joseph

MINNESOTA
- Litchfield
- Minneapolis
- St. Paul

MISSOURI
- Kansas City
- St. Louis

MONTANA
- Billings

NEBRASKA
- Lincoln

NEW JERSEY
- Atlantic City
- Belvidere
- Bridgeton
- Camden
- Cape May
- East Orange
- Elizabeth
- Flemington
- Freehold
- Hackensack
- Jersey City
- Morristown
- Mount Holly
- New Brunswick
- Newton
- Paterson
- Salem
- Somerville
- Toms River
- Trenton
- Woodbury

NEW MEXICO
- Albuquerque
- Clovis
- Farmington
- Sante Fe

NEW YORK
- Macedon
- New York
- Rochester
- Syracuse

OHIO
- Akron
- Canton
- Cleveland
- Columbus
- Cuyahoga Falls
- Dayton
- Delaware
- Lima
- Newark (2)

OKLAHOMA
- Stillwater

OREGON
- Portland

PENNSYLVANIA
- Philadelphia

SOUTH CAROLINA
- Columbia
- Greenville

TENNESSEE
- Memphis
- Nashville

TEXAS
- Dallas

WASHINGTON
- Everett
- Seattle
- Tacoma
- Vancouver

WISCONSIN
- Madison
- Milwaukee

APPENDIX B

INTERVIEW AND STATISTICAL QUESTIONNAIRES

1979 PRETRIAL SERVICES AGENCY QUESTIONNAIRE (PPB)

A. General Questions: All Agencies

1. Name, address, phone # of agency: _____

_____

_____ Phone # _____

2. Name of agency director: _____

3. Name and title of respondent (if different from director) _____

_____

4. Primary pretrial program offered by the agency (check only one):

___ (a) release
___ (b) diversion
___ (c) mediation/arbitration
___ (d) victim/witness
___ (e) multiple programs (of equal importance)
___ (f) other (indicate) _____

5. If more than one pretrial program or service is offered by the agency, indicate any not listed in #4:

___ (a) release
___ (b) diversion
___ (c) mediation/arbitration
___ (d) victim/witness
___ (e) other (indicate) _____

6. In what year did the agency begin operation? _____

NOTE: For any person responding for an entire system of several different programs in different locations (e.g., a statewide agency), please indicate here the # of separate offices or programs in the total system: _____

SKIP TO QUESTIONS IN PART B

NOTE: For any agency offering more than one of the following types of pretrial programs or services—release, diversion, mediation/arbitration, victim/witness (as checked in Questions 4 and 5)—Part B should be filled out separately for each program. Thus, for example, if an agency offers three of those four types of programs or services, a copy of Part B should be completed for each of the three. If the agency offers some type of program or service other than the four listed, Part B should not be filled out for it.

B. General Questions: Each Pretrial Program of an Agency

Agency name _____

Program name (if different from agency name) _____

Name and title of head of program (if different from agency director) _____

_____

Name and title of respondent (if different) _____

NOTE: If an agency offers only one pretrial program or service (e.g., release), answers to Questions 1 and 2 below can simply be transferred from Questions 4 and 6, respectively, in Part A.

1. Type of pretrial program (check only one):

___ (a) release
___ (b) diversion
___ (c) mediation/arbitration
___ (d) victim/witness

2. In what year did this program begin operation? _____

3. Indicate the primary area served by your program (check only one):

___ (a) portion of a local jurisdiction
___ (b) local jurisdiction—city or town(s)
___ (c) local jurisdiction—total county
___ (d) more than one county
___ (e) entire state
___ (f) other (indicate) _____

4. What is the approximate population of your primary service area? (check only one)

___ (a) less than 50,000
___ (b) between 50,000 and 100,000
___ (c) more than 100,000 and less than 500,000
___ (d) between 500,000 and 1,000,000
___ (e) more than 1,000,000

5. How would you describe the nature of the area served by the program? (check only one)

___ (a) primarily urban
___ (b) primarily suburban
___ (c) primarily rural
___ (d) a mixture of urban, suburban, and rural
___ (e) a mixture of urban and suburban
___ (f) a mixture of suburban and rural

6. What is the legal or administrative basis for your program's existence?

___ (a) State or federal statute—mandatory
___ (b) State or federal statute—permissive
___ (c) Local law
___ (d) Court rule—mandatory
___ (e) Court rule—permissive
___ (f) Administrative decision by state or federal agency—mandatory
___ (g) Administrative decision by state or federal agency—permissive
___ (h) Local government administrative decision
___ (i) Special grant
___ (j) Non-profit agency operating on contract with governmental agency
___ (k) Independent agency operating on informal basis within criminal justice system
___ (l) Other (indicate) _____

7. Who has ultimate responsibility for the operation of this program? (check only one)

___ (a) probation department (state or federal)
___ (b) probation department (local)
___ (c) courts (state or federal)
___ (d) courts (local)
___ (e) district attorney (prosecutor)
___ (f) public defender
___ (g) law enforcement agency (police, sheriff)
___ (h) other public agency (indicate) _____
___ (i) bar association
___ (j) other private nonprofit agency
___ (k) other (indicate) _____

8. Please indicate the types of courts served by your program: _____

_____

9. What is this program's annual budget? _____

10. Please indicate the approximate proportion of your annual budget which comes from each of the following sources of funding. Also indicate what the approximate proportions were when the program was started (totals should each = 100%).

CURRENT percentage	Source of funds	ORIGINAL percentage
_____	(a) LEAA grant	_____
_____	(b) CETA funds	_____
_____	(c) TASC grant	_____
_____	(d) Other federal funds	_____
_____	(e) state government	_____
_____	(f) municipal government	_____
_____	(g) county government	_____
_____	(h) bar association	_____
_____	(i) other private contributions	_____
_____	(j) other (indicate)	_____
	_____	
	_____	

11. How would you describe your program in terms of its current and future stability? (check only one)

___ (a) an established institutionalized function, with continued financial support reasonably well assured

___ (b) an established function, but with future financial support uncertain

___ (c) an experimental demonstration project

___ (d) other (indicate) _____

_____

12. Excluding secretarial and clerical staff, how many staff do you have? (for paid staff, include any current vacancies likely to be filled within a month or two)

___ (a) paid full-time

___ (b) paid part-time

___ (c) volunteers and/or students

___ (d) other (indicate) _____

_____

13. Still excluding secretarial/clerical, of the remaining paid staff (full and part time), how many are female? How many are of minority groups? How many have a professional academic degree?

___ (a) number female

___ (b) number minorities

___ (c) number with degree

14. What type of Management Information System does the program have?

___ (a) manual ___ (b) computer ___ (c) none

15. Is your agency willing to supervise, monitor or work in other ways with defendants with charges pending in other jurisdictions (i.e., engage in inter-agency compacts)?

___ (a) yes ___ (b) no ___ (c) in certain circumstances

If there are qualifications or exceptions, please indicate _____

_____

SKIP TO MORE DETAILED QUESTIONS ABOUT PARTICULAR TYPES OF PROGRAMS (Release - Part C, Diversion - Part D, Mediation/Arbitration - Part E, Victim/Witness - Part F)

D. Specific Questions: DIVERSION Programs Only

Agency/Program Name _____

1. Does your program have particular target groups (though not necessarily limited to such groups)? For example, those of particular ages, sex, charged with particular types of crimes, needing specific services, first offenders, etc.

_____

_____

_____

_____

2. What types of defendants does the program specifically exclude by policy (even if there may be a very occasional individual exception)? Check any that apply:

___ (a) substance (drug) abusers
___ (b) alcohol abusers
___ (c) juveniles
___ (d) adults under a particular age (specify) _____
___ (e) adults over a particular age (specify) _____
___ (f) those with too many arrests (specify maximum allowed _____)
___ (g) those with too many convictions (specify maximum allowed _____)
___ (h) those on probation or parole
___ (i) those with charges pending
___ (j) all violations
___ (k) all misdemeanors
___ (l) all felonies
___ (m) defendants with specific charges (e.g., specific types of misdemeanors or felonies - see #3 for more detailed breakdown)
___ (n) those living outside primary jurisdiction(s) served by program
___ (o) female defendants
___ (p) male defendants
___ (q) those with severe mental or emotional problems
___ (r) defendants needing other specific services (specify)
_____
_____
___ (s) those who will not accept moral responsibility for their behavior (even if no guilty plea is required)
___ (t) those judged by the program to be unmotivated
___ (u) other (specify) _____
_____
___ (v) no specific exclusions

(IF SPECIFIC CHARGES ARE NOT CHECKED IN 2(m), SKIP TO QUESTION 4)

3. If any defendants with specific charges are excluded, please indicate types of charges (check any that apply).

___ (a) violent felonies
___ (b) prostitution
___ (c) other sex-related offenses
___ (d) minor traffic violations
___ (e) sale of drugs
___ (f) certain other drug-related offenses
___ (g) alcohol-related offenses
___ (h) certain personal misdemeanors (specify) _____
_____
___ (i) victimless crimes (other than those listed)
___ (j) other (specify) _____
_____

4. Are there any other specific requirements for program admission? (check any that apply)

___ (a) guilty plea
___ (b) informal admission of guilt or moral responsibility
___ (c) financial restitution (if applicable)
___ (d) community service
___ (e) formal waiver of right to speedy trial
___ (f) waiver of right to trial by jury
___ (g) other (specify) _____
_____

5. About what percentage of those diverted to the program are diverted at the following points? (provide % for each)

___ (a) prior to the filing of formal charges
___ (b) post-indictment

6. Please briefly describe how persons are initially identified, referred to and accepted into the program, i.e., describe the referral and selection procedures.

_____

_____

_____

_____

7. Who initially does most of the initial screening of cases (i.e., makes initial determination of potential program eligibility) and makes most of the direct referrals to the program? Please list in order the top three.

___ (a) judges

___ (b) prosecuting attorney

___ (c) defense attorney (directly, or in cooperation with prosecuting attorney)

___ (d) program identifies directly from arrest docket, court files, etc. and suggests to prosecuting or defense attorney, etc.

___ (e) release program

___ (f) police

___ (g) other (specify)

_____

_____

_____

8. Who must formally agree for a defendant to be officially diverted?

___ (a) judge ___ (b) victim ___ (c) police ___(d) prosecuting attorney

___ (e) defense attorney ___ (f) defendant ___ (g) others (specify) _____

_____

9. How much time typically elapses between initial program contact (initial interview) and official acceptance into the program? _____

_____

_____

10. Is a detailed service plan worked out for program participants, including specific goals and objectives, which must be agreed to and signed by the participant?

___ (a) yes, always ___ (b) yes, but not always ___ (c) no

11. Please indicate what specific programs and services are offered by your program, and whether they are offered in-house or through referral. (check any that apply. Also add any comments offered at the end of the question.)

In-house	Service/Program	Referral
_____	(a) employment counseling	_____
_____	(b) job training	_____
_____	(c) job placement	_____
_____	(d) educational upgrading	_____
_____	(e) drug counseling	_____
_____	(f) personal counseling	_____
_____	(g) family counseling	_____
_____	(h) group counseling	_____
_____	(i) housing assistance	_____
_____	(j) financial assistance	_____
_____	(k) health services	_____
_____	(l) mental health services	_____
_____	(m) restitution	_____
_____	(n) community service	_____
_____	(o) other (indicate) _____	_____

Additional comments: _____

_____

12. What are the minimum, maximum, and typical diversion periods for people in this program? Indicate if there are differences for misdemeanors and felonies.

	misdemeanor	felony
(a) minimum diversion period	_____	_____
(b) maximum diversion period	_____	_____
(c) typical (approximate average) time of diversion	_____	_____

13. Are there other minimum requirements established for participants while in the program?

_____

_____

_____

14. On what grounds can a participant be unfavorably terminated from the program? (check any that apply)

Can be terminated	Must be terminated	
_____	_____	(a) rearrest
_____	_____	(b) conviction on rearrest
_____	_____	(c) failure to keep appointments with program or other service agency (specify how many missed appointments _____)
_____	_____	(d) inability to successfully complete at least some goals of contract
_____	_____	(e) unwillingness to work on particular problems identified through the program
_____	_____	(f) failure to make restitution payments

15. If the defendant is unfavorably terminated, is there a formal termination hearing?

___ (a) never

___ (b) yes, always

___ (c) yes, under certain circumstances (specify) _____

_____

16. If the participant "succeeds" in the program (favorably terminated), are the charges automatically dismissed? (check any that apply)

___ (a) yes, all charges are automatically dismissed

___ (b) In a few cases, program may recommend no dismissal, but reduced charge and sentence

___ (c) In a few cases, judge may choose not to dismiss, despite successful completion and program recommendation to dismiss

___ (d) other (specify) _____

_____

17. When charges are dismissed following successful program completion, are the records expunged or sealed?

___ (a) never ___ (b) yes, always ___ (c) yes, but not always (specify)

_____

18. Is the defense attorney involved in the following decisions associated with the diversion program? (check one for each of a-e)

	Always	If requested by defendant	Never
(a) decision to enter diversion program	_____	_____	_____
(b) decisions concerning restitution and/or community service	_____	_____	_____
(c) decision to extend diversion period	_____	_____	_____
(d) termination hearing	_____	_____	_____
(e) decision not to dismiss participant's case, following successful program completion	_____	_____	_____

19. What specific data does your program keep track of and analyze on an ongoing basis?

___ (a) disposition of original charge for successfully terminated participants

___ (b) disposition of original charge for unfavorably terminated participants

___ (c) post program rearrest data for successful participants

___ (d) post program rearrest data for unfavorably terminated participants

___ (e) post program conviction data for successful participants

___ (f) post program conviction data for unfavorably terminated participants

___ (g) impact of program on different types of participants (e.g., by age, sex, prior record, service need, etc.)

___ (h) impact of different types of services and/or of in-house vs. referral on program outcomes (successful termination, recidivism, etc.)

20. What types of formal evaluation or research have been done of your program over the past two or three years? (check any that apply)

___ (a) none

___ (b) in-house evaluation of how the program operates

___ (c) external evaluation of how the program operates

___ (d) in-house evaluation of the impact of the program, no comparison group

___ (e) external evaluation of impact of the program, no comparison group

___ (f) in-house evaluation of the impact of the program, with a comparison group

___ (g) external evaluation of the impact of the program, with a comparison group

___ (h) evaluation of the cost effectiveness of the program

Questions Related to Resource Center

21. How could the Resource Center be most helpful to your program in the future?

_____

_____

_____

_____

22. How could the Pretrial Reporter be improved?

_____

_____

_____

23. What issues should be covered in depth by Resource Center bulletins or through specific training initiatives?

_____

_____

_____

24. Do you have any questions or need any advice concerning research issues related to your program?

_____

_____

_____

25. What types of pretrial program profiles would be most helpful to you? That is, what types of information about programs would you most appreciate having?

_____

_____

_____

NOTE: AT THIS POINT, INDICATE THAT THERE IS ONE MORE SHEET OF QUESTIONS ASKING ABOUT PROGRAM STATISTICAL DATA. OFFER TO MAIL THAT TO THE PERSON FOR COMPLETION AND RETURN WITHIN TWO WEEKS, OR TO DO NOW BY PHONE, DEPENDING ON PERSON'S PREFERENCE.

NOTE: For any person responding for an entire system of several different programs (e.g., statewide agency), please indicate if there are any significant exceptions to the above for particular programs—and/or if there are specific individual programs that the person thinks we should make separate contact with. If so, indicate here.

D. STATISTICAL Questions: DIVERSION Programs Only

Agency/Program Name and Location _____

_____

NOTE: If you do not have some of the information requested, simply indicate N.A.

1. In the jurisdiction(s) covered by your program, about how many total arrests (misdemeanor and felony) occur per year? _____

2. During the most recent year, please indicate the numbers for your program of each of the following:

___ (a) number formally referred to your program for possible diversion

___ (b) number actually interviewed by the program for possible acceptance

___ (c) number recommended by program for acceptance into diversion program

___ (d) number who were formally accepted and enrolled in the program

___ (e) number who were recommended by the program but decided not to participate

___ (f) number who were recommended by the program but were rejected for diversion by the prosecutor or judge

3. Approximately what percentage of all those formally accepted into the program have the following characteristics when they enter?

___ (a) age 20 or under

___ (b) age 40 or older

___ (c) female

___ (d) ethnic minority

___ (e) charged with violation

___ (f) charged with misdemeanor

___ (g) charged with felony

___ (h) no prior adult arrests

___ (i) no prior adult convictions

___ (j) more than one prior felony arrest

___ (k) more than one prior felony conviction

___ (l) unemployed and not in school

___ (m) receiving public assistance

___ (n) single

___ (o) represented by public defender or court appointed attorney

4. Please indicate, if you know, the following percentages for the last full year for all program participants, including both successfully and unfavorably terminated:

___ (a) percentage rearrested while in program

___ (b) percentage convicted on such rearrests

___ (c) percentage rearrested within one year of program entry

___ (d) percentage convicted on such rearrests

___ (e) percentage successful terminations from program

5. About what percentage of the program's participants receive services in the following manner? (provide separate % for each)

___ (a) receive only basic supervision, reporting to the program periodically, but with no direct services provided other than staff "rapping" with the participant

___ (b) receive all supervision or services in-house, directly from program staff (i.e., this refers to the proportion of all program participants for whom no outside referrals are made for services as part of the diversion "contract")

THANK YOU VERY MUCH FOR YOUR COOPERATION. PLEASE RETURN THIS SHEET TO: DON PRYOR, PRETRIAL SERVICES RESOURCE CENTER, 918 F STREET, NW, SUITE 500, WASHINGTON, DC 20004.