



Preliminary Protective Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the preliminary protective hearing²

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- Child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)

In all states, the preliminary protective hearing must take place within a short time after the child has been removed from the home. The time limit is specified by state law and, in most states, must occur within one to three working days after removal.

The main purpose of the PPH is to determine if probable cause exists to remove a child or keep a child in shelter status pending further investigation of the case and whether removal can be avoided through reasonable efforts by the child welfare agency.

- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Education liaison/school representative
- Education surrogate parent if appropriate
- Law enforcement
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Courts can make sure that parties and key witnesses are present by:

- ensuring that the judge, not the bailiff or court staff, makes the determination about who is allowed to be in the courtroom;
- asking the youth/family if there is someone else who should be present;
- requiring quick and diligent notification efforts by the agency;
- requiring both oral and written notification in a language understandable to each party and witness;
- requiring service/tribal notice to include the reason for removal, purpose of the hearing, and availability of legal assistance in a language and form understandable to each party and witness;
- requiring caseworkers and/or protective service investigators to facilitate attendance of children, parents, relatives (paternal and maternal), fictive kin, and other parties;
- facilitating telephonic or video conferencing appearance at hearings; and
- implementing time-certain calendaring.

Review relevant documents

REVIEW THE PETITION³

- A sworn petition or complaint should be filed prior to the PPH and served/provided to the parents and their counsel.
- The petition should be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- Petitions need to include allegations specific to each legal parent or legal guardian if appropriate.
- If the petition does not contain allegations against a legal parent or legal guardian, the child should be placed with or returned to that parent or legal guardian.
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child's safety.

The court should require submission of agency and/or law enforcement reports at least one hour prior to the PPH.

Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent the need for removal.

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE PRELIMINARY PROTECTIVE HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.

Due Process Considerations

- IDENTIFICATION OF PARENTS AND/OR GUARDIANS
 - Who are the child's parents and/or guardians?
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - Have efforts to identify and locate fathers been sufficient? What has been done?
- NOTICE
 - How were the parents/guardians and foster parents notified of this hearing?
 - Was the notice in a language and form understandable to the parents/guardians and foster parents?
 - Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
 - Has the agency exercised due diligence to provide notice to all parents of a sibling of the child, where such parent has legal custody of the child? (P.L. 113-183 § 471(a)(29))
 - Verify that relatives who requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).⁴

- **REPRESENTATION**

- Are the **parents** entitled to representation?
- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- Has counsel been appointed to represent the **child**?
- Does counsel have sufficient training and experience to represent the child in this case?
- Has counsel met with the child in person? Is he able to determine and advocate the child's position?
- Should the court appoint a Guardian *ad litem* and/or CASA for the child?

- **UNDERSTANDING AND COMPETENCY**

- Do the parents understand the allegations and the purpose of the hearing?
- Are there parental competency issues?

- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**

- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Interstate Compact on the Placement of Children (ICPC), or other federal law apply to this case?⁵

Engage parents and any children or relatives present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Do you understand the petition? (Review the petition with parties.)
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- What family members and/or other important people should be involved in this process?

KEY INQUIRIES, ANALYSES, FINDINGS, AND DECISIONS AT THE PRELIMINARY PROTECTIVE HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

Inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. §§ 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

- Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Checklist.⁵
- If ICWA applies, inquire whether:
 - The party seeking the adjudication has notified the parent or Indian custodian and the Indian child's tribe of the hearing by registered mail with return receipt requested (25 U.S.C. § 1912).
 - There is a qualified expert witness who will be providing testimony about the imminent risk of serious physical or emotional harm to the child if left in the custody of the parents (25 U.S.C. § 1912(e)).
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶

Key decisions and findings at the adjudication hearing

- **BEFORE ADJUDICATION IN ANY CASE**
 - Are there specific allegations as to each parent?
 - Which allegations have been proven by the applicable burden of proof?⁷
 - Are the allegations, as proven or admitted, legally sufficient to support a finding of abuse, neglect, or dependency? If not, dismiss the dependency and order custody of the child returned to the parents or legal guardians.
 - If there are no allegations or the state is not proceeding as to one or more parents, determine whether the court has statutory authority to take jurisdiction.⁸
- **IS THE PARENT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVING HIS/HER TRIAL RIGHTS? [See sample colloquy]**
 - Does the parent have the capacity to enter an admission?
 - Has the parent been advised by counsel of, and does he/she understand, the rights waived and direct and potential short- and long-term consequences of an admission?
 - Is the admission or consent voluntary?

- Do the pleadings outline specifically the basis for state intervention in a manner that will support specific services rationally related to the jurisdictional findings the court will be asked to make?
- Have the pleadings been amended to reflect the agreement of the parties?
- Is testimony or other evidence necessary to support an admission or consent?
- Do the parents have any questions for the judge regarding the stipulation?

• **IN ICWA CASES, DETERMINE: [See ICWA Adjudication Checklist for more detail]⁹**

- Whether the child is an Indian child under ICWA (25 U.S.C. § 1903(4));
- Whether the state court lacks jurisdiction because the child is already a ward of a tribal court (25 U.S.C. § 1911(a));
- Whether there is evidence, including the **testimony of a qualified expert witness**, that proves by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e));
- Whether the agency made **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful? (25 U.S.C. § 1912(d))

KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATION HEARING:

- Which allegations of the petition have been proved or admitted, if any;
- Whether there is a legal basis for continued court and agency intervention.

The court must make specific findings as to the basis of the finding of abuse and/or neglect.

Determine whether:

- The agency is not required to make reasonable efforts to prevent removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely (42 U.S.C. § 671(a)(15)(D)) ;
- It would be contrary to the welfare and best interests of the child to continue in the home (42 U.S.C. § 672, 472(1)).

- **IN ICWA CASES, CERTIFY THAT:**

[See ICWA Adjudication Checklist for more detail]¹⁰

- The consent to foster placement was executed in writing and filed in court;
- The consequences of the consent were fully explained in detail in English or in a language that the parent or Indian custodian understood;
- The consequences were fully understood by the parent or Indian custodian (25 U.S.C. § 1913).

- **ADDITIONAL FINDINGS AND ORDERS IF THE DISPOSITION HEARING IS NOT HEARD IMMEDIATELY AFTER THE ADJUDICATION HEARING**

If the disposition hearing will not occur immediately after the adjudication hearing, the judge will need to make temporary decisions at the conclusion of the adjudication such as:

- Where will the child be placed prior to the disposition hearing?
- Is the temporary order placing each child extended until the disposition hearing?
- Are there any other orders that the court deems appropriate (e.g., evaluations, services, family time, etc.)?
 - Order further testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing, and ensure that all assessments or evaluations are culturally appropriate.
 - Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family as caretakers (in ICWA cases, if no family member is available, ensure other tribal members or other Indian families are being identified as possible caretakers).
 - Direct the agency to continue its efforts to notify non-custodial parents, including an unwed father whose paternity has been acknowledged or established.
 - Set terms for the type, frequency, and duration of family time, support, and other intra-family communication, including parent-child, sibling, and relative visits.

FEDERALLY REQUIRED TITLE IV-E FINDINGS AT THE PPH

The court must make a finding that continuance in the home of the parent or legal guardian would be **contrary to the child's welfare** (42 U.S.C. § 672(a)(1-2)).

- This finding must be made at the time of the first court ruling authorizing removal of the child from the home (45 C.F.R. § 1356.21(c)).

The court must order that placement and care are the responsibility of the state agency or any other public agency with which the responsible state agency has an agreement (42 U.S.C. § 672(a)(1-2); 45 C.F.R. § 1356.71(d)(1)(iii)).

While federal law requires the judge to determine whether reasonable efforts have been made to prevent or eliminate the need for removal within 60 days of the date of removal (45 C.F.R. § 1356.21(b)(1)), this finding should be made at the PPH when the removal can first be challenged.

Reasonable efforts to allow the child to safely return home

- Is the agency making reasonable efforts to effect the safe reunification of the child and family? (45 C.F.R. § 1356.21(b)(1))
- What is preventing the child from SAFELY returning home TODAY?⁷
- What is the current and immediate safety threat? Has the threat diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
- What type of safety plan could be developed and implemented in order for the child to return home today?
 - What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or into the home allow the child to safely return?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family, and child, and are you satisfied that they understand these conditions?

The court's written findings of fact and conclusions of law at the adjudication hearing should:

- accurately reflect the reasons for state intervention;
- provide sufficiently detailed information to justify agency and court choices for treatment and services;
- provide a defensible basis for refusing to return a child home or terminating parental rights if parents fail to improve;
- be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning; and
- set date and time of next hearing, if needed.

CONCLUDING THE ADJUDICATION HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.
- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes.
 - **If the disposition hearing is not held immediately after adjudication**, set disposition within 30 days and identify tasks to be accomplished, including the filing of the disposition report/case plan if not previously filed with the court.
- Identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of adjudication orders immediately following the hearing.

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences of failure to appear at future court events.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

If the child remains in an out-of-home placement, the court should set the review and permanency hearings at the adjudication hearing to emphasize the importance of the legal timeframes and that the clock is ticking.

ADJUDICATION HEARING BENCHCARD ENDNOTES

¹ The adjudication hearing, which may also be known as the jurisdictional or fact-finding hearing, is the hearing to determine whether allegations in the petition are substantiated by the evidence.

² State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

³ State and federal laws determine what must be contained in the petition.

⁴ See Federal Law Chapter in the GUIDELINES.

⁵ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the Adjudication Hearing) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁶ *Ibid.*

⁷ State law defines child abuse, neglect, abandonment, and dependency.

⁸ Most state statutes require allegations as to both parents in order to adjudicate the child dependent.

⁹ *Supra* note 5.

¹⁰ *Ibid.*

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES (Refer to the PPH Chapter for more detail.)

Aggravated Circumstances: The court should advise the state or agency that if they are seeking relief from making reasonable efforts based on aggravated circumstances, they must file their motion so the matter may be set as soon as possible in the case and prior to the adjudication.

Effective Case Planning Moving Forward: Although the information might not be available as early as the PPH, the court should set clear expectations for parties and advocates regarding the information to be provided to the court at each subsequent hearing by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior? Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

CONCLUDING THE PRELIMINARY PROTECTIVE HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
- Make oral findings and orders that all participants can understand.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes, and identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of the PPH order immediately following the hearing.

If the court has determined that it is contrary to the welfare of the child to remain in the home, the final order should include the statement, "It is contrary to the welfare of the child to remain in the home. It is in the best interests of the child to be placed." This language must be included in the initial hearing sanctioning removing the child from the home in order for the agency to claim federal reimbursement of placement expenses for the child for the duration of this placement episode (45 C.F.R. § 1356.21(c)).

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at any further court hearings.

- When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

THE PRELIMINARY PROTECTIVE HEARING BENCHCARD ENDNOTES

¹ The preliminary protective hearing is the first court hearing in juvenile abuse and neglect cases. In some jurisdictions, this may be called a “shelter care,” “detention,” “emergency removal,” or “temporary custody” hearing.

² State and federal law determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

³ State and federal laws determine what must be contained in the petition.

⁴ The Fostering Connections Act requires the agency to use due diligence to identify and notify all relatives within 30 days of removal (Fostering Connections to Success and Increasing Adoptions Act of 2008, H.R. 6893 / P.L. 110-351 § 103).

⁵ See the Federal Law Chapter.

⁶ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the PPH) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁷ The intent of this inquiry is to ensure that the court is fully exploring safety and risk concerns while at the same time examining the current issues that the family faces to ensure that there is no legitimate reason why the child(ren) cannot be returned home.



Adjudication Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the adjudication hearing²

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings; paternal and maternal relatives

The adjudication hearing should be held within 60 days from removal at the latest in order to comply with the ASFA goal of providing an expedited process to find children in temporary placements permanent homes. Continuances or extensions should be permitted only in the most extraordinary circumstances.

The Reasonable Efforts to Prevent Removal Finding must be:

- made within 60 days of the child's removal (45 C.F.R. § 1356.21(b)(1));
- explicitly documented by reference to facts (45 C.F.R. § 1356.21(d)); and
- made on a case-by-case basis (45 C.F.R. § 1356.21(d)).

- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Court reporter
- Court security

Persons whose presence may also be needed at the adjudication hearing:

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- Law enforcement officers
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Education liaison/school representative
- Education surrogate parent if appropriate
- Adult or juvenile probation or parole officer
- Court-certified interpreters or court-certified language services

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REVIEW THE PETITION³

- A sworn petition or complaint must be filed and served/provided to the parties sufficiently in advance of the hearing.
- The petition must be specific about the facts that bring the child before the court.
- The petition should not be conclusory without relevant facts to explain and support the conclusions.
- The petition must include allegations specific to each legal parent or legal guardian if appropriate.
- Petitions/removal affidavits need to include specific language clearly articulating the current threat to the child's safety.

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE ADJUDICATION HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.
- Swear in the parties, participants, and relatives.

Due Process and Due Diligence Considerations

- **IDENTIFICATION OF PARENTS AND/OR GUARDIANS**
 - Who are the child's parents and/or guardians?
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made for all parents and/or guardians? Are they sufficient?
 - Have efforts to identify and locate fathers been sufficient? What has been done?
 - Has paternity of all children been legally established? If so, how?
 - Conduct a paternity inquiry if still in dispute.
 - If a parent has not legally established paternity, DNA testing should be ordered after proper inquiry.

- **NOTICE**

- Ensure that reasonable notice of the date, time, place, and purpose of the hearing was achieved.
- How were the parents/guardians and foster parents notified of this hearing?
 - If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed.
- Was the notice in a language and form understandable to the parents/guardians or foster parents?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Verify that the agency used due diligence to notify all relatives within 30 days of removal as required by the Fostering Connections Act (H.R. 6893/P.L. 110-351 § 103).
 - Verify that relatives who requested notice actually received notice to attend the hearing (P.L. 110-351 § 103).
- Has the agency exercised due diligence to provide notice to all parents of a sibling of the child, where such parent has legal custody of the child? (P.L. 113-183 § 471(a)(29))
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

- **REPRESENTATION**

- Advise any unrepresented party of their right to counsel, including court-appointed counsel if indigent.
 - If parents do not have counsel, advise of the right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.
 - Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.

- Appoint counsel to represent the child if one has not yet been appointed.
 - Does counsel have sufficient training and experience to represent the child in this case?
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- **UNDERSTANDING AND COMPETENCY**
 - Do the parents understand the allegations and the purpose of the hearing?
 - Are there parental competency issues?
- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**
 - Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?⁴

Engage parents and any children or relatives present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Do you understand the petition? (Review the petition with parties.)
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?

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REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
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- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
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- Have I placed the child in foster care as a last resort?
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- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

Inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. §§ 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

- Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Checklist.⁵
- If ICWA applies, inquire whether:
 - The party seeking the adjudication has notified the parent or Indian custodian and the Indian child's tribe of the hearing by registered mail with return receipt requested (25 U.S.C. § 1912).
 - There is a qualified expert witness who will be providing testimony about the imminent risk of serious physical or emotional harm to the child if left in the custody of the parents (25 U.S.C. § 1912(e)).
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶

Key decisions and findings at the adjudication hearing

- **BEFORE ADJUDICATION IN ANY CASE**
 - Are there specific allegations as to each parent?
 - Which allegations have been proven by the applicable burden of proof?⁷
 - Are the allegations, as proven or admitted, legally sufficient to support a finding of abuse, neglect, or dependency? If not, dismiss the dependency and order custody of the child returned to the parents or legal guardians.
 - If there are no allegations or the state is not proceeding as to one or more parents, determine whether the court has statutory authority to take jurisdiction.⁸
- **IS THE PARENT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVING HIS/HER TRIAL RIGHTS? [See sample colloquy]**
 - Does the parent have the capacity to enter an admission?
 - Has the parent been advised by counsel of, and does he/she understand, the rights waived and direct and potential short- and long-term consequences of an admission?
 - Is the admission or consent voluntary?

- Do the pleadings outline specifically the basis for state intervention in a manner that will support specific services rationally related to the jurisdictional findings the court will be asked to make?
- Have the pleadings been amended to reflect the agreement of the parties?
- Is testimony or other evidence necessary to support an admission or consent?
- Do the parents have any questions for the judge regarding the stipulation?

• **IN ICWA CASES, DETERMINE: [See ICWA Adjudication Checklist for more detail]⁹**

- Whether the child is an Indian child under ICWA (25 U.S.C. § 1903(4));
- Whether the state court lacks jurisdiction because the child is already a ward of a tribal court (25 U.S.C. § 1911(a));
- Whether there is evidence, including the **testimony of a qualified expert witness**, that proves by **clear and convincing evidence** that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(e));
- Whether the agency made **active efforts** to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful? (25 U.S.C. § 1912(d))

KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATION HEARING:

- Which allegations of the petition have been proved or admitted, if any;
- Whether there is a legal basis for continued court and agency intervention.

The court must make specific findings as to the basis of the finding of abuse and/or neglect.

Determine whether:

- The agency is not required to make reasonable efforts to prevent removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely (42 U.S.C. § 671(a)(15)(D)) ;
- It would be contrary to the welfare and best interests of the child to continue in the home (42 U.S.C. § 672, 472(1)).

- **IN ICWA CASES, CERTIFY THAT:**

[See ICWA Adjudication Checklist for more detail]¹⁰

- The consent to foster placement was executed in writing and filed in court;
- The consequences of the consent were fully explained in detail in English or in a language that the parent or Indian custodian understood;
- The consequences were fully understood by the parent or Indian custodian (25 U.S.C. § 1913).

- **ADDITIONAL FINDINGS AND ORDERS IF THE DISPOSITION HEARING IS NOT HEARD IMMEDIATELY AFTER THE ADJUDICATION HEARING**

If the disposition hearing will not occur immediately after the adjudication hearing, the judge will need to make temporary decisions at the conclusion of the adjudication such as:

- Where will the child be placed prior to the disposition hearing?
- Is the temporary order placing each child extended until the disposition hearing?
- Are there any other orders that the court deems appropriate (e.g., evaluations, services, family time, etc.)?
 - Order further testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing, and ensure that all assessments or evaluations are culturally appropriate.
 - Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family as caretakers (in ICWA cases, if no family member is available, ensure other tribal members or other Indian families are being identified as possible caretakers).
 - Direct the agency to continue its efforts to notify non-custodial parents, including an unwed father whose paternity has been acknowledged or established.
 - Set terms for the type, frequency, and duration of family time, support, and other intra-family communication, including parent-child, sibling, and relative visits.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: If disposition does not occur immediately after the adjudication, the court should set clear expectations for parties and advocates regarding the information to be provided to the court at the disposition and each subsequent hearing by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior? Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support the child's needs, and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- What efforts are being made to ensure children in foster care form and maintain long-lasting connections to caring adults? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any issues resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

The court's written findings of fact and conclusions of law at the adjudication hearing should:

- accurately reflect the reasons for state intervention;
- provide sufficiently detailed information to justify agency and court choices for treatment and services;
- provide a defensible basis for refusing to return a child home or terminating parental rights if parents fail to improve;
- be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning; and
- set date and time of next hearing, if needed.

CONCLUDING THE ADJUDICATION HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.
- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Set the date and time of the next hearing within state and federal timeframes.
 - **If the disposition hearing is not held immediately after adjudication**, set disposition within 30 days and identify tasks to be accomplished, including the filing of the disposition report/case plan if not previously filed with the court.
- Identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide parents with a copy of adjudication orders immediately following the hearing.

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
 - Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences of failure to appear at future court events.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
 - Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
 - Ask if there are any questions for the court.
-

If the child remains in an out-of-home placement, the court should set the review and permanency hearings at the adjudication hearing to emphasize the importance of the legal timeframes and that the clock is ticking.

ADJUDICATION HEARING BENCHCARD ENDNOTES

¹ The adjudication hearing, which may also be known as the jurisdictional or fact-finding hearing, is the hearing to determine whether allegations in the petition are substantiated by the evidence.

² State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

³ State and federal laws determine what must be contained in the petition.

⁴ See Federal Law Chapter in the GUIDELINES.

⁵ *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* (which is excerpted here for the Adjudication Hearing) provide benchcard checklists for use by judges and child welfare professionals in the implementation of ICWA. The checklists are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

⁶ *Ibid.*

⁷ State law defines child abuse, neglect, abandonment, and dependency.

⁸ Most state statutes require allegations as to both parents in order to adjudicate the child dependent.

⁹ *Supra* note 5.

¹⁰ *Ibid.*



Disposition Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the disposition hearing¹

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal *and* maternal relatives
- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)

The disposition hearing is the hearing at which the judge considers reports, recommendations, and other evidence regarding the child's placement.

The judge also reviews the case plan developed by the parties.

ASFA requires that the agency must develop a case plan "within a reasonable period" which can be no more than 60 days after the removal of the child (45 C.F.R. § 1356.21(g)(2)). The agency must involve the parents in case plan development (45 C.F.R. § 1356.21(g)(1)). If the parents are unwilling or unable to participate in the case plan development, the department must document its efforts to engage the parents in the process (65 Fed. Reg. 4057 (Jan. 25, 2000)).

- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Review reports submitted to the court

- *Case plan/disposition report should include:²*
 - a statement of family changes needed to correct the problems necessitating state intervention, along with timetables for accomplishing them;
 - a description of services to be provided to assist the family; and
 - a description of actions to be taken by parents to correct the identified problems and any steps the parent has taken thus far.
- *When the agency recommends foster placement, an affidavit of reasonable efforts (ACTIVE EFFORTS in ICWA cases)³ should be submitted. The following are some additional key elements of the affidavit:*
 - A description of the efforts made by the agency to avoid the need for placement and an explanation why they were not successful;
 - An explanation of why the child cannot be protected from the identified problems in the home even if services are provided to the child and family; and

- Identification of relatives and friends who have been contacted about providing a placement for the child.
- ***Other information that should be included in either the affidavit of reasonable efforts or an accompanying court report:***
 - a description of the placement and where it is located;
 - proposed arrangements for family time;
 - placement of the child's siblings and, if they are to be apart, proposed arrangements for visitation;
 - an appropriate long-term plan for the child's future; and
 - proposed child support.

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE DISPOSITION HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Verify that the court has current addresses for parents/guardians. (Do not openly identify addresses when one or more parents is party to an injunction for protection against domestic violence.)
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process and Due Diligence Considerations

• IDENTIFICATION OF PARENTS AND/OR GUARDIANS

- Have the identity and location of all parents and/or guardians been determined?
- If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
- Has paternity of all children been legally established? If so, how?
- Have efforts to identify and locate fathers been sufficient? What has been done?

• NOTICE

- Ensure that reasonable notice of the date, time, place, and purpose of the hearing was achieved.
- How were the parents/guardians and foster parents notified of this hearing?
 - If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed (P.L. 110-351 § 103).
- Was the notice in a language and form understandable to the parents/guardians?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Verify that the agency used due diligence to notify all relatives within 30 days of removal (P.L. 110-351 § 103).
- Verify that the agency used due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

• REPRESENTATION

- Advise any unrepresented parties of their right to counsel, including court-appointed counsel if indigent.
 - If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.

- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.
- Appoint counsel to represent the child if one has not yet been appointed.
 - Does counsel have sufficient training and experience to represent the child in this case?
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- **UNDERSTANDING AND COMPETENCY**
 - Do the parents understand the allegations and the purpose of the hearing?
 - Are there parental competency issues?
- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**
 - Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?⁴
 - Verify timely compliance with all ICPC requirements.

Engage parents and any children or relatives present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Were you involved in any ADR processes used before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Ask parents if any other individuals should be involved in the court matter, or who else is significant in the child's life.

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE DISPOSITION HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

- *Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Disposition Hearing Checklist.⁵*
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶
 - If needed, inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. § 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

Key decisions and findings at the disposition hearing

HAS THE AGENCY MADE REASONABLE EFFORTS TO ELIMINATE THE NEED FOR PLACEMENT (ACTIVE EFFORTS IN ICWA CASES)⁷ OR PREVENT THE NEED FOR PLACEMENT?

- Can the child be SAFELY returned to a parent today?
 - What specifically prevents the parent from providing the minimally adequate standard of care?

REVIEW THE CASE PLAN

- *Verify that the agency has filed the case plan in a timely manner.*
 - The agency must file the case plan within 60 days of removal (45 C.F.R. § 1356.21(g)(2)).
- *Verify that the agency has involved parents in case plan development (45 C.F.R. § 1356.21(g)(1)).*
 - If the parents are unwilling or unable to participate in the case plan development, the department must document its efforts to engage the parents in the process (65 Fed. Reg. 4057 (Jan. 25, 2000)).
- *Verify that the agency has involved children age 14 and older in case plan development (P.L. 113-183 § 475(1)(B)).*
 - Verify that children age 14 and older have selected two members of the case planning team who are not the caseworker or foster parent. (P.L. 113-183 § 475(5)(C)(iv)).

- Verify that the case plan documents the child's education, health, visitation, and court participation rights, the right to receive a credit report annually, and a signed acknowledgment that the child was provided these rights and that they were explained in an age-appropriate way (P.L. 113-183 § 475(A)).

KEY DECISIONS THE COURT SHOULD MAKE AT THE DISPOSITION HEARING:

Determine whether:

- The agency made or failed to make reasonable efforts to prevent the removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely, with a description of the services and why those services did not prevent removal or enable the child to return home;

OR

- The agency is not required to make reasonable efforts to prevent removal, to eliminate the continued removal of the child from the home, or to make it possible for the child to return home safely;

AND

- It would be contrary to the welfare and best interest of the child to continue in the home (42 U.S.C. § 672, 472(1)).

REVIEW CASE PLAN

- Verify that the agency has filed the case plan in a timely way, involved parents in case plan development, and involved children age 14 and older in case plan development.
- What is the permanency plan?
- What are the terms of meaningful family time?
- How does the plan address and support the child's well-being?

Is the case plan rationally related to jurisdictional findings?

In making dispositional orders, consider the best interests of the child.

- **Verify that the agency has involved children age 14 and older in case plan development (P.L. 113-183 § 475(1)(B)).**
 - Verify that children age 14 and older have selected two members of the case planning team who are not the caseworker or foster parent. (P.L. 113-183 § 475(5)(C)(iv)).
 - Verify that the case plan documents the child's education, health, visitation, and court participation rights, the right to receive a credit report annually, and a signed acknowledgment that the child was provided these rights and that they were explained in an age-appropriate way (P.L. 113-183 § 475(A)).
- **What is the permanency plan?**
 - **If the permanency plan is reunification**, what services will be offered to the parents?
 - How do the services specifically address the safety concerns supporting jurisdictional findings?
 - Do the parents believe the services will meet their needs and build on their strengths?
 - How does the agency assist the family in accessing services?
 - Has the agency demonstrated that the services offered are culturally appropriate and proven effective for families with similar issues and characteristics?
 - **If the permanency plan is not reunification**, has there been a judicial determination that reasonable efforts are not required due to aggravated circumstances? (42 U.S.C. § 671(a)(15))
 - What is the **concurrent case plan**, and what steps are being taken to implement that plan?
 - APPLA is limited as a permanency plan for youth age 16 and older (P.L. 113-183 § 475(5)(C)(i)).
- **What are the terms of meaningful family time with parents, siblings, and extended family members?**
 - Do the terms of family time match the safety concerns?
 - Is there evidence supporting supervised visitation if this is recommended?
 - Are the time and location of family time logistically possible for the parents and extended family, and supportive of the child's needs?
- **Is the case plan rationally related to jurisdictional findings?**

REVIEW THE CHILD'S PLACEMENT

- Is the placement appropriate? (42 U.S.C. § 675(5)(A))
 - When and where did the caseworker last see the child? What was the nature of contact?
 - Is the child safe? Is the placement least restrictive (most family-like), the most appropriate available, and in close proximity to the parents? (42 U.S.C. § 675(5)(A))
 - If the child is in foster care, what efforts are being made to fully explore kinship options? (42 U.S.C. § 671(a)(19) and (29))
 - Have relatives been deemed inappropriate? If so, why? Were waivers to foster care licensing considered?
 - If child is in kinship care, how is the relative linked with all available training, services, and financial support?
 - Has the agency made reasonable efforts to place siblings together? If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, what efforts have been made to place the siblings together? (42 U.S.C. § 671(a)(31))
 - If an ICWA case, is the placement consistent with ICWA placement preferences? (25 U.S.C. 1915)
 - From the family's perspective, is the placement culturally and linguistically appropriate?
 - Is the placement in proximity to the child's educational setting, or does it otherwise support educational continuity? (42 U.S.C. § 675(1)(G))
 - Is the placement trained to help children with traumatic stress reactions cope with those reactions? Is the placement knowledgeable about recognizing and managing traumatic stress reactions?
 - Verify that the case plan outlines efforts to ensure caregivers and foster parents are able to apply a reasonable prudent parent standard (P.L. 113-183 § 471(a)(24); 111(a)(3)).
 - Caregivers and foster parents should support the child's participation in age- or developmentally-appropriate activities.

CHILD WELL-BEING⁸

- What is the specific plan to assess and ensure the child's well-being, including, as applicable, his/her educational, developmental, emotional and mental health, medical, dental, medication, and reproductive health needs?

- Verify that the child's mental, physical, dental, and educational needs are being addressed. Get input from all parties/participants, including child (if appropriate) and caregiver.
- Verify that the child has received all health assessments, immunizations, hearing and vision screenings, dental check-ups and services, prescriptions for medications, and medical equipment as needed.
- Is a trauma assessment of the child by a trauma-informed professional needed?
- What monitoring, treatment, or other supports might be needed to help children cope with any traumatic stress reactions?
 - Verify that if the child is a victim of sex trafficking, or at risk of becoming a victim of sex trafficking, that the case plan includes appropriate and necessary services for the child (P.L. 113-183 § 471(a)).
- If the child has been missing from placement, inquire about the factors that led to the child being absent from care, and to the extent possible how those factors will be addressed in subsequent placements (P.L. 113-183 § 471(a)(35)).
- If the child has been missing from placement, inquire about what is known of the child's experiences while absent from care, including whether the child was a victim of sex trafficking or at risk of such victimization – and if so, what services will be offered (P.L. 113-183 § 471(a)(35)).
- Verify that parents are participating in the child's medical and educational appointments.
- Review appropriate school records, including any Individualized Education Program (IEP).
- Verify that the child is attending the same school as when he/she entered care. If not, ask what has been done to ease the transition.
- Verify that the child is attending school on a regular basis and has adequate transportation.
- How are the child's educational needs being met, and what are the plans for the future?
 - What is the child's academic performance? Are there identifiable areas in which the child is excelling? Are there areas that are posing a challenge, and how are they being addressed?
 - Are there any potential barriers related to the child's academic success that can be addressed by the court, the agency, and the caregiver?
- Is there a need for a surrogate parent to act in the place of a parent in educational decision-making and in safeguarding the child's rights under the Individual with Disabilities Education Act (IDEA)?

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

The court's written findings of fact and conclusions of law at the disposition hearing should:

- Determine the legal disposition of the case, including the custody of the child, based upon the statutory options provided under state law.
- State the permanency plan for the child (e.g., maintenance of the child in the home of a parent, reunification with a parent or relative, permanent placement of the child with a relative, placement of the child in a permanent adoptive home).
- When applicable, specify why continuation of child in home would be contrary to the child's welfare.
- Where charged with this responsibility under state law and based upon the evidence before the court, approve, disapprove, or modify the agency's case plan.
- Determine whether there is a plan for monitoring the implementation of the service plan and assuming the child's continued well-being.
 - Is a GAL/CASA available to do this?
- When placement or services are ordered that were not agreed by the parties, specify the evidence or legal basis upon which the order is made.
- Specify whether reasonable efforts have been made to prevent or eliminate the need for placement.
- Specify the terms of family time and communication with parents, extended family, and siblings.
- Specify parental responsibilities for child support.
- Be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning.
- Set the date and time of the next hearing, if needed

CONCLUDING THE DISPOSITION HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.

- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Schedule review and permanency hearings within state and federal timeframes.
- Identify persons whose presence is needed at the next hearing.
 - Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
 - Provide all parties with a copy of orders immediately following the hearing.

Engage parents, children, and family members.

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review and permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The first review should be set within three to six months of disposition. The case must be reviewed no less frequently than every six months (42 U.S.C. § 675(5)(B)).

If the court determined that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. §1356.21(i)(ii) and (iii)).

- Advise parents of the consequences for failure to appear at future court hearings.
- When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

THE DISPOSITION HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the hearing.

² If an ICWA case, see Disposition Hearing Checklist for ICWA cases, in *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. (2003). Reno, NV: NCJFCJ.

³ *Ibid.*

⁴ See Federal Law Chapter.

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ *Supra* note 2.

⁸ Judges may wish to re-visit the child well-being questions listed in the PPH Benchcard to supplement this inquiry.

| Review Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the review hearing¹

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal and maternal relatives

In the review hearing, the court determines the status of the child, reviews compliance with the case plan, and the possible need for case plan and placement changes to maintain focus on safety and permanency. Review is required for both out-of-home and in-home placements.

ASFA requires that the case plan be “reviewed periodically,” but not less than every six months (42 U.S.C. §675(5)(B)). Additionally, a permanency hearing must be held no more than 12 months after the date the child was first considered to have entered foster care (42 U.S.C. § 675(5) (C)) or no later than 30 days after a court determines that reasonable efforts to return a child to either parent are not required, whichever occurs first.

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Review reports submitted to the court

- *Pre-review reports should include:*²
 - a statement of family changes needed to correct the problems necessitating state intervention, along with timetables for accomplishing them;
 - a description of services to be provided to assist the family; and
 - a description of actions to be taken by parents to correct the identified problems and any steps the parent has taken thus far.
- *When the agency recommends foster placement, evidence of reasonable efforts (ACTIVE EFFORTS in ICWA cases)³ must be presented to the court, which allows parents and counsel to challenge the quality and quantity of those efforts. In some jurisdictions an affidavit of reasonable efforts in lieu of live testimony may be permitted. The following are some additional key elements of an affidavit of reasonable efforts:*
 - a description of the efforts made by the agency to avoid the need for placement and an explanation of why they were not successful;

- an explanation of why the child cannot be protected from the identified problems in the home, even if services are provided to the child and family; and
- identification of relatives and friends who have been contacted about providing a placement for the child.
- *Other information that should be included in either the affidavit of reasonable efforts or an accompanying court report:*
 - a description of the placement and where it is located;
 - proposed arrangements for family time;
 - placement of the child's siblings and, if they are to be apart, proposed arrangements for visitation;
 - an appropriate long-term plan for the child's future; and
 - proposed child support.

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE REVIEW HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process and Due Diligence Considerations

• IDENTIFICATION OF PARENTS AND/OR GUARDIANS

- Have the identity and location of all parents and/or guardians been determined?
- If not, what diligent search efforts have been made for all parents and/or guardians?
Are they sufficient?
- Has paternity of all children been legally established? If so, how?
- Have efforts to identify and locate fathers been sufficient? What has been done?

• NOTICE

- Ensure that reasonable notice of the date, time, place, and purpose of the hearing was achieved.
- How were the parents/guardians and foster parents notified of this hearing?
 - If child, parents, caregivers, or relatives who requested notices are absent, confirm that they were properly noticed (P.L. 110-351 § 103).
- Was the notice in a language and form understandable to the parents/guardians?
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Verify that the agency used due diligence to notify all relatives within 30 days of removal (P.L. 110-351 § 103).
- Verify that the agency used due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child (P.L. 113-183 § 471(a)(29)).
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.

• REPRESENTATION

- Advise any unrepresented parties of their right to counsel, including court-appointed counsel if indigent.
 - If parents do not have counsel, advise of right to counsel, ascertain whether the right to counsel is understood, and appoint counsel for parents who qualify as indigent.

- Are there language issues to consider in appointing counsel?
- Does counsel have sufficient training and experience to provide competent representation in this case?
- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- If counsel is waived, determine if waiver is made knowingly, intelligently, and voluntarily.
- Appoint counsel to represent the child if one has not yet been appointed.
 - Does counsel have sufficient training and experience to represent the child in this case?
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- **UNDERSTANDING AND COMPETENCY**
 - Do the parents understand the allegations and the purpose of the hearing?
 - Are there parental competency issues?
- **APPLICABILITY OF OTHER FEDERAL LAWS AND REGULATIONS**
 - Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?⁴
 - Verify timely compliance with all ICPC requirements.

Engage parents and any children or relatives present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain the purpose of the hearing.)
- Were you involved in any ADR processes used before this hearing? If yes, what was the outcome?
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Ask parents if any other individuals should be involved in the court matter, or who else is significant in the child's life.

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE REVIEW HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

Indian Child Welfare Act (ICWA) Determination

- *Has an ICWA determination been made? If yes, different standards apply; refer to the ICWA Review Hearing Checklist.*⁵
- If an ICWA determination has not been made, does ICWA apply? Refer to the ICWA Checklist.⁶
 - If needed, inquire as to whether the child or parents may be of Native American heritage (25 U.S.C. § 1903, 1912, and 1922). If such heritage is a possibility, until such a determination is made, the court should proceed as if ICWA applies.

Key decisions and findings at the review hearing

Can the child be SAFELY returned to a parent today?

- Is there a continuing necessity for out-of-home placement? (42 U.S.C. § 675(5)(B))
 - If not, and the court finds that the child can be safely placed at home, order that the child be returned to the parent's custody. Keep the case open for a period of time to monitor the situation. If the court is satisfied that the family has fully completed all services, and the family is ready, the court can dismiss.
 - If yes, what are the specific safety risks preventing the child from being placed with the parents today?
 - What services or supports, rationally related to the specific safety risks, can be arranged to allow the child to be maintained at home or safely returned home today?
 - Will the removal of someone from the home or addition of someone in the home allow the child to be safely placed in the home?

Does the court-approved, long-term permanent plan for the child remain the best plan for the child?

- Is the placement appropriate? (42 U.S.C. § 675(5))
 - When and where did the caseworker last see the child? What was the nature of the contact?
 - Is the child safe? Is the placement the least restrictive (most family-like) and most appropriate available and in close proximity to the parents? (42 U.S.C. § 675(5))

- If the child is in foster care, what efforts are being made to fully explore kinship options? (42 U.S.C. § 671(a)(19))
- Have relatives been deemed inappropriate? If so, why? Were waivers to foster care licensing considered?
- If the child is in kinship care, how is the relative linked with all available training, services, and financial support?
- Are siblings placed together? If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, has the agency made reasonable efforts to place siblings together? (42 U.S.C. § 671(a)(31))

KEY DECISIONS THE COURT SHOULD MAKE AT THE REVIEW HEARING:

Determine whether:

- There is a continuing necessity for out-of-home placement of the child (42 U.S.C. § 675(5)(B)).
- The agency is making reasonable efforts to effect the safe reunification of the child and family (45 C.F.R. § 1356.21).
- The agency is making reasonable efforts to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child (42 U.S.C. § 671(a)(15)(C)).
- Any progress has been made toward alleviating or mitigating the causes necessitating placement in foster care? (42 U.S.C. § 675(5))
- Services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.
- The child's placement is an appropriate placement that adequately meets all physical, emotional, and educational needs (42 U.S.C. § 675(5)).
- There is a need for any additional court orders to move the case toward successful completion.

- From the child's and family's perspective, is the placement culturally and linguistically appropriate?
- Is the placement in proximity to the child's education setting or does it otherwise support educational continuity? (45 C.F.R. § 1356.21(g)(3); P.L. 110-351)
 - For children in foster care, what is the educational stability plan? (P.L. 110-351)
 - Are children able to remain in the school they were attending at the time of placement (unless not in their best interests) even if they move away from that school's boundaries? (P.L. 110-351) When it is not in the best interests of the child to remain, are children immediately enrolled in a new school with all educational records following them? (P.L. 110-351)
- If it is an ICWA case, is the placement consistent with ICWA preferences? (25 U.S.C. § 1915)
- Is the placement trained to help children with traumatic stress reactions cope with those reactions? Is the placement knowledgeable about recognizing and managing traumatic stress reactions?
- Verify that the case plan outlines efforts to ensure caregivers and foster parents are able to apply a reasonable prudent parent standard (P.L. 113-183 § 471(a)(24); 111(a)(3)).
 - Caregivers and foster parents should support the child's participation in age- or developmentally-appropriate activities.

Is the agency making reasonable efforts to rehabilitate the family and effect the safe reunification of the child and family? (45 C.F.R. § 1356.21(b))

- What specifically prevents the parents from safely providing the minimally adequate standard of care?
- What specific reasonable efforts have been made to reunify the child with his/her parents?

Is the agency making reasonable efforts to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child? (42 U.S.C. § 671(a)(15)(C))⁷

- What timeframe should be followed to achieve reunification or another permanency plan for each child?
 - What steps have been implemented to effectuate any permanency plan?
 - What steps are still required to finalize any permanency plan?
 - What is the likely date by which the child may be returned to and safely maintained in the home OR placed for adoption or legal guardianship? (42 U.S.C. § 675(5))

What is the extent of progress toward alleviating or mitigating the causes necessitating placement in foster care? (42 U.S.C. §675(5))

- What are the barriers to progress, and what steps have been taken to eliminate those barriers?
- What is the concurrent case plan goal, and what steps are being taken to implement that plan?
- Should the case plan goal be changed?

Which services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances?

- How are the parents, extended family, and children being engaged in the development of the case plan? (45 C.F.R. § 1356.21(g)(1))
 - Verify that children age 14 and older have been involved in case plan development (P.L. 113-183 § 475(1)(B)).
 - Verify that children age 14 and older have selected two members of the case planning team who are not the caseworker or foster parent (P.L. 113 § 475(5)(C)(iv)).
 - If parents are unwilling or unable to participate in the case plan, the agency must document its efforts to engage the parents in the process (65 Fed. Reg. 4057 (Jan. 25, 2000)).
- Does the family believe the services, supports, and interventions will meet their needs and build on their strengths?
- Has the family been given the opportunity to ask for additional services?
- How is the agency assisting the family in accessing services?
- Has the agency demonstrated that the services offered are culturally appropriate and proven effective for families with similar issues and characteristics?

- What are the terms of family time with parents, siblings, and extended family members?
- Do the terms of family time match the safety concerns? Is there evidence supporting supervised visitation?
- Are the time and location of family time logistically possible for the family and supportive of the child's needs?
- Do the terms of child support need to be set or adjusted?

What is the specific plan to assess and ensure the child's well-being, including, as applicable, his/her educational, developmental, emotional and mental health, medical, dental, medication, and reproductive health needs?

- Verify that the child's mental, physical, dental, and educational needs are being addressed. Get input from all parties/participants, including child (if appropriate) and caregiver/foster and pre-adoptive parents.
- Verify that parents are participating in the child's medical and educational appointments.
- Review appropriate school records, including any Individualized Education Program (IEP). Verify that the child is attending the same school as when he/she entered care. If not, ask what has been done to ease the transition.
- Verify that the child is attending school on a regular basis and has adequate transportation.
- Verify that the child is able to participate in developmentally age-appropriate activities that promote a sense of normalcy (P.L. 113-183).
- If the child has been missing from placement, inquire about what is known of the child's experiences while absent from care, including whether the child was a victim of sex trafficking or at risk of such victimization; if so, what services will be offered? (P.L. 113-183 § 471(a)(35))
- Is the child in an appropriate placement which adequately meets all physical, emotional, and education needs?
 - Are any identified trauma needs being supported?
 - If the child was a victim of sex trafficking, or at risk of being a victim of sex trafficking, are appropriate and necessary services being addressed? (P.L. 113-183 § 471(a))

Do any additional court orders need to be made to move the case toward successful completion?

The court's written findings of fact and conclusions of law at the review hearing should:

- be written in easily understandable language, which allows the parents and all parties to fully understand what action they must take to have their children returned to their care as well as timeframes for completion of various tasks;
- set forth findings explaining why the children are in need of continued placement outside the parents' home or continued court supervision, including the specific risks to the children;
- set forth findings as to whether and why family reunification and an end to court supervision continues to be the long-term case goal;
- set forth findings as to whether the agency has made reasonable efforts to eliminate the need for placement, with specific findings about actions the agency is taking;
- set forth detailed Findings of Fact and Conclusions of Law about whether the parents are in compliance with the case plan, and identify specifically what further actions the parents need to complete;
- approve proposed changes in the case plan and set forth any court-ordered modifications needed as a result of information presented at the review;
- identify an expected date of final reunification or other permanency plan for the child;
- set forth orders for the agency to make additional efforts necessary to meet the needs of the family and move the case toward completion;
- make any other orders necessary to resolve the problems that are preventing reunification or the completion of another permanency plan for the child; and
- set a date and time for the next hearing, if needed.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

CONCLUDING THE REVIEW HEARING

Case Management – Prepare for the next hearing

- Identify tasks to be accomplished by the next hearing.
 - Focus on permanency and mandated timeframes.
- Make oral findings and orders that all participants can understand.
 - Make findings and orders on the record.
- Consider the appropriateness of ADR processes, and order if applicable.
- Schedule review and permanency hearings within state and federal timeframes.
- Identify persons whose presence is needed at the next hearing.
- Order that the child (if appropriate) and caregivers receive notice of all proceedings and hearings.
- Ensure all orders are written, signed, copied, and distributed at the end of the hearing.
- Provide all parties with a copy of orders immediately following the hearing.

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Do you understand what happened here today?
 - Do you understand what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at future court hearings.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.

- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review and permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The case must be reviewed no less frequently than every six months (42 U.S.C. § 675(5)(B)).

The case plan goal, or permanency plan, must be re-evaluated and determined at a permanency hearing to be held within 12 months of the date the child entered care (42 U.S.C. § 675(5)(B)). If the court determines that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i)(ii), and (iii)).

THE REVIEW HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law.

² If an ICWA case, see Review Hearing Checklist for ICWA cases, in *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*. (2003). Reno, NV: NCJFCJ.

³ *Ibid.*

⁴ See Federal Law Chapter.

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ ASFA anticipates that a finding of reasonableness of the agency's efforts will be made at the permanency hearing, as it requires such a finding within 12 months of the date the child first entered care and every 12 months afterward (45 C.F.R. § 1356.21(b)(2)(i)). If the review hearing is prior to the permanency hearing, judges should inquire about progress made toward finalizing the plan.



Permanency Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the permanency hearing'

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal *and* maternal relatives

Hold the permanency hearing no later than 12 months after date the child was first considered to have entered foster care (42 U.S.C. § 675(5)(C)) or 30 days after the court determines reasonable efforts to return the child to the parent are not required, whichever is first (42 U.S.C. § 671(a)(15)).

After the initial permanency hearing, subsequent permanency hearings must be held every 12 months while the child is in care (45 C.F.R. 1356.21(b)(2)(i)).

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Review the relevant documents

- Current and updated case plan
- CASA, GAL, or Foster Care Review Board report
- Information from the child
- Information from the current caregiver, foster parents
- Service provider reports
- Medical and education records
- For children placed out of state, the report documenting the visit by the caseworker

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
- What is update or status of those cases?
 - What are the steps required for obtaining update/status?
- What is the impact on this hearing?
- Can these cases be consolidated before one judge?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE PERMANENCY HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Swear in the parties, participants, and relatives.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process Considerations

- NOTICE
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made? Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - How were the parents and/or guardians notified of this hearing?

- Was the notice in a language and form understandable to the parents and/or guardian?
- If child, parents, legal custodians, caregivers, or relatives who requested notice are absent, confirm that they were properly noticed.
- If parent is absent and has not been served, inquire about the diligent search.
 - Require a thorough description of efforts to locate and advise any absent parent of the hearing and confirm that a diligent search was begun. If needed, ask parents.
- Have the foster parents, pre-adoptive parent, or relative providing care for the child been provided notice of, and an opportunity to be heard in, the hearing? (42 U.S.C. § 675(5)(G))
- Has the agency exercised due diligence to identify and provide notice to all adult relatives of the child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))
- Has the agency exercised due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child? (P.L. 113-183 § 471(a)(29))
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.
- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/ UCCJEA, ICPC, or other federal laws apply to this case?

• REPRESENTATION

- Address any outstanding or new representation issues.
 - If the parents do not have representation, are they entitled to representation?
 - Determine if the right to counsel is understood.
 - Are there language issues to consider in appointing counsel?
 - If parents request counsel and claim to be indigent, have parents filled out affidavit for indigence?
 - If parents are ineligible for the appointment of counsel or knowingly, intelligently, and voluntarily waive appointed counsel, ask if they want to proceed pro se or hire a private attorney. Explain pro se if necessary.

- Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
- Has counsel been appointed to represent the child? If not, appoint counsel to represent the best interests of the child if it has not yet been appointed.
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
- If any counsel needs to be appointed, ensure that orders appointing counsel are expedited.

Engage parents, children, relatives, and foster parents present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about?
 - Explain the purpose of the hearing.
- Have you had sufficient opportunity to speak with your counsel prior to this hearing?
- Were you involved in any ADR process used before this hearing? If yes, what was the outcome?
- What family members and/or other important people should be involved in this process with us?
 - Ask parents if any other individuals should be involved in this court matter, or who else is significant in the child's life.
- Consult with the child in an age-appropriate manner regarding the permanency plan and/or transition to independent living (42 U.S.C. § 675(5)(c)(iii); P.L. 113-183 § 475A(a)(2)).

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE PERMANENCY HEARING

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

ICWA Inquiry and Determination

- Was the ICWA inquiry made by the agency? Whom did the agency ask?
- Has an ICWA determination been made?
 - If yes, different standards apply; refer to the ICWA Checklist.²
 - If yes, determine whether there was clear and convincing evidence, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child** (25 U.S.C. § 1912(e)).
- If ICWA applies:
 - Determine whether the state court has jurisdiction.³
 - Have the parent or Indian custodian and the Indian child's tribe been notified of this hearing by registered mail with return receipt requested?
 - Has the case been evaluated for transfer to a tribal court?
 - Has the tribal court accepted jurisdiction?
 - Has either parent vetoed the transfer?
 - Does good cause exist to deny the transfer?

If ICWA applies, or the court has reason to believe ICWA applies, the court should refer to the ICWA Checklist.

Determine the permanency plan (42 U.S.C. § 675(5)(c))

- What plan does the agency recommend?
- How was the plan determined, and who was involved in developing the plan?
- What is the child's position? How was the child consulted?
- What is the concurrent plan? What efforts are being made to implement it?

Does the court-approved, long-term permanent plan for the child remain the best plan for the child?

In determining the permanency plan, review the following:

REVIEW FAMILY TIME (IF APPLICABLE)

- Reassess the type, frequency, duration, and quality of family time.
- Consider who should supervise (a visitation center, a caseworker, or an approved third party).
- Outline incentives to gradually increase family time or reduce limits. Indicate if the agency is given discretion to increase (and whether this includes up to reunification) or is automatic upon proof of satisfying the announced incentive (such as approved housing or completion of a specified case plan task).
- If a child is placed in permanent guardianship, the court should specify the frequency and nature of family time between the child and the child's parents, siblings, and other family members in the written order.
- If siblings are unable to be placed together, verify sibling visitation is occurring. The agency must make reasonable efforts to provide frequent sibling visitation, even with previously adopted siblings (P.L. 110-351).
- Inquire if transportation has been an issue and determine who has been present and has participated in the visits.
- If family time is not possible because of the distance of the parent, the court should specify what alternative forms of contact are permitted (such as phone, email, webcam, or video conferencing).
- If the case involves domestic violence, ensure family time practices are adequate to protect the child.
- Ensure that there is ongoing supporting documentation regarding the frequency, quality, and progress of family time.
- Verify that the family time is consistent to meet the developmental, emotional, and mental health needs of the child.

REVIEW THE CHILD'S CURRENT PLACEMENT

- **Determine if safety is still an issue.** Consider reunification when the circumstances that caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's remaining with or being returned to the child's parent.⁵

- Ask what changes, if any, have been made to the child's living arrangement and/or placement since the last hearing. If there has been a change, ask if the change is necessary to achieve the child's permanency goal or meet the child's service needs.
- If siblings are not placed together, determine why not, and ask about efforts made (when appropriate) to keep them together.
 - Has every possible effort been made to place siblings together, when appropriate, in the same home? And, in the event of permanent placement of the siblings, has every effort been made to place them in the same adoptive home or, if the siblings are separated, to keep them in contact with each other? (P.L. 110-351)
- Verify that the caseworker advised the child and the individuals with whom the child will be placed of the availability of more permanent and legally secure placements and the type of assistance associated with each placement.
- Inquire of the child, caregiver, GAL, and caseworker of any issues with the current placement.
 - Consider the child's preference – conduct an age-appropriate consultation with a child during a permanency hearing (42 U.S.C. § 675(5)(c)(iii); P.L. 113-183 § 475(A)(a)(2)).⁶
- Determine if concurrent planning is appropriate based on the facts of the case.⁷
- Verify that the caregiver is willing and able to meet the needs of the child.
 - Does the current placement apply the reasonable and prudent parent standard and permit the child to engage in age- or developmentally-appropriate activities? (P.L. 113-183 § 475(5)(B), § 475(A)(a)(3))
 - Is the placement trained to help children with traumatic stress cope with those reactions? Is the placement knowledgeable about recognizing and managing traumatic stress reactions?
 - Is the placement trained to help children who have been victimized by sex trafficking? (P.L. 113-183)
- Is the placement in proximity to the child's education setting or does it otherwise support educational continuity? (42 U.S.C. § 675(1)(G))
- If the case involves domestic violence, ensure safety provisions exist, the placement is appropriate to protect the child, there is safety plan compliance, and visitation practices are adequate to protect the child.⁸

REVIEW AND ADDRESS THE NEEDS OF THE CHILD AND CHILD WELL-BEING⁹

- What services, interventions, and/or supports are in place to assess and ensure the child's well-being?
 - Does the agency have the child's most current health and education records?
(42 U.S.C. § 675 (1)(C))
 - Have they been provided to the child's current foster/kinship caregiver?
 - Verify that the child's mental, physical and dental, medication, and reproductive health care needs have been addressed. Get input from all parties or participants, including the child and caregiver.
- Verify that the parents are participating in the child's medical, educational, and other appointments related to the child's well-being as appropriate.
- Are the services specifically tailored to address this child's unique issues?
 - If applicable, are services related to the child's traumatic stress being provided? Ensure sufficient supports and treatments are in place to address any of the child's trauma issues.
 - If applicable, are services related to the child's victimization as a result of sex trafficking being provided? Ensure sufficient supports and treatments are in place to address any issues stemming from the child's victimization (P.L. 113-183).
- How has the agency assessed the quality of any services provided?
- How are the child's connections to his/her cultural heritage being preserved and promoted?
- What efforts has the state made to ensure children in foster care form and maintain long-lasting connections to caring adults, even when a child in foster care must move to another foster family home or when the child is placed under the supervision of a new caseworker? (P.L. 113-183 § 105(3))
- What progress has the child made? What are the barriers to progress, if any? What additional services, interventions, and supports will be provided to assist the child in overcoming these barriers?
- What is the status of the child's education?
 - Review educational records, including any individualized education plan. If an educational surrogate parent has been appointed, the educational surrogate parent should report to the court as appropriate.
 - Verify that the child is attending school on a regular basis and has adequate school supplies and transportation.

- Has the agency developed a plan to ensure educational stability? (42 U.S.C. § 675(1)(G))
 - Verify that the child is attending the same school as when he or she first entered care.
If not, verify what has been done to ease the transition.
- **If the child is 14 or older**, has the agency developed a transition plan, personalized at the direction of the child, including specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services? (42 U.S.C. § 675(H))
 - Has the agency documented the child's education, health, visitation, and court participation rights, and the right to receive a credit report annually? Have those rights been fully explained to the child in an age-appropriate way? (P.L. 113-183 § 475(A))
 - Verify that children age 14 and older have been able to select and include up to two individuals (excluding those normally involved on their case planning team) to be involved in developing their case plan (P.L. 113-183 § 475(1)(B)).
 - If aging out of foster care (18, 19, 20, or 21), has the youth been supplied with his or her birth certificate, Social Security card, driver's license or identification card, health insurance information, and medical records? (P.L. 113-183 § 475(5)(I))
- What are the child's interests? What are the agency and the placement doing to support those interests?
 - Is the child able to participate fully in age- or developmentally-appropriate activities such as sports, field trips, and overnight activities? (P.L. 113-183 § 475(5)(B); § 475(A)(a)(3))
- Order child support, if not already ordered. If already ordered, review compliance.
- **If the child has been missing from placement**, inquire about the factors that led to the child being absent from care and to the extent possible, how those factors will be addressed in the current or subsequent placements (P.L. 113-183 § 471(a)(35)).
 - If the child has been missing from placement, inquire about what is known of the child's experiences while absent from care, including whether the child was a victim of sex trafficking or at risk of such victimization, and if so, what services will be offered (P.L. 113-183 § 471(a)(35)).

To determine the permanency plan, conduct a five-plan analysis

IF THE PLAN IS REUNIFICATION

- Why is this plan in the child's best interests?
- What is the expected reunification date? Is reunification achievable within a timeframe consistent with the child's developmental needs?
- What services are in place to support successful reunification?
- What is the plan for follow-up supervision upon reunification?
- Are the parents in compliance with the case plan?
- What is preventing the child from returning SAFELY home TODAY?
- What is the current and immediate safety threat?
 - Has the threat been diminished? How do you know that? Specifically, how can the risk be ameliorated or removed?
 - What type of safety plan could be developed and implemented in order for the child to return home today?
- What specifically prevents the parents from being able to provide the minimally adequate standard of care to protect the child?
 - Will the removal or addition of any person from or in the home allow the child to be safe and be placed back in the home?
- If the safety threat is too high to return the child home, how have the conditions for return been conveyed to the parents, family, and child, and are you satisfied that they understand these conditions?

IF THE PLAN IS ADOPTION

- How is adoption rather than reunification in the best interests of the child?
- Is the child of an age where his/her consent is required by state law?
- What is the status of proceedings to terminate parental rights?
 - Determine the date by which the agency must file a petition to terminate parental rights.

- Is the child currently in an adoptive placement? If not, what is the plan to place the child in an adoptive placement?
- What efforts were made to identify relatives willing and able to adopt the child?
- How have alternatives to adoption and/or other options been discussed and resolved, including:
 - Cultural/customary adoptions for an Indian child
 - Relative guardianship v. non-relative adoption
 - Adoption subsidies and supports
 - Open adoption or post-adoption contact
- Determine the agency's timeframe for completing legal proceedings, home study, adoption subsidy, and other steps in the adoption process.
- Has the agency made full disclosure about the child's current and prospective needs?
- What, if any, services for such needs will continue after the adoption is finalized?

IF THE PLAN IS PERMANENT GUARDIANSHIP

- How is permanent guardianship rather than reunification or adoption in the best interests of the child?
- What is the relationship between the proposed permanent guardian and the child? Can the proposed permanent guardian provide the child with a safe, nurturing home?
- Is the child placed with the proposed permanent guardian? If not, what is the plan to place the child with the proposed permanent guardian?
- Has the agency disclosed to the proposed permanent guardian the child's current and prospective needs? What, if any, services for such needs will continue after the guardianship is finalized?
- Has the agency identified, and is it able to assist in securing, the resources the proposed permanent guardian will need to support the child through the age of majority, including:
 - Guardianship subsidy
 - Child support
 - Social Security
 - Food stamps

- Medicaid
- Determine the timeframe for completion of the permanent guardianship process.

IF THE PLAN IS PLACEMENT WITH A FIT AND WILLING RELATIVE

- How is placement with a fit and willing relative rather than reunification or adoption in the child's best interests?
- Has the agency fully informed the relatives about the benefits of adoption and/or permanent guardianship?
- What is the nature of the relationship between the relative and the child? Can the relative provide the child with a safe, nurturing home?
- Is the child placed with a relative? If not, what is the plan to place the child with a relative?
- What contact will occur between the child and parents, siblings, and other family members?
- Has the agency fully disclosed to the relative the child's current and prospective needs? How will the relative be able to meet those needs? What, if any, services for such needs continue after the permanency plan is finalized?
- Is the relative financially able to care for the child through the age of majority? Has the agency informed the relative about any aid or benefits that may be available to support the child?

IF THE PLAN IS ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT (APPLA)

- Has the agency documented a compelling reason for this plan? (42 U.S.C. § 675(5)(C))
- What is the child's position regarding APPLA as the permanent plan? How was the child consulted?
- How will this plan provide stability and permanency for the child?
- Does the child have any special needs? If so, will services for such needs continue after this plan is finalized?
- What is the identified, specific, permanent placement for the child? Is the child already placed in this home? If not, what is the plan for placement?
- What efforts has the agency made to identify, locate, and contact relatives or non-relatives who may be able and willing to care for the child on a permanent basis?

- How will connections and relationships important to the child be maintained through this permanency goal?
- If the child is placed in congregate care or an institutional setting, how is this least restrictive, most family-like, and consistent with the best interests and special needs of the child? What efforts have been made to provide additional services that would allow the child to reside in a more permanent, family-like environment? (42 U.S.C. § 675(5)(A))
- If the child is 14 years old or older, determine whether the agency is providing services needed to assist the child to make the transition from foster care to successful adulthood (P.L. 113-183 § 475(5)(I)).

Summary of key findings/orders

- If the child has been in foster care 15 of the past 22 months, has a termination of parental rights petition been filed? If not, is there a compelling reason not to file a TPR petition? (42 U.S.C. § 675(5)(E))
 - If the agency is required to file a termination of parental rights petition, but has not done so or has expressed an intention not to file, state whether:
 1. the child is placed with a relative;
 2. the agency has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
 3. if reasonable efforts are required, the agency has not provided to the family of the child, consistent with the time period in the case plan, such services as the agency deems necessary for the safe return of the child to the child's home.
- Has the agency made REASONABLE EFFORTS to finalize the permanency plan? (45 C.F.R. § 1356.21(b)(2))
 - The court's determination of the permanent plan for the child and why the plan is in the child's best interests. The order should state the steps to be taken and timelines for accomplishing the permanent goal.
 - If the permanent plan is reunification and the child is not yet returned to the parent(s), whether reunification is achievable within a reasonable amount of time taking into consideration the child's age and unique needs. Specify a date for reunification.
 - If the plan is termination of parental rights and a TPR petition has not been filed, the

order should state the expected timeframe for filing a TPR, which must be within 30 days. If the petition has been filed, the court should schedule pre-trials, mediation, and trial dates.

- If the plan is TPR, and a parent wishes to relinquish parental rights at the permanency hearing, the court should be prepared to accept the relinquishment and include the relinquishment in the order.
- If the permanency plan is adoption, permanent guardianship, placement with a fit and willing relative, or APPLA, and the child is not living with the proposed permanent family, did the agency provide documentation that includes child-specific recruitment efforts such as use of state, regional, and national adoption exchanges, including electronic exchange systems? (45 C.F.R. § 1356.21(g)(5))
- If the child is placed out of state, determine whether:
 - The placement continues to be appropriate and in the best interests of the child (42 U.S.C. § 675(5)(C));
 - The child has been visited every 12 months by a caseworker;
 - The required report has been submitted.
- If the child is 16 years old at the time of the review, determine whether the agency is providing services needed to assist the child to make the transition from foster care to independent living.

Whether the agency provided, and the court reviewed, the health and education records of the child, including the most recent information available regarding the names and addresses of the child's health and educational providers; the child's grade level performance; the child's school record.

- A record of the child's immunizations; the child's known medical problems; the child's medications; and any other relevant health and education information concerning the child determined to be appropriate by the agency.
- Orders necessary to address issues or concerns identified in the health and education records or during the court hearing.
- Order that parties engage in alternative dispute resolution, if applicable.

FINDINGS AND CONCLUSIONS

- Persons present and whether absent parties were provided with appropriate notice; verification that reports offered into evidence have been provided to all parties in advance of the hearing.
- A finding of the reasonable efforts made to reunify the family and a finalized permanency plan. A well-designed, appropriate case plan and meaningful case reviews should prevent unexpected findings of “no reasonable efforts” at this stage of a case. Should it be found that additional remedial steps are necessary, specific expectations should be set out in a detailed order, with a short timeframe (e.g., 30 days) for holding the follow-up permanency hearing. A copy of the order should be forwarded to the head of the agency.
- A statement addressing special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs, and who is responsible for providing the services.
- The court’s determination of the permanency plan for the child and why the plan is in the best interests of the child. The order should state the steps to be taken and timelines for accomplishing the permanent goal. If the plan is reunification, the date for reunification should be specified.
- If the plan is TPR and the petition has not yet been filed, the order should state expected timeframe for filing a TPR petition, which must be within 30 days. If the petition has been filed, the court should schedule pre-trials, mediation, and trial dates.
- If the plan is TPR, and a parent wishes to relinquish parental rights at the permanency hearing, the court should be prepared to accept the relinquishment and include the relinquishment in the order.
- For any plan, the next hearing date and purpose unless all court and agency involvement is terminated.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

POST-PERMANENCY REVIEWS

- If the court determines the goal should continue to be family reunification, the focus of post-permanency hearing reviews will continue to be on the appropriateness of services offered to the parents and their progress on eliminating safety risks.
- If goal is no longer reunification, the focus of post-permanency hearing reviews will be on the agency's efforts to finalize the concurrent plan as the new permanency plan.
- If reunification is not possible, the child well-being inquiry must go beyond basic questions of safety and physical health as the child welfare system is responsible for meeting the child's educational, emotional, and social needs, including preparing the child for transition to an adult as appropriate.

CONCLUDING THE PERMANENCY HEARING

Case Management – Prepare for the next hearing

- Make oral findings and orders that all participants can understand.
- Enter additional orders necessary to move the case toward permanency.
- Set review or permanency hearing and identify tasks to be accomplished.
 - Focus on permanency. State the number of months the child has been in care and how many months before the permanency hearing.
 - Identify an expected date for final reunification or achievement of another permanency plan for each child.
 - Set the date and time of the next hearing within state and federal timeframes. Review hearings should be set for at least 30 minutes.
- Identify persons whose presence is needed at the next hearing.
- Consider appropriateness of alternative dispute resolution process.
- Complete a detailed written order.
 - Ensure all orders are written, signed, copied, and distributed to all parties at the end of the hearing.

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- Advise parents of the importance of their active participation in all proceedings.
 - Advise parents of the rigorous timeframes for child abuse and neglect cases outlined in state and federal laws.
 - Advise parents of the consequences for failure to appear at future court hearings.
 - When calendaring the next hearing, all parties, including the parents, should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that parents and children have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set review and permanency hearings, and identify tasks to be accomplished.
- Make understandable findings and orders in court on the record.
- Engage parents and children.

The first review should be set within three to six months of the permanency hearing. The case must be reviewed no less frequently than every six months (42 U.S.C. § 675 (5)(B)).

PERMANENCY HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

² The *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

³ *Ibid.*

⁴ State law may require judicial approval of the permanency plan. See 65 Fed Reg 4053 (Jan. 25, 2000).

⁵ See Lund, T., & Renne, J. (2009). *Child safety: A guide for judges and attorneys*. Washington, DC: American Bar Association.

⁶ See section of General Issues Chapter covering children in court, pg. 72.

⁷ See section of General Issues Chapter covering concurrent planning case models, pg. 93.

⁸ See section of General Issues Chapter covering domestic violence considerations, pg. 57.

⁹ Judges may wish to re-visit the child well-being questions listed in the PPH Benchcard to supplement this inquiry.

¹⁰ See *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*, *supra* note 2.



Termination of Parental Rights Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the termination of parental rights (TPR) hearing'

- Judge or judicial officer
- Parents of each child whose rights have not been terminated
 - Mothers, fathers (legal, biological, alleged, putative, named), non-custodial parents – all possible parents
- Child
- Assigned caseworker
- Agency attorney and/or prosecuting attorney
- Attorney(s) for each parent
- Legal advocate for the child
- Guardian *ad Litem* (GAL); CASA
- The child's current placement (caregivers, foster parents, custodial adults, adoptive parents)
- All adult relatives of the child
 - Relatives (P.L. 110-351) with legal standing or other custodial adults, including adult half-siblings
 - Paternal and maternal relatives

ASFA states that when a child has been in foster care for 15 of the last 22 months, the agency "shall file or join a petition to terminate the parental rights of the child's parents" absent compelling reasons not to do so, the child is being cared for by a relative or the state has not made reasonable efforts to reunify (42 U.S.C. § 675(5)(E)).

In every case in which the agency does not file for the termination of parental rights after the child has been in care 15 of the last 22 months, the agency must document why not filing for the termination of parental rights is in the child's best interests (65 Fed. Reg. 4062, Jan. 25, 2000).

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- If ICWA applies: Indian custodian; the child's tribe and attorney; tribal representative/tribal liaison; ICWA-qualified expert witness
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Educational surrogate parent if appropriate
- Educational liaison/school representative
- Court-certified interpreters or court-certified language services
- Court reporter
- Court security

Among the persons whose presence may also be needed at the TPR hearing:

- Non-related extended family, fictive kin (persons known and trusted by the families; godparents)
- Parents of a sibling child, where such parent has legal custody of the sibling (P.L. 113-183)
- Cultural leaders, cultural liaison, religious leaders
- Adult or juvenile probation or parole officer
- Treatment and/or service providers
- Parent partners, parent mentors if assigned/available, substance abuse coach, DV advocate
- Education liaison/school representative/educational surrogate parent if appropriate
- Court-certified interpreters or court-certified language services

Review the relevant documents

- TPR petition
- In both instances of voluntary relinquishment and trial, prior to the court hearing the judge should review the court file which should provide:
 - reports, case plan, findings, orders, and a chronology of the child's out-of-home placements and treatment;
 - the age of the child and needs at removal;
 - a current report of the child's status and well-being;
 - circumstances leading to the filing of a termination of parental rights petition; and
 - an agency report of concurrent efforts to identify, recruit, and place the child with an adoptive family or other permanent placement.

Consider whether there are any related cases in juvenile or other courts

- Are there other family, delinquency, domestic violence, probate, guardianship, or criminal cases or orders of protection involved in this case?
 - What are the steps required for obtaining update/status?
- What is the impact on this hearing?
- Is there any impact on this hearing?
- Is there a potential for duplicative or conflicting orders?
- Can the judges consult?

CONDUCTING THE TERMINATION OF PARENTAL RIGHTS HEARING

Opening the Hearing

- Call the case.
- Identify the people in the courtroom and their connection to the case.
- Swear in the parties, participants, and relatives.
- Explain the type and purpose of the hearing.
- State the number of days the child has been in care and the number of placements to date.

Due Process Considerations

- NOTICE
 - Have the identity and location of all parents and/or guardians been determined?
 - If not, what diligent search efforts have been made? Are they sufficient?
 - Has paternity of all children been legally established? If so, how?
 - How were the parents and/or guardians notified of this hearing?
 - Was the notice in a language and form understandable to the parents and/or guardian?
 - If child, parents, legal custodians, caregivers, or relatives who requested notice are absent, confirm that they were properly noticed.
 - If parent is absent and has not been served, inquire about the diligent search.
 - Require a thorough description of efforts to locate and advise any absent parent of the hearing and confirm that a diligent search was begun. If needed, ask parents.
 - Have the foster parents, pre-adoptive parent, or relative providing care for the child been provided notice of, and an opportunity to be heard in, the hearing? (42 U.S.C. § 675(5)(G))
 - Has the agency exercised due diligence to identify and provide notice to all adult relatives of the

child's removal and their options to participate in the child's care and placement? (42 U.S.C. § 671(a)(29))

- Has the agency exercised due diligence to provide notice to all parents of a sibling child, where such parent has legal custody of that child? (P.L. 113-183 § 471(a)(29))
- If the child is eligible for membership in a federally recognized tribe, confirm that the tribe has been notified pursuant to ICWA.
- Do the provisions of the Americans with Disabilities Act, Service Members Civil Relief Act, UCCJA/UCCJEA, ICPC, or other federal laws apply to this case?

• REPRESENTATION

- Address any outstanding or new representation issues.
 - If the parents do not have representation, are they entitled to representation?
 - Determine if the right to counsel is understood.
 - Are there language issues to consider in appointing counsel?
 - If parents request counsel and claim to be indigent, have parents fill out an affidavit of indigency.
 - If parents are ineligible for the appointment of counsel or knowingly, intelligently, and voluntarily waive appointed counsel, ask if they want to proceed pro se or hire a private attorney. Explain pro se if necessary.
 - Has counsel had sufficient opportunity to consult with his/her client prior to the hearing?
 - Has counsel been appointed to represent the child? If not, appoint counsel to represent the best interests of the child if it has not yet been appointed.
 - Has counsel met with the child in person? Is counsel able to determine and advocate the child's position?
 - Should the court appoint a Guardian *ad litem* and/or CASA for the child?
 - If any counsel needs to be appointed, ensure that orders appointing counsel are expedited.

Engage parents, children, relatives, and foster parents present

- What language are you most comfortable speaking and reading?
- Do you understand what this hearing is about? (Explain purpose of hearing.)
- Do you understand the petition?
 - Do parents understand the consequences of termination, their right to a trial and to counsel, and the availability of less drastic legal alternatives?
 - If a plea is entered, determine whether it is entered knowingly, intelligently, and voluntarily.
- Was any alternative dispute resolution process used prior to the hearing? Who was involved in that process? What was the outcome?

KEY INQUIRIES, ANALYSES, AND DECISIONS AT THE TERMINATION OF PARENTAL RIGHTS HEARING

ICWA Inquiry and Determination

- Was the ICWA inquiry made by the agency? Whom did the agency ask?
 - Has an ICWA determination been made?
 - If yes, different standards apply; refer to the ICWA Checklist.²
 - If yes, determine whether **active efforts** were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and whether the active efforts were unsuccessful (25 U.S.C. § 1912(d)).
- *If ICWA applies, or the court has reason to believe ICWA applies, the court should refer to the ICWA Checklist.*

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

Take a moment before every hearing or before making decisions in a case to ask yourself:

- What assumptions have I made about the cultural identity, genders, and background of this family?
- What is my understanding of this family's unique culture and circumstances?
- How is my decision specific to this child and this family?
- How has the court's past contact and involvement with this family influenced (or might influence) my decision-making process and findings?
- What evidence has supported every conclusion I have drawn, and how have I challenged unsupported assumptions?
- Am I convinced that reasonable efforts (or active efforts in ICWA cases) have been made in an individualized way to match the needs of the family?
- Am I considering relatives as preferred placement options as long as they can protect the child and support the permanency plan?
- Have I placed the child in foster care as a last resort?
- Have I integrated the parents, children, and family members into the hearing process in a way that ensures they have had the opportunity to be heard, respected, and valued? Have I offered the family and children the chance to respond to each of the questions from their perspective?
- Is this family receiving the same level and tailoring of services as other families?
- Is the parents' uncooperative or negative behavior rationally related to the involvement of the agency and/or the court?
- If this were my child, would I be making the same decision? If not, why not?

- If yes, determine whether there is evidence **beyond a reasonable doubt**, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child** (25 U.S.C. § 1912(f)).

Questions that Must Be Answered to Determine Whether Grounds Exist for Termination of Parental Rights and Whether Termination and Adoption are in the Best Interests of the Child

WHEN AN AGREEMENT OR MEDIATION RESULTS IN VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS

At the hearing, the judge should take the time to make sure that each parent understands the consequences of termination and the right to a trial. Among the questions judges should ask are:

- Was the parental consent to relinquishment voluntary and informed?
- Have both biological parents consented to relinquishment?
- Why is relinquishment and adoption in the best interests of the child?
- Is there a recommendation for adoption with contact? How is this recommendation, or lack thereof, in the best interests of the child?

For **Indian children**, the court must comply with the requirements of ICWA (25 U.S.C. 1913), which states that voluntary relinquishments must be:

- executed in writing;
- recorded before a judge and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
- certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood;

- any consent given prior to or within 10 days after the birth of the child shall not be valid; and
- any parent or Indian custodian may withdraw consent for any reason at any time prior to the entry of a final decree of termination of parental rights (25 U.S.C. § 1913(c)).

WHEN THE CASE GOES TO TRIAL

Questions that must be answered when termination motions go to trial include:

- Were all parties properly identified and served?
- Does the evidence presented show that statutory grounds for termination of parental rights exist?
- Were reasonable efforts made to reunify?
- Is termination of parental rights in the best interests of the child?

Questions that Must Be Answered to Determine Whether Reasonable Efforts are Being Made Toward Adoption and to Finalize the Permanency Plan

IN ALL CASES, WHAT ARE THE CHILD'S SPECIAL NEEDS?

- Is current health and educational information available?
- Is a description of the child's current placement available?
- What services have been provided to the child, what progress has the child made, and what issues still need to be addressed, including cultural needs?
- Has the child received counseling with regard to termination of parental rights, and how is the child adjusting to the adoption plan?

IF THE PLAN IS RELATIVE OR FOSTER HOME ADOPTION

- What, if anything, remains to be done before the home is approved as the adoptive home? Can the adoption home study be waived and replaced with the kinship care or foster home study?
- Is there another person who spends significant time in the home involved with the family, and if so, has

that individual been interviewed for appropriateness?

- Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
- What is the timeframe for finalization?
- Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?

IF AN ADOPTIVE HOME HAS BEEN RECRUITED

- A detailed description of the family is needed. Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness? Have all relatives been explored?
- If the child is an Indian child, does the home meet the placement preferences in ICWA, and if not, why not? What efforts has the agency made to identify a placement under ICWA?
- Has there been full disclosure to the adoptive family of the child's circumstances and special needs?
- What remains to be done, if anything, to process and approve the home?
- What are the transition and placement plans and timeframe? If visits have begun, how are the child and the adoptive family adjusting?
- What efforts will be made to ensure that the child's cultural and ethnic heritage and relationships are preserved? Does the adoptive family understand the special aspects of the child's cultural and ethnic heritage?
- If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
- Have all appropriate subsidies been identified, and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of the state? Is the adoptive family aware of the details of the appropriate subsidy issues?

If the child is an Indian child, what efforts are being made to identify potential adoptive homes in the child's tribal community, and what efforts are being made by the agency to comply with the ICWA placement preferences? (25 U.S.C. 1915)

- After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adoptive family agreeable to any contact plan that may have been recommended with the biological parent(s) and relatives?

IF AN ADOPTIVE HOME MUST BE RECRUITED

- What efforts are being made to identify potential adoptive homes both locally and in other jurisdictions? On what adoption exchanges and Internet sites is the child listed? What other efforts are being made?
- What is the status of investigating adults with whom the child has or has had a positive relationship regarding their potential as adoptive families?
- How many potential families have expressed interest in the child, and what is the status of the investigation of each family?

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT THE TERMINATION OF PARENTAL RIGHTS HEARING

- Persons present and how notice was provided to absent parties, paying particular attention to any biological parent, tribal representative or Indian custodian not present.
- If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment were voluntary and informed.³
- How reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that based on family circumstances and child health and safety, all reasonable efforts were made.⁴
- If the case went to trial, whether or not termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case.⁵ For Indian children, findings must include the special requirements of ICWA.
- Why termination of parental rights and adoption is in the best interests of the child.

IN A SEPARATE ENTRY:

- What is being done to ensure that reasonable efforts are being made to find an adoptive home and to finalize the permanent placement, with specific steps and timeframes that are to occur?
- A description of any special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs and who is responsible for providing each service.
- The date and time of the next review hearing (set for within 90 days).

POST-TPR PERMANENCY REVIEWS

- Because the goal is no longer reunification, the focus is on the agency taking all steps necessary to finalize the new permanent plan.
- The child well-being inquiry must go beyond basic questions of safety and physical health as the child welfare system is responsible for meeting the child's educational, emotional, and social needs, including preparing the child for successful transition to an adult, if appropriate.

SETTING THE STAGE FOR SUBSEQUENT HEARINGS AND ACHIEVING POSITIVE OUTCOMES FOR CHILDREN AND FAMILIES

Effective Case Planning Moving Forward: The court should set clear expectations for parties and advocates regarding the information to be provided to the court at subsequent hearings by inquiring about:

Trauma:

- Has trauma played a role in the child's behavior?
- Is trauma being sufficiently considered in decisions about where the child is going to live and with whom?
- Is there reason to believe that the child is a victim of sex trafficking or at risk of becoming a sex trafficking victim? Is the placement able to support their needs and are appropriate services in place? (P.L. 113-183)

Child Well-Being:

- Has the court fully considered well-being issues including education, physical and dental health, and mental/emotional/developmental health?
- Does the placement facilitate a sense of "normalcy" by supporting the child's participation in developmentally appropriate activities and events? (P.L. 113-183)
- If the child has been missing from placement(s), why did the child leave? How will the agency address those factors in current/subsequent placements? What experiences did the child have while absent? Was the child exposed to traumatic events? How will the current/subsequent placements address any needs resulting from that trauma? (P.L. 113-183)

Refer to the Preliminary Protective Hearing Chapter in the GUIDELINES for more detail.

CONCLUDING THE TERMINATION OF PARENTAL RIGHTS HEARING

Case Management – Prepare for the next hearing

- Make oral findings and orders that all participants can understand.
- Enter additional orders necessary to move the case toward permanency.
- Set review or permanency hearing and identify tasks to be accomplished.
 - Focus on permanency. State the number of months the child has been in care and how many months before the permanency hearing.
 - Identify an expected date for final reunification or achievement of another permanency plan for each child.
 - Set the date and time of the next hearing within state and federal timeframes. Review hearings should be set for at least 30 minutes.
- Identify persons whose presence is needed at the next hearing.
- Consider appropriateness of alternative dispute resolution process.
- Engage parents, children, relatives, and foster parents (see sample questions below).
- Complete a detailed written order.
 - Ensure all orders are written, signed, copied, and distributed to all parties at the end of the hearing.

PREPARE FOR THE NEXT HEARING

- Focus on permanency and mandatory timeframes.
- Set further reviews and permanency hearings and identify tasks to be accomplished.
- Make understandable findings and orders on the record.
- Engage parents, children, and other participants.

Engage parents, children, and family members

- Specifically ask parents and children if they understand what occurred at the hearing, and engage them in a conversation about next steps.
 - Can you tell me what happened here today?
 - Can you tell me what the next steps are?
- When calendaring the next hearing, all parties should be asked if the scheduling works for them, and if not, ask for a better time.
- Ensure that all remaining parties have contact information for caseworkers and attorneys and that they understand the process to request court review if necessary.
- Ask if there are any questions for the court.

If the court determines that a child has been abandoned or that reasonable efforts to return the child home are not required, a permanency hearing must be held within 30 days (42 U.S.C. § 671(a)(15)(E); 45 C.F.R. § 1356.21(h)(2)), and the agency must file a petition to terminate parental rights within 60 days, absent compelling reasons not to file (45 C.F.R. § 1356.21(i)(ii), and (iii)).

TERMINATION OF PARENTAL RIGHTS HEARING BENCHCARD ENDNOTES

¹ State and federal laws determine who must be present for any hearing to proceed. Noted participants may or may not be required by law; however, as many as possible should be encouraged to attend the initial hearing.

² *The Indian Child Welfare Act Checklists for Juvenile and Family Court Judges* are available from the National Council of Juvenile and Family Court Judges at www.ncjfcj.org.

³ For Indian children, this must include the special requirements of ICWA previously described in this Chapter.

⁴ *Ibid.*

⁵ *Ibid.*