

# ADVISEMENT OF RIGHTS

*Bench Card*

## PURPOSE

To advise the parent(s), guardian or other custodian:

1. that a Child Protective Act petition concerning a child(ren) in their custody or control has been filed with the court, and has been scheduled for a shelter care hearing;
2. that the purpose of the shelter care hearing is to determine whether the child(ren) will be placed in or remain in shelter care pending the adjudicatory hearing;<sup>1</sup> and
3. of their rights and the possible consequences of failing to appear at Child Protective Act hearings.

## WHEN

At the shelter care hearing.

## ADVISEMENT:

### Purpose and Scope of the Shelter Care Hearing

The court shall advise the parents(s), guardian, or other custodian that the purpose and scope of the shelter care hearing is to determine whether there is reasonable cause to believe that the child(ren) is neglected, abused, abandoned, homeless, or lacks a stable home environment.<sup>2</sup> If the court determines there is reasonable cause, the child(ren) may be returned home with a protective order safeguarding the child's welfare or may be placed in or remain in foster care pending the adjudicatory hearing.<sup>3</sup> If the court decides there is not reasonable cause, the petition will be dismissed and the child(ren) will be returned home to the parent, guardian or other legal custodian.<sup>4</sup>

### Rights of the Custodial Party

The court shall advise the parent(s), guardian, or other custodian that they have the following rights at every hearing in a Child Protective Act case:

**Right to Counsel.** You have the right to be represented by an attorney. If you are financially unable to hire an attorney, you have the right to be represented by a court-appointed attorney.<sup>5</sup>

**Knowledge of the Allegations.** The allegations claiming to bring the child(ren) within the jurisdiction of the Child Protective Act are found in the petition. You are entitled to a copy of the petition, and to be advised of the allegations contained in the petition.<sup>6</sup>

**Evidentiary Rights.** At hearings in your case, you have the right to present evidence and cross-examine witnesses on relevant issues, including whether the child(ren) should return home with or without conditions, or whether the child(ren) should be placed in the care of the Department or other authorized agency.<sup>7</sup>

**Right to Appeal.** You have the right to appeal the adjudicatory order, any order after the adjudicatory order that vests custody of the child in the Department, any order that authorizes the Department to cease making reasonable efforts to make it possible for the child to return home, or an order of dismissal.<sup>8</sup>

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**Indian Child Welfare Act.** If your unmarried child under the age of 18 is a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe, the Indian Child Welfare Act is applicable to your case. The court, the Department, and the prosecuting attorney must follow certain additional standards.<sup>9</sup> Please provide the court and your caseworker with any information about possible tribal membership regarding your child, yourself, the child's other parent, or any custodian of the child.

## POSSIBLE CONSEQUENCES OF THE PROCEEDINGS

The court shall advise the parent(s), guardian, or other custodian that the Child Protective Act proceedings could result in the following:

1. If you fail to appear at the shelter care hearing, the court could:
  - a) find that the petition has been proved<sup>10</sup>
  - b) issue an order adjudicating that the child(ren) is/are in need of protection or services<sup>11</sup>
2. If you fail to appear at a scheduled hearing in your case the court:
  - a) may proceed without your presence and you may forfeit your rights<sup>12</sup>
  - b) could issue an order transferring permanent legal or physical custody of your child(ren) to another<sup>13</sup>
  - c) could find grounds for contempt. Each count of contempt is punishable by up to five (5) days in jail and/or a \$5,000 fine.<sup>14</sup>
3. The State may file a petition with the court to terminate your parental rights. If a child has been in the custody of the Department for fifteen (15) of the most recent twenty-two (22) months, the Department shall file a petition for termination of parental rights unless the court finds that:
  - a) the child is placed permanently with a relative,
  - b) there are compelling reasons why termination is not in the best interests of the child, or
  - c) the Department has failed to provide reasonable efforts to reunify the child with his family.

## ENDNOTES

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<sup>1</sup> I.J.R. 39(a), (g).

<sup>2</sup> I.C. § 16-1603(1)

<sup>3</sup> I.C. § 16-1615(4)(e) and (8).

<sup>4</sup> I.C. § 16-1615(9).

<sup>5</sup> I.C. § 16-1613(1); I.J.R. 37(d) and (e); I.J.R. 39(g).

<sup>6</sup> I.J.R. 39(g).

<sup>7</sup> *Id.*

<sup>8</sup> I.C. §§ 16-1625, 16-1613(1)

<sup>9</sup> 25 U.S.C. § 1901-1921.

<sup>10</sup> I.J.R. 39(g).

<sup>11</sup> *Id.*

<sup>12</sup> I.J.R. 33(b).

<sup>13</sup> I.J.R. 39(g).

<sup>14</sup> I.C. §§ 1-1901, 1-1902.

# SHELTER CARE HEARING

## Bench Card

### PURPOSE

To determine:

1. If there is *reasonable cause* to believe that the child(ren) comes within the jurisdiction of the Child Protective Act; and,
2. If so, whether it is in the child's best interest to remain in her/his home or to remain in temporary shelter care pending the conclusion of the adjudicatory hearing.<sup>1</sup>

### WHEN

1. Within 48 hours of the child(ren) being removed or within 24 hours of an alleged offender being removed, excluding Saturdays, Sundays, and holidays.<sup>2</sup>
2. Continuances<sup>3</sup>
  - a. *Request by child's custodian.* The shelter care hearing may be continued for a reasonable time by the request of a parent(s), guardian, or custodian of the child.
  - b. *Request by other parties.* The court may also grant a reasonable continuance to all other parties or participants upon good cause shown.
  - c. *Findings of the court.* If the hearing is continued and if there is a waiver of the statutory time limits for setting the shelter-care hearing, the court must find that it is contrary to the welfare of the child to remain in the home.

### WHO MAY BE PRESENT

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>4</sup>
2. The child may be excluded from hearings at any time in the discretion of the court. A counselor, friend, or other person may be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>5</sup>

### ADVISEMENT OF RIGHTS AND APPOINTMENT OF COUNSEL

1. Advise parent(s) of their rights and appoint counsel where appropriate.<sup>6</sup> (*See Advisement of Rights Bench Card*)
2. Best practice: Appoint counsel for the child or a Guardian *ad Litem* represented by counsel.<sup>7</sup>

### EVIDENCE

1. The Rules of Evidence do not apply.<sup>8</sup>
2. The evidentiary standard is reasonable cause. The court may consider "any evidence which is of the type which reasonable people may rely upon."<sup>9</sup>
3. The only privileges in effect at the shelter care hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental, or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>10</sup>

### MAKING THE RECORD

1. The hearing, in its entirety, must be on the record.<sup>11</sup>
2. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interests of the child.<sup>12</sup>

# Shelter Care Hearing Bench Card

## FINDINGS (CASE SPECIFIC)

1. The proceedings were properly initiated by: a) a CPA petition, or b) a Rule 16 expansion, or c) an Order of Removal/Endorsement on Summons.<sup>13</sup>
2. Reasonable cause to believe the child comes within the jurisdiction of the CPA:
  - a. The child lives in or is found within the state of Idaho;<sup>14</sup> and
  - b. The child is abandoned, abused, neglected, homeless, or lacks a stable home environment, or the court has jurisdiction over another child living or having custodial visitation in the same household and this child has been exposed to or is at risk of being a victim of abuse, neglect, or abandonment;<sup>15</sup> and
  - c. The child could not be placed in the temporary sole custody of a parent having joint physical or legal custody,<sup>16</sup> and

### **IV-E FINDINGS:**

- a. The Department made reasonable efforts to eliminate the need for shelter care but was not successful; or
  - b. The Department made reasonable efforts to eliminate the need for shelter care but was not able to safely provide preventative services;<sup>17</sup> and
  - c. It is contrary to the welfare of the child to remain in the home;<sup>18</sup> and
  - d. It is in the child's best interests to remain in temporary shelter care.<sup>19</sup>
3. Child does/does not come within the jurisdiction of the Indian Child Welfare Act (ICWA). (If YES, findings under ICWA must be made. **(See the ICWA Bench Card)**<sup>20</sup>
4. Reasonable efforts to prevent placement outside the home could be affected by protective order. If a protective order is entered, additional findings may be required.<sup>21</sup>
5. Further efforts to reunify may be temporarily suspended if:
  - a. A termination of parental rights (TPR) petition has been filed regarding the child; or
  - b. There is reason to believe the child has been subjected to aggravated circumstances; or
  - c. The parental rights to a child's sibling have been involuntarily terminated.<sup>22</sup>

## QUESTIONS THE COURT MUST ASK

### *ICWA (See the ICWA Bench Card)*

The court must ask on the record if there is reason to know that the child is an Indian child.<sup>23</sup> If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child's status, the court must treat the child as an Indian child.<sup>24</sup>

### *Sibling Placement*

If a group of siblings was removed from the home but was not placed together, the court must ask about:

1) the Department's efforts to place the siblings together, 2) the reasons the siblings were not placed together, and, 3) the Department's plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>25</sup>

### *Educational Stability*

The court must ask about the Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interest.<sup>26</sup>

## POSSIBLE OUTCOMES

1. Proceed to Adjudicatory hearing.
  - a. There is reasonable cause to believe the child comes within the jurisdiction of the court, and it is in the best interests of the child to be placed in temporary shelter care (see findings above). If so, the case proceeds to adjudicatory hearing.<sup>27</sup>
  - b. There is reasonable cause to believe that the child comes within the jurisdiction of the court, but it is not in the best interest of the child to be placed in temporary shelter care.<sup>28</sup> If there was an emergency removal of the child, the child is released.<sup>29</sup>
  - c. There is reasonable cause to believe that the child comes within the jurisdiction of the court, but a reasonable effort to prevent placement of the child outside the home could be affected by a protective order safeguarding the child's welfare.<sup>30</sup> The court may issue a protective order in addition to, or instead of, placing the child in temporary shelter care.<sup>31</sup>
2. Dismiss the petition.

There is not reasonable cause to believe that the child comes within the jurisdiction of the court and the court shall dismiss the petition.<sup>32</sup>

## ORDER

1. Direct the Department and Guardian *ad litem* to investigate and file written reports for the adjudicatory hearing.<sup>33</sup>
2. Direct the Department to make reasonable efforts to contact extended family prior to adjudicatory hearing.<sup>34</sup>
3. Best practice: Direct the Department to identify unknown parents, locate missing parents, and provide notice to them, and/or utilize paternity tests to establish biological parentage.
4. Schedule next hearing:
  - a. Pretrial: 3 to 5 days before Adjudicatory.<sup>35</sup>
  - b. Adjudicatory: Within 30 days after filing the petition.<sup>36</sup>

## ADDITIONAL QUESTIONS

1. What are the specific safety issues that caused the child to be removed from the home and what is preventing the child from returning home today?
2. **Is the Department fully exploring placement options with a fit and willing relative:**
  - a. **Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?**
  - b. **Who has been contacted?**
  - c. **Are there placement options?**<sup>37</sup>
3. Does the current placement support the child's cultural identity?
4. Parents:
  - a. Do you understand what happened here today?
  - b. Do you understand what the next steps are?
  - c. Do you have any questions for the court?
5. Department and Guardian *ad Litem*:
  - a. Do you understand what is required of the Department and/or Guardian *ad Litem* prior to the adjudicatory?
  - b. Do you have any questions for the court?

## ENDNOTES

- <sup>1</sup> I.C. § 16-1603, § 16-1615(5); I.J.R. 39(a) and (i).
- <sup>2</sup> I.C. § 16-1608(2) and (3); I.J.R. 39(c) and (d).
- <sup>3</sup> I.C. § 16-1615(4); IJR 39(f).
- <sup>4</sup> I.C. § 16-1613(1); I.J.R. 39(h), I.J.R. 52(a).
- <sup>5</sup> I.C. § 16-1613(1) and (2).
- <sup>6</sup> I.C. § 16-1611(3); I.J.R. 39(g), I.J.R. 37(d).
- <sup>7</sup> I.C. § 16-1614; I.J.R. 39(g).
- <sup>8</sup> I.R.E. 101(e)(6), I.J.R. 39(e), I.J.R. 51(b).
- <sup>9</sup> I.C. § 16-1615(5); I.J.R. 39(e) and (i)(2), I.J.R. 51(b).
- <sup>10</sup> I.R.E. 502, I.R.E. 505; I.J.R. 39(e). *See also* I.R.E. 504(d)(1) Husband/wife privilege; b) I.R.E. 503(d)(4) Physicians and psychotherapists; c) I.R.E. 516(d)(3) School counselors; d) I.R.E. 517(d)(3) Licensed counselors; and e) I.R.E. 518(d)(5) Licensed social workers.
- <sup>11</sup> I.J.R. 39(h).
- <sup>12</sup> I.J.R. 38.
- <sup>13</sup> I.C. § 16-1610(1), § 16-1611(4), § 16-1615(5)(a); I.J.R. 16.
- <sup>14</sup> I.C. § 16-1603(1), § 16-1615(5)(b); I.J.R. 39(i)(2).
- <sup>15</sup> I.C. § 16-1603(1) and (2), § 16-16(5)(b); I.J.R. 39(i)(2).
- <sup>16</sup> I.C. § 16-1615(5)(c); I.J.R. 39(i)(4).
- <sup>17</sup> I.C. § 16-1615(5)(b); I.J.R. 39(i)(3).
- <sup>18</sup> I.C. § 16-1615(5)(d); I.J.R. 39(i)(5).
- <sup>19</sup> I.C. § 16-1615(5)(e); I.J.R. 39(i)(6).
- <sup>20</sup> 25 U.S.C. § 1903(4).
- <sup>21</sup> I.C. § 16-1615(8); I.J.R. 39(j).
- <sup>22</sup> I.J.R. 39(m).
- <sup>23</sup> I.C. § 16-1615(6).
- <sup>24</sup> 25 C.F.R. §23.107(2).
- <sup>25</sup> I.C. § 16-1615(7)(b); 42 U.S.C. § 671(a)(31).
- <sup>26</sup> I.C. § 16-1615(7)(a); 42 U.S.C. § 675(1)(G).
- <sup>27</sup> I.C. § 16-1615(6).
- <sup>28</sup> *Id.*
- <sup>29</sup> I.C. § 16-1615(9).
- <sup>30</sup> I.C. § 16-1615(8).
- <sup>31</sup> I.J.R. 39(j).
- <sup>32</sup> I.C. § 16-1615(10).
- <sup>33</sup> I.C. § 16-1616, § 16-1633(2).
- <sup>34</sup> 42 U.S.C. §671(a)(29).
- <sup>35</sup> I.C. § 16-1619(2).
- <sup>36</sup> I.C. § 16-1615(6).
- <sup>37</sup> I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).

# ADJUDICATORY HEARING

## *Bench Card*

### **PURPOSE**

- Part I. Adjudication: To determine whether the child is within jurisdiction of the court under the Child Protective Act (CPA).<sup>1</sup>
- Part II. Aggravated Circumstances: When appropriate, to determine if a parent has subjected the child to aggravated circumstances.<sup>2</sup> If found: (1) the Department does not have to make reasonable efforts to prevent the placement of the child in foster care;<sup>3</sup> and, (2) the Department is not required to make reasonable efforts to reunify the child with the child's parent.<sup>4</sup>
- Part III. Disposition: If jurisdiction is found, to determine if the child should be placed in the custody of the Department (or other authorized agency), or in the child's own home under the protective supervision of the Department.<sup>5</sup>

### **WHEN**

1. No later than 30 days after filing of the petition.<sup>6</sup>
2. Continuances:
  - a. The hearing may not be continued more than 60 days from the date of removal, unless the court has made the "reasonable efforts to prevent removal" finding.<sup>7</sup>
  - b. Best practice recommendations are to: 1) make findings regarding contrary-to-the-welfare, best interests, and reasonable efforts to prevent the placement of the child in foster care and, 2) obtain from the parties a waiver of the statutory time limits for the adjudicatory hearing.

### **WHO MAY BE PRESENT**

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>8</sup>
2. The child may be excluded from hearings at any time in the discretion of the court. A counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>9</sup>

### **PART I: ADJUDICATION**

#### *ICWA (See the ICWA Bench Card)*

If there is reason to know the child is an Indian child, and there has been no final determination of the child's status as an Indian child, the court shall inquire about:<sup>10</sup>

1. The efforts made to determine whether the child is an Indian child.
2. The Department's efforts to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership.

If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child's status, the court must treat the child as an Indian child.<sup>11</sup>

#### *Evidence:*<sup>12</sup>

1. The Rules of Evidence apply.
2. The evidentiary standard is preponderance of the evidence.
3. The court cannot consider the Department/guardian *ad litem* investigatory reports.
4. The only privileges in effect at the adjudicatory hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>13</sup>



# Adjudicatory Hearing Bench Card

## *Making the Record:*<sup>14</sup>

Stipulations must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.

## *Findings:*<sup>15</sup> *(Must be written and case-specific)*

1. Child comes within the jurisdiction of the CPA:
  - a. The child lives or was found in Idaho; and
  - b. The child is abused, abandoned, neglected, or has an unstable home environment; or, the child is living or having custodial visitation in the same household as a child already under the jurisdiction of the court and is exposed to or at risk of being a victim of abuse, neglect, or abandonment.
2. Facts and conclusions of law upon which court exercises jurisdiction must be in the record.
3. Written, case-specific findings regarding contrary-to-welfare, best interest, and reasonable efforts to prevent the placement of a child in foster care.
4. If the child does not come under the jurisdiction of the CPA, the case is dismissed.<sup>16</sup>

## **PART II: AGGRAVATED CIRCUMSTANCES**

### *Evidence:*<sup>17</sup>

1. The Rules of Evidence apply.
2. The Department/guardian *ad litem* reports may be admitted into evidence at the adjudicatory hearing for purposes other than determining whether the child comes under the jurisdiction of the CPA. However, the reports must be admitted under the rules of evidence to be considered in determining the presence of aggravated circumstance.

## *Making the Record:*<sup>18</sup>

Stipulations must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.

## *Findings:* *(Must be written and case specific)*

1. Parent(s) subjected the child to aggravated circumstances as defined in Idaho Code § 16-1602(6).<sup>19</sup>
2. The Department is not required to make reasonable efforts to prevent placement of the child in foster care or to reunify the child with his/her family.<sup>20</sup>

## **PART III: DISPOSITION**

### *Evidence:*<sup>21</sup>

1. The Rules of Evidence do not apply.
2. The court may consider any information relevant to disposition, including Department/guardian *ad litem* reports.

## *Making the Record:*<sup>22</sup>

Stipulations must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.

## *Findings:* *(Must be written and case specific)*<sup>23</sup>

1. Continued residence in the home is contrary to the welfare of the child; and
2. Vesting custody with the Department is in the best interest of the child; and
3. The Department made reasonable efforts to prevent the placement of the child into foster care:
  - a. but was not successful in eliminating the need for foster care placement; OR,
  - b. but was not able to safely provide preventative services; OR,



## Adjudicatory Hearing Bench Card

- c. but efforts to temporarily place the child with related persons were not successful; OR,
- d. reasonable efforts were not required because the parent subjected the child to aggravated circumstances.

### *Questions the court must ask:*<sup>24</sup>

If the court vests legal custody of the child in the Department or other authorized agency, the court must ask about these issues:

1. Educational stability:<sup>25</sup>  
The Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interest.
2. Sibling placement:<sup>26</sup>  
If a group of siblings was removed from the home but was not placed together, 1) the Department's efforts to place the siblings together, 2) the reasons the siblings were not placed together, and 3) about the Department's plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.
3. Psychotropic medications:<sup>27</sup>  
If the child is placed in the Department's custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.

### **EFFORTS TO REUNIFY MAY BE SUSPENDED IF:**

1. A petition to terminate parental rights has been filed with regard to the child; OR,
2. A petition or motion has been filed in a CPA case seeking a determination of aggravated circumstances; OR,
3. The permanency plan and permanency goal approved does not include reunification.<sup>28</sup>

### **CONTESTED MATTERS**

Motions contesting matters relating to the placement of the child by the Department are governed by Idaho Juvenile Rule 43.

### **ADJUDICATORY ORDERS**

1. A protective order may be issued if:
  - a. It is in the best interest of the child;
  - b. There is continued danger to the child.<sup>29</sup>
2. Scheduling Orders:
  - a. If aggravated circumstances exist, permanency hearing must be held within thirty (30) days.<sup>30</sup> Order the Department to prepare a permanency plan.<sup>31</sup>
  - b. In other cases, a case plan hearing within 30 days after the adjudicatory hearing.<sup>32</sup> Order the Department to prepare a case plan, which must be filed with the court thirty (30) days after the adjudicatory hearing, or no later than sixty (60) days after the child was removed from the home, whichever occurs first.<sup>33</sup>

### **ADDITIONAL QUESTIONS**

1. What are the specific safety issues that caused the child to be removed from the home, and what is preventing the child from returning home today?
2. What are the results of the Department's inquiry into the status of the child as an Indian child?
3. **Is the Department fully exploring placement options with a fit and willing relative:**
  - a. **Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin?)**
  - b. **Who has been contacted?**
  - c. **Are there placement options?**<sup>34</sup>

4. Has the child been moved since the shelter care hearing? If so:
  - a. Why?
  - b. What further efforts are needed to ensure the child's placement stability?
  - c. Does the new placement support the child's cultural identity?
5. Parents:
  - a. Do you understand what happened here today?
  - b. Do you understand what the next steps are?
  - c. Do you have any questions for the court?
6. Department and guardian *ad litem*:
  - a. Do you understand what is required of the Department and/or guardian *ad litem* prior to the case plan hearing?
  - b. Do you have any questions for the court?

## ENDNOTES

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- <sup>1</sup> I.C. § 16-1602(4)(a), § 16-1603, § 16-1619(4); I.J.R. 41(a).
  - <sup>2</sup> I.C. § 16-1602(6), § 16-1619(6)(d); I.J.R. 41(a).
  - <sup>3</sup> I.C. § 16-1619(6)(d), I.J.R. 41(e).
  - <sup>4</sup> I.C. § 16-1620(2); I.J.R. 41(i).
  - <sup>5</sup> I.C. § 16-1602(4)(b), § 16-1619(5); I.J.R. 41(a).
  - <sup>6</sup> I.C. § 16-1619(1).
  - <sup>7</sup> I.J.R. 41(b).
  - <sup>8</sup> I.C. § 16-1613(1); I.J.R. 52(a).
  - <sup>9</sup> I.C. § 16-1613(1) and (2); I.J.R. 52(a).
  - <sup>10</sup> I.C. § 16-1619(7)(a).
  - <sup>11</sup> 25 C.F.R. § 23.107(2).
  - <sup>12</sup> I.C. § 16-1616(3), § 16-1619(4), and § 16-1633(2); I.R.E. 101(e)(6); I.J.R. 41(c) and 51(b).
  - <sup>13</sup> I.R.E. 502 and I.R.E. 505. *See also* I.R.E. 504(d)(1), I.R.E. 503(d)(4), I.R.E. 516(d)(3), I.R.E. 517(d)(3), I.R.E. 518(d)(5).
  - <sup>14</sup> I.J.R. 38.
  - <sup>15</sup> I.C. § 16-1603, § 16-1619(4) and (6); I.J.R. 41(d) and (f).
  - <sup>16</sup> I.C. § 16-1619(11).
  - <sup>17</sup> I.C. § 16-1616(3), § 16-1633(2); I.R.E. 101(e)(6); I.J.R. 41(c), I.J.R. 51(b).
  - <sup>18</sup> I.J.R. 38.
  - <sup>19</sup> I.C. § 16-1602(6), § 16-1619(6)(d).
  - <sup>20</sup> I.C. § 16-1620(2); I.J.R. 41(i).
  - <sup>21</sup> I.R.E. 101(e)(6). *See also* I.C. § 16-1616(2) and (3), § 16-1633(2); I.J.R. 41(c), I.J.R. 51(b).
  - <sup>22</sup> I.J.R. 38.
  - <sup>23</sup> I.C. § 16-1619(6); I.J.R. 41(e),(f).
  - <sup>24</sup> I.C. § 16-1619(7)(b) and (c).
  - <sup>25</sup> I.C. § 16-1619(7)(b)(i); 42 U.S.C. § 675(1)(G).
  - <sup>26</sup> I.C. § 16-1619(7)(b)(ii); 42 U.S.C. § 671(a)(31).
  - <sup>27</sup> I.C. § 16-1619(7)(c).
  - <sup>28</sup> I.C. § 16-1619(6)(d), § 16-1620(8); I.J.R. 41(i).
  - <sup>29</sup> I.C. § 16-1602(34), § 16-1619(10).
  - <sup>30</sup> I.C. § 16-1619(6)(d), § 16-1620(1).
  - <sup>31</sup> I.C. § 16-1620(1); I.J.R. 41(i).
  - <sup>32</sup> I.C. § 16-1621(1); I.J.R. 41(g), (h).
  - <sup>33</sup> I.C. § 16-1621(1); 45 C.F.R. § 1356.21(g)(2).
  - <sup>34</sup> I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).

# AGGRAVATED CIRCUMSTANCES DETERMINATION

*(NOT TO BE USED IN AN ICWA CASE)*

*Bench Card*

## **PURPOSE**

To determine whether the parent(s) subjected the child to aggravated circumstances, and if so, that reasonable efforts to prevent placement of the child in foster care and to reunify are not required.<sup>1</sup>

## **WHEN**

At the adjudicatory hearing or at any time in the case upon motion and notice.<sup>2</sup>

## **WHO MAY BE PRESENT**

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>3</sup>
2. If the State raises the aggravated circumstances issue subsequent to the adjudicatory hearing, the Department shall provide notice of the hearing to: 1) the foster parents; 2) pre-adoptive parents; 3) a relative who is providing care to a child who is in the custody of the Department; and 4) children aged eight (8) and older. The Department shall confirm to the court that this notice was given.<sup>4</sup>
3. If the aggravated circumstances issue is raised subsequent to the adjudicatory hearing, a child eight (8) or older and the foster parents have the right to be heard.<sup>5</sup> The child may be excluded from hearings at any time in the discretion of the court. If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>6</sup>

## **EVIDENCE**

The Rules of Evidence apply.<sup>7</sup>

## **STIPULATIONS**

Stipulations must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.<sup>8</sup>

## **FINDINGS (WRITTEN AND CASE SPECIFIC)**

1. Parent(s) subjected the child to aggravated circumstances as defined in the CPA.
2. The Department is not required to make reasonable efforts to prevent removal or to reunify the child(ren) with his/her parents.<sup>9</sup>
3. If the State raises the issue after the adjudicatory hearing, that the Department confirmed notice was provided to the individuals identified above in "Who May Be Present" - #2.<sup>10</sup>

# AGGRAVATED CIRCUMSTANCES DETERMINATION

*(NOT TO BE USED IN AN ICWA CASE)*

*Bench Card*

## ORDER

1. Order the Department to prepare a written permanency plan that includes the information set forth in Idaho Code § 16-1620 and Idaho Juvenile Rule 44(b).
2. Schedule a permanency hearing within thirty (30) days of the determination of aggravated circumstances.<sup>11</sup>
3. Order the Department either to file the petition to terminate parental rights no later than thirty (30) days from the date of the aggravated circumstance finding or file a motion requesting the court find compelling reasons why termination of parental rights would not be in the best interest of the child.<sup>12</sup>

## ENDNOTES

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<sup>1</sup> I.C. § 16-1602(6); § 16-1619(6)(d); § 16-1620; I.J.R. 41(a) and (i), I.J.R. 44(b).

<sup>2</sup> I.C. § 16-1619(6)(d); I.J.R. 41(a).

<sup>3</sup> I.C. § 16-1613(1); IJR 52(a).

<sup>4</sup> I.C. § 16-1620(2); I.J.R. 40(a), I.J.R. 41(a).

<sup>5</sup> I.J.R. 40 (b), I.J.R. 41(a).

<sup>6</sup> I.C. § 16-1613(2).

<sup>7</sup> I.R.E. 101(e)(6); I.J.R. 51(b).

<sup>8</sup> I.J.R. 38.

<sup>9</sup> I.C. § 16-1602(6); § 16-1619(6)(d); § 16-1620(1) and (2).

<sup>10</sup> I.J.R. 40(a) and (b).

<sup>11</sup> I.C. § 16-1619(6)(d); § 16-1620.

<sup>12</sup> I.C. § 16-1620(1); § 16-1624(2) and (3).

# PERMANENCY HEARING

(AGGRAVATED CIRCUMSTANCES)

*Bench Card*

## PURPOSE

1. Review, approve, reject, or modify the permanency goal/plan of termination of parental rights, adoption, placement with a legal guardian, or another planned permanent living arrangement (APPLA.)<sup>1</sup>
2. If this is the second or later permanency hearing, a review of the Department's past efforts to finalize the permanency plan in effect.<sup>2</sup>

## WHEN

1. Within thirty (30) days of the determination that the parent(s) subjected the child to aggravated circumstances.<sup>3</sup>
2. Every 12 months thereafter as long as the court has jurisdiction.<sup>4</sup>
  - a) To ensure the child's continuing eligibility for federal IV-E funding, the first annual permanency hearing should be scheduled for a date within 12 months from the date the child was removed or the date of the court's order finding jurisdiction, whichever comes first.<sup>5</sup>
  - b) If not timely held, an otherwise eligible child will lose federal IV-E match funds on the last day of the month in which the finding of "reasonable efforts to finalize permanency" should have been made. IV-E funding will be resumed on the first day of the month in which the required "reasonable efforts to finalize permanency" finding is made.<sup>6</sup>
3. For a youth in the custody of the Department, within 90 days prior to the youth's 18<sup>th</sup> birthday.<sup>7</sup>
4. The permanency hearing may be combined with a review hearing.<sup>8</sup> (Clerks must result both hearings.)
5. The Department must file and serve the permanency plan at least five (5) days prior to the hearing.<sup>9</sup>

## WHO MAY BE PRESENT

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>10</sup>
2. The Department must provide notice of the permanency hearing to:
  - a) the foster parents
  - b) pre-adoptive parents
  - c) a relative who is providing care to a child who is in the custody of the Department, and
  - d) children aged eight and older.The Department must confirm to the court that this notice was given.<sup>11</sup>
3. A child 8 or older has the right to be heard, either in person or in writing.<sup>12</sup> The Department must confirm to the court that notice was given.<sup>13</sup> The child may be excluded from hearings at any time in the discretion of the court. If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>14</sup>
4. Youth age 12 and older are required to attend permanency hearings in person or telephonically, unless the youth declines in writing prior to the hearing, declines through counsel, or the court finds good cause to excuse the youth from attending the hearing.<sup>15</sup>

# Permanency Hearing w/ AC Bench Card

## EVIDENCE

1. The Rules of Evidence do not apply.<sup>16</sup>
2. The foster parent, the pre-adoptive parent and/or the relative who is providing care to a child who is in the custody of the Department, and a child (age eight or older) each have the right to be heard at the permanency hearing.<sup>17</sup>
3. Privileges in effect at the permanency hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>18</sup>

## STIPULATIONS

Must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.<sup>19</sup>

## CONTENTS OF THE PERMANENCY PLAN

The permanency plan must include:

### *ICWA (See the ICWA Bench Card)*

If there is reason to know the child is an Indian child, and there has been no final determination of the child's status as an Indian child:<sup>20</sup>

1. The efforts made to determine whether the child is an Indian child.
2. The Department's efforts to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership.

### *Placement*

1. The current foster care placement for the child.<sup>21</sup>
2. The prospective, adoptive parents, if known.<sup>22</sup> (NOTE: In an adoption proceeding, if the person proposing to adopt the child is not the proposed adoptive parent named in the permanency plan, then the adoption judge must stay the adoption until the permanency plan is amended by the court in the child protection case.<sup>23</sup>)
3. If a group of siblings was removed from the home but was not placed together, the Department must document:
  - a) the efforts to place the siblings together
  - b) the reasons the siblings were not placed together, and
  - c) the plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the well-being of one or more siblings.<sup>24</sup>

### *Services to the child*

1. Services to identify and meet any educational, emotional, physical, or developmental needs the child may have, and to assist the child in adjusting to the placement or to ensure the stability of the placement.<sup>25</sup>
2. Options for maintaining the child's connection to the community. This includes people, schools, organizations, or activities with which the child has a significant connection.<sup>26</sup>
3. The plan to ensure educational stability for the child, including efforts to keep the child in the same school or reasons why keeping the child in the same school is not in the child's best interest.<sup>27</sup>

## Permanency Hearing w/ AC Bench Card

4. For youth age 14 and older, the case plan must include the information described in the Transition to Successful Adulthood bench card.<sup>28</sup>

### *Permanency goal and plan*

1. The plan must include a permanency goal, which must be one of the following:<sup>29</sup>
  - a) Termination of parental rights and adoption.
  - b) Guardianship.
  - c) For youth age 16 and older only, “another planned permanent living arrangement” (APPLA).
2. Best Practice: The plan should include both a primary goal and a concurrent goal.

### *The plan must also include the following:*

1. All options for permanent placement of the child, including in-state and out-of-state placement options.<sup>30</sup>
2. The advantages and disadvantages of each option, and a recommendation as to which option is in the child’s best interest.<sup>31</sup>
3. The actions necessary to implement the recommended option.<sup>32</sup>
4. A schedule for accomplishing the actions necessary to implement the permanency goal within the time frames in the Idaho Juvenile Rules:
  - a) If the permanency goal is termination of parental rights and adoption, a schedule that has the objective of finalizing termination within 6 months from approval of the permanency plan and finalizing the adoption within 12 months from the date the child was removed.<sup>33</sup>
  - b) If the permanency goal is guardianship, a schedule that has the objective of finalizing the guardianship within 5 months from the date of the determination of aggravated circumstances.<sup>34</sup>
5. If the permanency goal is termination of parental rights and adoption, identify the names of the prospective adoptive parents, when known.<sup>35</sup>
6. If the permanency goal is APPLA, the plan must document:<sup>36</sup>
  - a) Intensive, ongoing, and unsuccessful efforts the Department has made to place the youth with a parent, in an adoptive placement, in a guardianship, or in the custody of the Department in a placement with a fit and willing relative, including an adult sibling.
  - b) Reasons why APPLA is the best permanency goal for the youth and compelling reasons why one of the other placements is not in the youth’s best interest.
  - c) Steps taken by the Department to ensure that the youth’s foster parents or child care institution are following the reasonable and prudent parent standard when making decisions about the youth’s participation in extracurricular, enrichment, cultural, and social activities.
  - d) Opportunities provided to the youth to regularly engage in age or developmentally appropriate activities.

## QUESTIONS THE COURT MUST ASK AND FINDINGS THE COURT MUST MAKE

### *Reasonable efforts to finalize permanency*

At the annual permanency hearings, the *court must make written, case-specific findings* that the Department has made reasonable efforts to finalize the primary permanency goal for the child.<sup>37</sup>

### *ICWA (See the ICWA Bench Card)*

1. The court must ask:<sup>38</sup>
  - a) Is there reason to know that the child is an Indian child?
  - b) What efforts have been made since the last hearing to determine whether the child is an Indian child?



## Permanency Hearing w/ AC Bench Card

- c) What efforts have been made by the Department to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership?
2. The court must determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or eligible for membership.
3. If the court has reason to know the child is an Indian child, but the court does not have enough evidence to determine that the child is not an Indian child, the court must treat the child as an Indian child.<sup>39</sup>

### *Placement*

1. If a group of siblings was removed from the home but was not placed together, the court must ask about:
  - a) the efforts to place the siblings together
  - b) the reasons the siblings were not placed together, and
  - c) the plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>40</sup>
2. The hearing must include a review of the Department's consideration for in-state and out-of-state placement of the child. In the case of a child in an out-of-state placement, the court shall determine if the out-of-state placement continues to be in the best interest of the child.<sup>41</sup>

### *Educational Stability*

The Department must document and the court must ask about the Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interest.<sup>42</sup>

### *Psychotropic medication*

If the child is placed in the Department's custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.<sup>43</sup>

### *Youth Age 12 and Older*

For youth age 12 and older, the Department must provide additional information and the court must ask additional questions and make additional findings regarding the permanency plan, including the plan for the youth's transition to successful adulthood. Refer to the Transition to Successful Adulthood bench card.

## **ORDER**

1. The order must adopt, modify or reject the plan.<sup>44</sup>
2. The permanency plan as approved by the court must be entered into the record as an order of the court.<sup>45</sup>
3. At annual permanency hearings, the court may approve a plan with a primary permanency goal and a concurrent permanency goal.<sup>46</sup>
4. If the permanency plan approved by the court has a permanency goal of termination of parental rights and adoption, the Department must file a petition to terminate parental rights within 30 days of the approval of the plan.<sup>47</sup>
5. The court should schedule the next hearing.

# Permanency Hearing w/ AC Bench Card

## ADDITIONAL QUESTIONS

1. If the child is an Indian child, and the child is in the custody of the Department, does the child's placement comply with ICWA? (See ICWA bench card)
2. Is the Department fully exploring placement options with a fit and willing relative:
  - a) Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?
  - b) Who has been contacted?
  - c) Are there placement options?<sup>48</sup>
3. Has the child been moved since the last hearing? If so:
  - a) Why?
  - b) What further efforts are needed to ensure the child's placement stability?
  - c) Does the new placement support the child's cultural identity?
4. Department and guardian *ad litem*:
  - a) Do you understand what is required of the Department and/or guardian *ad litem* prior to the review hearing?
  - b) Do you have any questions for the court?

## ENDNOTES

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<sup>1</sup> I.C. § 16-1620(2).

<sup>2</sup> I.C. § 16-1622(2)(c).

<sup>3</sup> I.C. § 16-1619(6)(d), 16-1620(1).

<sup>4</sup> I.C. § 16-1620(1).

<sup>5</sup> I.C. § 16-1622(2)(b).

<sup>6</sup> 45 C.F.R. § 1356.21(b)(2)(ii).

<sup>7</sup> I.C. § 16-1622(3).

<sup>8</sup> I.C. § 16-1622(2)(b).

<sup>9</sup> I.C. § 16-1620(1), § 16-1629(9); I.J.R. 45(c).

<sup>10</sup> I.C. § 16-1613(1); I.J.R. 52(a).

<sup>11</sup> I.C. § 16-1620(1); I.J.R. 40(a).

<sup>12</sup> I.J.R. 40(b).

<sup>13</sup> *Id.*

<sup>14</sup> I.C. § 16-1613(1) and (2).

<sup>15</sup> I.J.R. 40(c).

<sup>16</sup> I.R.E. 101(e)(6); I.J.R. 51(b).

<sup>17</sup> I.J.R. 40(a) and (b).

<sup>18</sup> I.R.E. 502, I.R.E. 505 *See also* I.R.E. 504(d)(1) Husband/wife privilege; b) I.R.E. 503(d)(4) Physicians and psychotherapists; c) I.R.E. 516(d)(3) School counselors; d) I.R.E. 517(d)(3) Licensed counselors; and e) I.R.E. 518(d)(5) Licensed social workers.

<sup>19</sup> I.J.R. 38.

<sup>20</sup> I.C. § 16-1620(3)(j), § 1622(2)(i). U.S. Bureau of Indian Affairs regulations provide that where the court has reason to know the child is an Indian child, but does not have sufficient evidence to determine that the child is not an Indian child, the court must proceed as if the child is an Indian child. The regulations also define the term "reason to know." 25 C.F.R. § 23.107.

<sup>21</sup> I.J.R. 43(2).

<sup>22</sup> I.C. § 16-1620(3)(k), § 16-1622(2)(a).

<sup>23</sup> I.C. § 16-1506(2).

<sup>24</sup> I.C. § 16-1620(3)(g), § 16-1622(2)(h)(ii).

<sup>25</sup> I.C. § 16-1620(3)(a), § 16-1622(2)(a), cross-referencing § 16-1621(3)(a).

<sup>26</sup> I.C. § 16-1620(3)(f), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d).

<sup>27</sup> *Id.*

<sup>28</sup> I.C. § 16-1620(3)(h), § 16-1622(2)(e).

<sup>29</sup> I.C. § 16-1620(2), § 16-1622(2)(a).

<sup>30</sup> I.C. § 16-1620(3)(b), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d).

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<sup>31</sup> I.C. § 16-1620(3)(c), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d).

<sup>32</sup> I.C. § 16-1620(3)(d), § 16-1622(2)(a), cross-referencing § 16-1621(3)(a).

<sup>33</sup> I.J.R. 44(b)(2).

<sup>34</sup> I.J.R. 44(b)(1).

<sup>35</sup> I.C. § 16-1620(3)(k), § 16-1622(2)(a).

<sup>36</sup> I.C. § 16-1620(3)(i) and (7), § 16-1622(2)(a), cross-referencing § 16-1621(3)(d), § 16-1622(f).

<sup>37</sup> I.C. § 16-1622(2)(c).

<sup>38</sup> I.C. § 16-1620(4)(b), § 16-1622(2)(i).

<sup>39</sup> 25 C.F.R. §23.107.

<sup>40</sup> I.C. § 16-1622(2)(h)(ii). The court is required to inquire at annual permanency hearings, but recommended best practice is to also inquire at the 30-day permanency hearing.

<sup>41</sup> I.C. § 16-1622(2)(d).

<sup>42</sup> I.C. § 16-1620(3)(f), § 16-1622(2)(h)(i). The court is required to inquire at annual permanency hearings, but recommended best practice is to also inquire at the 30-day permanency hearing.

<sup>43</sup> I.C. § 16-1620(4)(c), § 16-1622(2)(j).

<sup>44</sup> I.C. § 16-1620(4), § 16-1622(2)(b).

<sup>45</sup> I.C. § 16-1620(6).

<sup>46</sup> I.C. § 16-1622(2)(a).

<sup>47</sup> I.C. § 16-1620(1), I.J.R. 44(b)(3).

<sup>48</sup> I.C. § 16-1629(11); 42 U.S.C. §671(a)(29).

# CASE PLAN HEARING

## *Bench Card*

### **PURPOSE**

Where aggravated circumstances are not found, to determine whether the best interest of the child is served by adopting, modifying, or rejecting the case plan. This includes cases where the child was placed in the custody of the Department or cases where the child was placed at home under the supervision of the Department. (Where aggravated circumstances are found, see Permanency Hearing – Aggravated Circumstances Bench Cards.)<sup>1</sup>

### **WHEN**

1. The case plan hearing must be held within thirty (30) days after the adjudicatory hearing.<sup>2</sup>
2. The case plan must be filed no later than five days prior to the hearing.<sup>3</sup>

### **WHO MAY BE PRESENT**

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>4</sup>
2. The Department shall provide notice of the planning hearing to: 1) the foster parents; 2) pre-adoptive parents; 3) a relative who is providing care to a child who is in the custody of the Department; and 4) children aged eight and older. The Department shall confirm to the court that this notice was given.<sup>5</sup>
3. A child aged eight (8) or older has the right to be heard, either in person or in writing.<sup>6</sup> The Department must confirm to the court that this notice was given.<sup>7</sup> The child may be excluded from hearings at any time at the discretion of the court. If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>8</sup>

### **EVIDENCE**

1. The Rules of Evidence do not apply.<sup>9</sup>
2. The foster parent, the pre-adoptive parent and/or the relative who is providing care to a child who is in the custody of the Department each have the right to be heard at the planning hearing.<sup>10</sup>
3. A child aged eight (8) or older has the right to be heard, either in person or in writing.<sup>11</sup>
4. Privileges in effect at the case plan hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>12</sup>

### **MAKING THE RECORD**

The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interests of the child.<sup>13</sup>

### **CONTENTS OF THE CASE PLAN**

**The Department's current practice is to prepare two documents: a service plan and an alternative care plan. The two documents are intended to provide the information required in the case plan. The court should ensure that the document(s) filed by the Department contain all required information.**

## The case plan must include:

### *Placement*

1. The current foster care placement for the child.<sup>14</sup>
2. If a group of siblings was removed from the home but was not placed together, the Department must document: 1) the efforts to place the siblings together, 2) the reasons the siblings were not placed together, and 3) the plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>15</sup>

### *Services to the child*

1. Services to identify and meet any educational, emotional, physical, or developmental needs the child may have, and to assist the child in adjusting to the placement or to ensure the stability of the placement.<sup>16</sup>
2. Options for maintaining the child's connection to the community. This includes people, schools, organizations, or activities with which the child has a significant connection.<sup>17</sup>
3. The plan to ensure educational stability for the child, including efforts to keep the child in the same school or reasons why keeping the child in the same school is not in the child's best interest.<sup>18</sup>
4. For youth age 14 and older, the case plan must include the information described in the Transition to Successful Adulthood Bench Card.<sup>19</sup>

### *ICWA (See the ICWA Bench Card)*

If there is reason to know the child is an Indian child, and there has been no final determination of the child's status as an Indian child:<sup>20</sup>

1. The efforts made to determine whether the child is an Indian child.
2. The Department's efforts to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership.

### *Reunification*

1. A reunification plan that includes:<sup>21</sup>
  - a) Reasonable efforts to be made by the Department to make it possible for the child to return home.<sup>22</sup>
  - b) All issues that need to be addressed before the child can safely be returned home (or remain home) without Department supervision.
  - c) Tasks to be completed by the Department, each parent and others, including services to be provided by the Department and in which the parents are required to participate.
  - d) Deadlines for completion of each task.
  - e) The role of the Department as to each parent.
  - f) A plan for achieving reunification within 12 months from the date the child was removed from the home.<sup>23</sup>
2. If the child is an Indian child, active efforts by the Department to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child's status, the court must treat the child as an Indian child.<sup>24</sup> (*See the ICWA Bench Card*)
3. A visitation plan, the need for supervision of visitation, and child support.<sup>25</sup>

### *Concurrent permanency plan*

A concurrent permanency plan is required when the court has placed the child in the custody of the Department.<sup>26</sup>

The concurrent plan must include:

1. A permanency goal, which must be one of the following:<sup>27</sup>
  - a) Termination of parental rights and adoption.
  - b) Guardianship.

## Case Plan Hearing Bench Card

- c) For youth age 16 and older only, “another planned permanent living arrangement” (APPLA.)
2. All options for permanent placement of the child, including in-state and out-of-state placement options.<sup>28</sup>
3. The advantages and disadvantages of each option, and a recommendation as to which option is in the child’s best interest.<sup>29</sup>
4. The actions necessary to implement the recommended option.<sup>30</sup>
5. A schedule for accomplishing the actions necessary to implement the permanency goal within the time frames in the Idaho Juvenile Rules.<sup>31</sup>
  - a) If the permanency goal is termination of parental rights and adoption, a schedule that has the objective of finalizing termination within 18 months from the date the child was removed and finalizing the adoption within 24 months from the date the child was removed.<sup>32</sup>
  - b) If the permanency goal is guardianship, a schedule that has the objective of finalizing the guardianship within 13 months from the date the child was removed.<sup>33</sup>
6. For youth 16 and older whose permanency goal is APPLA, the plan must include the information listed in the Transition to Successful Adulthood Bench Card.<sup>34</sup>
7. Further investigation necessary to identify or assess other options for permanent placement, to identify actions necessary to implement the recommended placement or to identify options for maintaining the child’s significant connections.<sup>35</sup>
8. If the court approves a concurrent permanency plan with a goal of termination of parental rights and adoption, the plan must identify the names of the proposed adoptive parents, when known.<sup>36</sup>

### QUESTIONS THE COURT MUST ASK AND FINDINGS THE COURT MUST MAKE

#### *Psychotropic medication*

If the child is placed in the Department’s custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.<sup>37</sup>

#### *ICWA (See the ICWA Bench Card)*

1. The court must ask:<sup>38</sup>
  - a) Is there reason to know that the child is an Indian child?
  - b) What efforts have been made since the last hearing to determine whether the child is an Indian child?
  - c) What efforts have been made by the Department to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership?
2. The court must determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or eligible for membership.<sup>39</sup>
3. If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child is not an Indian child, the court must treat the child as an Indian child.<sup>40</sup>

### CASE PLAN ORDER

The court’s order must:

1. Adopt, modify, or reject the case plan.<sup>41</sup>
2. Incorporate the case plan approved by the court.<sup>42</sup>
3. Provide that reasonable efforts shall be made to reunify the family in a timely manner.<sup>43</sup>
4. Require completion of the steps necessary to finalize the permanent placement of the child.<sup>44</sup>
5. Schedule the next hearing.

## ADDITIONAL QUESTIONS

1. What are the specific safety issues that caused the child to be removed from the home, and what is preventing the child from returning home today?
2. **If the child is an Indian child, and the child is in the custody of the Department, does the child's placement comply with ICWA? (*See the ICWA Bench Card*)**
3. **Is the Department fully exploring placement options with a fit and willing relative:**
  - a) **Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?**
  - b) **Who has been contacted?**
  - c) **Are they placement options?<sup>45</sup>**
4. Has the child been moved since the adjudicatory hearing? If so:
  - a) Why?
  - b) What further efforts are needed to ensure the child's placement stability?
  - c) Does the new placement support the child's cultural identity?
5. Parents:
  - a) Do you understand what happened here today?
  - b) Do you understand what the next steps are?
  - c) Do you have any questions for the court?
6. Department and guardian *ad litem*:
  - a) Do you understand what is required of the Department and/or guardian *ad litem* prior to the review hearing?
  - b) Do you have any questions for the court?

## ENDNOTES

<sup>1</sup> I.C. § 16-1621(1)(a).

<sup>2</sup> I.C. § 16-1621(1).

<sup>3</sup> *Id.*

<sup>4</sup> I.C. § 16-1613(1); I.J.R. 52(a).

<sup>5</sup> I.C. § 16-1621(2); I.J.R. 40(a).

<sup>6</sup> I.J.R. 40(b).

<sup>7</sup> *Id.*

<sup>8</sup> I.C. § 16-1613(2).

<sup>9</sup> I.R.E. 101(e)(6); I.J.R. 51(b).

<sup>10</sup> I.J.R. 40(a).

<sup>11</sup> I.J.R. 40(b).

<sup>12</sup> I.R.E. 502, I.R.E. 505 *See also* I.R.E. 504(d)(1); I.R.E. 503(d)(4); I.R.E. 516(d)(3); I.R.E. 517(d)(3); and I.R.E. 518(d)(5).

<sup>13</sup> I.J.R. 38.

<sup>14</sup> I.J.R. 43(2).

<sup>15</sup> I.C. § 16-1621(3)(b)(iv).

<sup>16</sup> I.C. § 16-1621(3)(a).

<sup>17</sup> I.C. § 16-1621(3)(b)(i).

<sup>18</sup> I.C. § 16-1621(3)(b)(ii).

<sup>19</sup> I.C. § 16-1621(3)(a).

<sup>20</sup> I.C. § 16-1621(3)(b)(v).

<sup>21</sup> I.C. § 16-1621(3)(c).

<sup>22</sup> I.C. § 16-1621(5).

<sup>23</sup> I.J.R. 44(a)(1).

<sup>24</sup> 25 C.F.R. § 23.107.

<sup>25</sup> I.C. § 16-1621(3)(b)(iii) and (c).

<sup>26</sup> I.C. § 16-1621(3)(d).

<sup>27</sup> *Id.*

<sup>28</sup> I.C. § 16-1621(3)(d)(i).

<sup>29</sup> I.C. § 16-1621(3)(d)(ii).

<sup>30</sup> I.C. § 16-1621(3)(d)(iii).

<sup>31</sup> I.C. § 16-1621(3)(d)(iv).

<sup>32</sup> I.J.R. 46(a).

<sup>33</sup> I.J.R. 44(a)(2).

<sup>34</sup> I.C. § 16-1621(3)(d)(viii).

<sup>35</sup> I.C. § 16-1621(3)(d)(ix).

<sup>36</sup> I.C. § 16-1621(3)(vi).

<sup>37</sup> I.C. § 16-1621(1)(c).

<sup>38</sup> I.C. § 16-1621(1)(b).

<sup>39</sup> *Id.*

<sup>40</sup> 25 C.F.R. § 23.107(2).

<sup>41</sup> I.C. § 16-1621(1)(a).

<sup>42</sup> I.C. § 16-1621(4).

<sup>43</sup> I.C. § 16-1621(5).

<sup>44</sup> *Id.*

<sup>45</sup> I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).



# AMENDED DISPOSITION HEARING

(REMOVAL FROM PROTECTIVE SUPERVISION)

## Bench Card

### PURPOSE

To determine whether to vest legal custody of a child, who is removed from the home after being placed under protective supervision, with the Department or other authorized agency.<sup>1</sup>

### WHEN

1. Within 48 hours of the child's removal from her or his home.<sup>2</sup>
2. The hearing may be continued for a reasonable time upon request of the parties.<sup>3</sup>

### WHO MAY BE PRESENT

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>4</sup>
2. Notice must be given to the parent(s) or guardian from whom the child is removed in the same manner as required for a shelter care hearing.<sup>5</sup>
3. A child aged eight (8) or older has the right to be heard, either in person or in writing.<sup>6</sup> The Department must confirm to the court that this notice was given.<sup>7</sup> The child may be excluded from hearings at any time at the discretion of the court.<sup>8</sup> If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>9</sup>
4. After the adjudicatory hearing, the foster parent, the pre-adoptive parent and/or the relative who is providing care to a child who is in the custody of the Department, and the child (if eight (8) years or older) each have the right to be heard.<sup>10</sup>

### EVIDENCE

1. The Rules of Evidence do not apply. The court may consider any information relevant to the redispotion of the child.<sup>11</sup>
2. Privileges in effect at the amended disposition hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental, or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>12</sup>

### MAKING THE RECORD

Findings regarding reasonable efforts, contrary to the welfare, and best interests must be case-specific, written, and on the record.<sup>13</sup>

### QUESTIONS THE COURT MUST ASK

#### *ICWA (See the ICWA Bench Card)*

If there is reason to know the child is an Indian child, and there has been no final determination of the child's status as an Indian child:<sup>14</sup>

1. The efforts made to determine whether the child is an Indian child.
2. The Department's efforts to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership.
3. If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child's status, the court must treat the child as an Indian child.<sup>15</sup>

## Amended Disposition Hearing Bench Card

4. If the child is an Indian child or there is reason to know the child is an Indian child, even if the child's status as an Indian child has not been confirmed, the hearing after the removal from protective supervision is an emergency removal hearing and the ICWA requirements for emergency removal hearings must be met. (*See the ICWA Bench Card*)

### *Questions the court should ask at disposition:*<sup>16</sup>

If the court vests legal custody of the child in the Department or other authorized agency, the court must ask about these issues:

1. Educational stability:<sup>17</sup>

The court must ask about the Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interest.

2. Sibling placement:<sup>18</sup>

If a group of siblings was removed from the home but was not placed together, the court must ask about:

1) the Department's efforts to place the siblings together, 2) the reasons the siblings were not placed together, and 3) the Department's plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.

3. Psychotropic medications:<sup>19</sup>

If the child is placed in the Department's custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.

### **REQUIRED FINDINGS**<sup>20</sup>

1. The Department confirmed to the court that it provided notice as required by Idaho Juvenile Rule 40(a) and (b).
2. The court finds, as appropriate:
  - a. Continued residence in the home is contrary to the welfare of the child **and**;<sup>21</sup>
  - b. Vesting custody with the Department is in the best interests of the child **and**;<sup>22</sup>
  - c. The Department made reasonable efforts to prevent the placement of the child(ren) into foster care:
    - i. But was not successful in eliminating the need for foster care placement; or
    - ii. But was not able to safely provide preventative services; or
    - iii. But efforts to temporarily place the child(ren) with a related person were not successful; or
    - iv. Reasonable efforts were not required because the parent(s) subjected the child(ren) to aggravated circumstances.<sup>23</sup>
3. Legal custody of the child is vested with the Department or other authorized agency and may continue until the child's 18<sup>th</sup> birthday.<sup>24</sup>

### **ORDER**

1. The order returning legal custody to the Department shall be treated the same as the original adjudicatory order.<sup>25</sup>
2. The court may order the Department to prepare a written case plan, to be filed with the court and served upon the parties five (5) days prior to the case plan hearing. The court may hold a case plan hearing, to be held within 30 days of the amended disposition hearing.<sup>26</sup>
3. If aggravated circumstances are found, order the Department to prepare a written permanency plan to be filed with the court and served upon the parties five (5) days prior to the permanency hearing.<sup>27</sup> A permanency hearing shall occur within thirty (30) days of the amended disposition hearing.<sup>28</sup>

# Amended Disposition Hearing Bench Card

## ADDITIONAL QUESTIONS

1. What are the specific safety issues that caused the child to be removed from the home, and what is preventing the child from returning home today?
2. **If the child is an Indian child, and the child is in the custody of the Department, does the child's placement comply with ICWA? (*See the ICWA Bench Card.*)**
3. **Is the Department fully exploring placement options with a fit and willing relative:**
  - a. **Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?**
  - b. **Who has been contacted?**
  - c. **Are they placement options?**<sup>29</sup>
4. Does the placement support the child's cultural identity?
5. Parents:
  - a. Do you understand what happened here today?
  - b. Do you understand what the next steps are?
  - c. Do you have any questions for the court?
6. Department and guardian *ad litem*:
  - a. Do you understand what is required of the Department and/or guardian *ad litem* prior to the next hearing?
  - b. Do you have any questions for the court?

## ENDNOTES

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<sup>1</sup> I.C. § 16-1623(4); I.J.R. 47.

<sup>2</sup> I.C. § 16-1623(3).

<sup>3</sup> I.C. § 16-1623(7).

<sup>4</sup> I.C. § 16-1613(1); I.J.R. 52(a).

<sup>5</sup> I.C. § 16-1623(6).

<sup>6</sup> I.J.R. 40(b).

<sup>7</sup> *Id.*

<sup>8</sup> I.C. § 16-1613(1).

<sup>9</sup> I.C. § 16-1613(2).

<sup>10</sup> I.J.R. 40(a) and (b).

<sup>11</sup> I.R.E. 101(e)(6); I.J.R. 51(b); and I.C. § 16-1623(4).

<sup>12</sup> I.R.E. 502, I.R.E. 505 *See also* I.R.E. 504(d)(1); I.R.E. 503(d)(4); I.R.E. 516(d)(3); I.R.E. 517(d)(3); and I.R.E. 518(d)(5).

<sup>13</sup> I.C. § 16-1619(6), § 16-1623(4).

<sup>14</sup> I.C. § 16-1619(7)(a), § 16-1623(4).

<sup>15</sup> 25 C.F.R. § 23.107(2).

<sup>16</sup> At an amended disposition hearing, the court is making the same decisions that it would make in the disposition portion of an adjudicatory hearing. Therefore, the court should make the same inquiry at a an amended disposition hearing. I.C. § 16-1619(7)

<sup>17</sup> I.C. § 16-1619(7)(b)(i).

<sup>18</sup> I.C. § 16-1619(7)(b)(ii).

<sup>19</sup> I.C. § 16-1619(7)(c)

<sup>20</sup> 42 U.S.C. § 672(a)(2)(a)(ii), 42 U.S.C. § 671(a)(15); 45 C.F.R. § 1356.21(b),(c), and (d); I.C. § 16-1619(6) and § 16-1623(4).

<sup>21</sup> I.C. § 16-1619(6).

<sup>22</sup> *Id.*

<sup>23</sup> I.C. § 16-1619(6)(a)-(d).

<sup>24</sup> I.C. § 16-1619(8) and (9).

<sup>25</sup> I.C. § 16-1623(5).

<sup>26</sup> *Id.*

<sup>27</sup> I.J.R. 41(i).

<sup>28</sup> I.C. § 16-1620(1).

<sup>29</sup> I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).

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# REVIEW HEARINGS

## *Bench Card*

### **PURPOSE**

To review the progress of the case, determine the continuing need for the child's placement, monitor compliance with the case plan or permanency plan, and to modify the case plan or permanency plan as appropriate.<sup>1</sup>

### **WHEN**

1. No later than six (6) months after entry of the court's order taking jurisdiction and at least every six (6) months thereafter.<sup>2</sup>
2. Best practice is to hold hearings at least every 90 days or more frequently as needed to ensure timely permanency for the child.<sup>3</sup>
3. The Department and the guardian *ad litem* must file progress reports with the court at least five (5) days before each six-month review hearing.<sup>4</sup>
4. For a youth in the legal custody of the Department, within 90 days prior to the youth's 18<sup>th</sup> birthday.<sup>5</sup>
5. A review hearing may be combined with a permanency hearing.<sup>6</sup> (NOTE: Clerks must "result" both hearings.)
6. Continuances: The court may continue a review hearing for a short period of time to respond to substantive issues raised for the first time at a review hearing. The court may enter temporary orders as appropriate pending the hearing.<sup>7</sup>

### **WHO MAY BE PRESENT**

1. The general public is excluded, and only such persons found by the court to have a direct interest in the case may be admitted.<sup>8</sup>
2. The Department must provide notice of the review hearing to: 1) the foster parents; 2) pre-adoptive parents; 3) a relative who is providing care to a child who is in the custody of the Department; and 4) children age eight (8) and older. The Department must confirm to the court that this notice was given.<sup>9</sup>
3. A child age eight (8) or older has the right to be heard, either in person or in writing.<sup>10</sup> The Department must confirm to the court that this notice was given.<sup>11</sup> The child may be excluded from hearings at any time in the discretion of the court.<sup>12</sup>
4. Youth age 12 and older are required to attend six-month review hearings in person or telephonically, unless the youth declines in writing prior to the hearing, declines through counsel, or the court finds good cause to excuse the youth from attending the hearing.<sup>13</sup>
5. If the child or youth testifies, a counselor, friend or other person shall be permitted to remain in the courtroom at the witness stand as the child or youth testifies.<sup>14</sup>

### **EVIDENCE**

1. The Rules of Evidence do not apply.<sup>15</sup>
2. The foster parent, the pre-adoptive parent and/or the relative who is providing care to a child who is in the custody of the Department, and the child (if eight (8) years or older) each have the right to be heard at the review hearing.<sup>16</sup>
3. Privileges in effect at the review hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>17</sup>

# Review Hearings Bench Card

## STIPULATIONS

Must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is: knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.<sup>18</sup>

## INFORMATION THE DEPARTMENT MUST PROVIDE/QUESTIONS THE COURT MUST ASK

### *ICWA (See the ICWA Bench Card)*

1. The Department must document and the court must ask:<sup>19</sup>
  - a. Is there reason to know that the child is an Indian child?
  - b. What efforts have been made since the last hearing to determine whether the child is an Indian child?
  - c. What efforts have been made by the Department to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership?
2. The court must determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or eligible for membership.
3. If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child's status, the court must treat the child as an Indian child.<sup>20</sup>

### *Placement*

1. The Department must include information about the child's placement in its report to the court.<sup>21</sup>
2. If a group of siblings was removed from the home but was not placed together, the Department must document, and the court must ask about: 1) the Department's efforts to place the siblings together, 2) the reasons the siblings were not placed together, and 3) the Department's plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>22</sup>

### *APPLA*

1. If the permanency goal is APPLA, the plan must document:<sup>23</sup>
  - a) Intensive, ongoing, and unsuccessful efforts the Department made to place the youth with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department in a placement with a fit and willing relative, including an adult sibling.
  - b) Reasons why APPLA is the best permanency goal for the youth and compelling reasons why one of the other placements is not in the youth's best interest.
  - c) Steps taken by the Department to ensure that the youth's foster parents or child care institution are following the reasonable and prudent parent standard when making decisions about the youth's participation in extracurricular, enrichment, cultural, and social activities.
  - d) Opportunities provided to the youth to regularly engage in age or developmentally appropriate activities.

### *Educational Stability*

The Department must document and the court must ask about the Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interest.<sup>24</sup>

### *Psychotropic medication*

If the child is placed in the Department's custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.<sup>25</sup>

# Review Hearings Bench Card

## *Youth Age 12 and Older*

For youth age 12 and older, the Department must provide additional information and the court must ask additional questions and make additional findings regarding the permanency plan, independent living skills and transition planning.<sup>26</sup> Refer to the Transition to Successful Adulthood Bench Card.

## **OTHER FINDINGS<sup>27</sup>**

1. Modify disposition, as appropriate.<sup>28</sup>
2. Extended Home Visits: Extended home visits must be approved by the court in writing prior to the extended home visit. An extended home visit is any period of unsupervised visitation between the parent and the child that exceeds 48 hours in duration.<sup>29</sup>
3. Parent and child visits: Approve (as appropriate), reject or modify visitation proposed in the reunification plan.<sup>30</sup>
4. Approve, reject or modify changes to the case plan or permanency plan as appropriate.<sup>31</sup>
5. If appropriate, the Department made/did not make reasonable efforts to finalize the permanency plan in effect.<sup>32</sup>
6. When the child will not be returned home, review the Department's consideration of in-state and out-of-state placements.<sup>33</sup>
7. If appropriate, a specific finding about the parent's progress on accomplishing the requirements of the case plan.<sup>34</sup>
8. If the permanency goal is APPLA, the court must find:
  - a. APPLA is the best permanency goal for the youth; and
  - b. There are compelling reasons why it is not in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department in a placement with a fit and willing relative, including an adult sibling.

## **ORDER**

1. Enter further orders as necessary to ensure the progress of the case toward achieving permanency for the child.<sup>35</sup>
2. If the next review hearing is the annual permanency hearing, order the Department to prepare a written permanency plan to be filed and served five (5) days prior to the hearing.<sup>36</sup>
3. Deadline for achieving reunification:

If the child has been in the temporary or legal custody of the Department for 15 of the last 22 months, the Department must file a petition to terminate parental rights prior to the last day of the 15<sup>th</sup> month, unless the court makes one of these findings:<sup>37</sup>

  - a. The child is placed permanently with a relative.
  - b. There are compelling reasons why termination of parental rights is not in the child's best interest.
  - c. The Department has failed to provide reasonable efforts to reunify the child with the family.

If the deadline is approaching (or has passed), the court should enter orders as appropriate, which may include making the finding based on information already before the court, setting deadlines for further proceedings for the court to make the finding, or ordering the Department to file a petition to terminate.
4. Enter appropriate orders for youth age 12 and older. See Transition to Successful Adulthood Bench Card.
5. Schedule the next hearing.

## **ADDITIONAL QUESTIONS**

1. What are the specific safety issues that caused the child to be removed from the home, and what is preventing the child from returning home today?



## Review Hearings Bench Card

2. **If the child is an Indian child, and the child is in the custody of the Department, does the child's placement comply with ICWA? (See the ICWA Bench Card)**
3. **Is the Department fully exploring placement options with a fit and willing relative:**
  - a. **Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?**
  - b. **Who has been contacted?**
  - c. **Are they placement options?**<sup>38</sup>
4. **Has the child been moved since the last hearing? If so:**
  - a. **Why?**
  - b. **What further efforts are needed to ensure the child's placement stability?**
  - c. **Does the new placement support the child's cultural identity?**
5. **Parents:**
  - a. **Do you understand what happened here today?**
  - b. **Do you understand what the next steps are?**
  - c. **Do you have any questions for the court?**
6. **Department and guardian *ad litem*:**
  - a. **Do you understand what is required of the Department and/or guardian *ad litem* prior to the review hearing?**
  - b. **Do you have any questions for the court?**

## ENDNOTES

<sup>1</sup> I.C. § 16-1622(1)(a); I.J.R. 45(a).

<sup>2</sup> I.C. § 16-1622(1)(a).

<sup>3</sup> NCJFCJ Enhanced Resource Guidelines - Improving Court Practice in Child Abuse and Neglect Cases, <https://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf>, Pg. 260, Last accessed April 28, 2018.

<sup>4</sup> I.C. § 16-1622(1)(a).

<sup>5</sup> I.C. § 16-1622(3).

<sup>6</sup> I.C. § 16-1622(2)(b).

<sup>7</sup> I.J.R. 45(b).

<sup>8</sup> I.C. § 16-1613(1); I.J.R. 52(a)

<sup>9</sup> I.J.R. 40(a) and (b).

<sup>10</sup> I.J.R. 40(b).

<sup>11</sup> *Id.*

<sup>12</sup> I.C. § 16-1613(1).

<sup>13</sup> I.J.R. 40(c).

<sup>14</sup> I.C. § 16-1613(2).

<sup>15</sup> I.R.E. 101(e)(6); I.J.R. 51(b).

<sup>16</sup> I.J.R. 40(a) and (b).

<sup>17</sup> I.R.E. 502, IRE 505 *See also* I.R.E. 504(d)(1) Husband/wife privilege; b) I.R.E. 503(d)(4) Physicians and psychotherapists; c) I.R.E. 516(d)(3) School counselors; d) I.R.E. 517(d)(3) Licensed counselors; and e) I.R.E. 518(d)(5) Licensed social workers.

<sup>18</sup> I.J.R. 38.

<sup>19</sup> I.C. § 16-1622(1)(a)(ii).

<sup>20</sup> 25 C.F.R. § 23.107.

<sup>21</sup> I.J.R. 43(2).

<sup>22</sup> I.C. § 16-1622(1)(a)(iv).

<sup>23</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(d)(viii).

<sup>24</sup> I.C. § 16-1622(1)(a)(iii).

<sup>25</sup> I.C. § 16-1622(1)(a)(ix).

<sup>26</sup> I.C. § 16-1622(1)(a)(v)-(vi).

## Review Hearings Bench Card

<sup>27</sup> If the 12-month review hearing is combined with the permanency hearing, see also Permanency Hearing Bench Card.

Findings for both the review hearing and the permanency hearing must be made.

<sup>28</sup> I.J.R. 45(a)(2).

<sup>29</sup> I.J.R. 42.

<sup>30</sup> I.J.R. 45(a)(1), I.C. § 16-1620(3)(c).

<sup>31</sup> I.J.R. 45(a)(1).

<sup>32</sup> I.J.R. 45(a)(3).

<sup>33</sup> I.J.R. 45(a)(3).

<sup>34</sup> I.C. § 16-1622(1)(a)(i).

<sup>35</sup> I.J.R. 45(a)(4).

<sup>36</sup> I.J.R. 45(c).

<sup>37</sup> I.C. § 16-1622(2)(g).

<sup>38</sup> I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).

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# PERMANENCY HEARING

*(NO AGGRAVATED CIRCUMSTANCES)*

## Bench Card

### PURPOSE

1. A review of the Department's past efforts to finalize the primary permanency plan in effect.
2. Review, approve, reject, or modify the permanency goal and plan that are proposed by the Department at the permanency hearing.<sup>1</sup>

### WHEN

1. Prior to twelve (12) months from the date the child is removed from the home or the date of the court's order taking jurisdiction under the Child Protection Act (CPA), whichever occurs first, and every twelve (12) months thereafter.<sup>2</sup>
2. For a youth in the custody of the Department, within 90 days prior to the youth's 18<sup>th</sup> birthday.<sup>3</sup>
3. The permanency hearing may be combined with a review hearing.<sup>4</sup> (Clerks must result both hearings.)
4. The Department must file and serve the permanency plan at least five (5) days prior to the hearing.<sup>5</sup>
5. If not timely held, an otherwise eligible child will lose federal IV-E match funds on the last day of the month in which the finding of "reasonable efforts to finalize permanency" should have been made. IV-E funding will be resumed on the first day of the month in which the required "reasonable efforts to finalize permanency" finding is made.<sup>6</sup>
6. No statute or rule specifically addresses continuances in permanency hearings. BUT NOTE: If the permanency hearing is not timely held, an otherwise eligible child will lose federal IV-E match funds on the last day of the month that the finding should have been made.<sup>7</sup>

### WHO MAY BE PRESENT

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>8</sup>
2. The Department shall provide notice of the permanency hearing to: 1) the foster parents; 2) pre-adoptive parents; 3) a relative who is providing care to a child who is in the custody of the Department; and 4) children aged eight and older. The Department shall confirm to the court that this notice was given.<sup>9</sup>
3. A child eight or older has the right to be heard, either in person or in writing.<sup>10</sup> The Department must confirm to the court that notice was given.<sup>11</sup> The child may be excluded from hearings at any time in the discretion of the court. If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>12</sup>
4. Youth age 12 and older are required to attend permanency hearings in person or telephonically, unless the youth declines in writing, declines through counsel, or the court finds good cause to excuse the youth from attending the hearing.<sup>13</sup>

### EVIDENCE

1. The Rules of Evidence do not apply.<sup>14</sup>
2. The foster parent, the pre-adoptive parent and/or the relative who is providing care to a child who is in the custody of the Department, and the child (eight or older) each have the right to be heard at the permanency hearing.<sup>15</sup>
3. Privileges in effect at the permanency hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>16</sup>

# Permanency Hearing (NO AC) Bench Card

## STIPULATIONS

Must be on the record and are subject to court approval. The court may enter orders or decrees based upon stipulations only upon a reasonable inquiry by the court to confirm that the stipulation is knowing and voluntary, has a reasonable basis in fact, and is in the best interest of the child.<sup>17</sup>

## CONTENTS OF THE PERMANENCY PLAN

The permanency plan must include:

### *Placement*

1. The current foster care placement for the child.<sup>18</sup>
2. The prospective adoptive parents if known.<sup>19</sup> (NOTE: In an adoption proceeding, if the person proposing to adopt the child is not the proposed adoptive parent named in the permanency plan, then the adoption judge must stay the adoption until the permanency plan is amended and approved by the court in the child protection case.<sup>20</sup>)
3. If a group of siblings was removed from the home but was not placed together, the Department must document: 1) the efforts to place the siblings together, 2) the reasons the siblings were not placed together, and 3) the plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>21</sup>

### *Services to the child*

1. Services to identify and meet any educational, emotional, physical, or developmental needs the child may have, and to assist the child in adjusting to the placement or to ensure the stability of the placement.<sup>22</sup>
2. Options for maintaining the child's connection to the community. This includes people, schools, organizations, or activities with which the child has a significant connection.<sup>23</sup>
3. The plan to ensure educational stability for the child, including efforts to keep the child in the same school or reasons why keeping the child in the same school is not in the child's best interest.<sup>24</sup>
4. For youth age 14 and older, the case plan must include the information described in the Transition to Successful Adulthood bench card.<sup>25</sup>

### *ICWA (See the ICWA Bench Card.)*

If there is reason to know the child is an Indian child, and there has been no final determination of the child's status as an Indian child:<sup>26</sup>

1. The efforts made to determine whether the child is an Indian child.
2. The Department's efforts to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership.

### *Permanency goal and plan*

1. The plan must include a permanency goal, which must be one of the following:<sup>27</sup>
  - a) Continued efforts at reunification.
  - b) Guardianship.
  - c) Termination of parental rights and adoption.
  - d) For youth age 16 and older only, "another planned permanent living arrangement" (APPLA).
2. The plan may include both a primary goal and a concurrent goal.<sup>28</sup>

### *Permanency Goal of Reunification*

If the plan has a permanency goal of reunification, the plan must include:<sup>29</sup>

1. All issues that need to be addressed before the child can safely be returned home (or remain home) without Department supervision.

## Permanency Hearing (NO AC) Bench Card

2. Tasks to be completed by the Department, each parents and others, including services to be provided by the Department and in which the parents are required to participate.
3. Deadlines for completion of each task.
4. The role of the Department as to each parent.
5. A plan for achieving reunification within 12 months from the date the child was removed from the home. The court may approve an amendment to a plan extending the deadline for reunification for up to 3 months.<sup>30</sup>
6. A visitation plan, the need for supervision of visitation, and child support.<sup>31</sup>
7. Reasonable efforts to be made by the Department to make it possible for the child to return home.<sup>32</sup>
8. A period of protective supervision or an extended home visit<sup>33</sup> of not less than ninety (90) days prior to vacating the case if one or more of the following circumstances exist:
  - a) The circumstances that caused the child to be ordered into the legal custody of the Department resulted in a conviction for lewd and lascivious conduct;
  - b) The child has been in the legal custody of the Department for more than six (6) months;
  - c) The child is at risk of repeated maltreatment or reentry into foster care because of a parent's recent completion of substance abuse treatment or other compelling circumstance.<sup>34</sup>
9. If the child is an Indian child, active efforts by the Department to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. (***See the ICWA Bench Card.***)

### *Other Permanency Goals*

If the plan has a permanency goal other than reunification, the plan must also include:

1. All options for permanent placement of the child, including in-state and out-of-state placement options.<sup>35</sup>
2. The advantages and disadvantages of each option, and a recommendation as to which option is in the child's best interest.<sup>36</sup>
3. The actions necessary to implement the recommended option.<sup>37</sup>
4. A schedule for accomplishing the actions necessary to implement the permanency goal within the time frames in the Idaho Juvenile Rules:
  - a) If the permanency goal is termination of parental rights and adoption, a schedule that has the objective of finalizing termination within 18 months from approval of the permanency plan and finalizing the adoption with 24 months from the date the child was removed.<sup>38</sup> Amendments to the plan to extend the time must be approved by the court.
  - b) If the permanency goal is guardianship, a schedule that has the objective of finalizing the guardianship within 13 months from the date the child was removed.<sup>39</sup> Any amendment to the plan to extend the time must be approved by the court.
5. If the permanency goal is termination of parental rights and adoption, the names of the proposed adoptive parents when known.<sup>40</sup>
6. If the permanency goal is APPLA, the plan must document:<sup>41</sup>
  - a) Intensive, ongoing, and unsuccessful efforts the Department has made to place the youth with a parent, in an adoptive placement, in a guardianship, or in the custody of the Department in a placement with a fit and willing relative, including an adult sibling.
  - b) Reasons why APPLA is the best permanency goal for the youth and compelling reasons why one of the other placements is not in the youth's best interest.
  - c) Steps taken by the Department to ensure that the youth's foster parents or child care institution are following the reasonable and prudent parent standard when making decisions about the youth's participation in extracurricular, enrichment, cultural, and social activities.
  - d) Opportunities provided to the youth to regularly engage in age or developmentally appropriate activities.

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## QUESTIONS THE COURT MUST ASK AND FINDINGS THE COURT MUST MAKE

### *Reasonable efforts to finalize permanency*

The **court must make written, case-specific findings** that the Department has made reasonable efforts to finalize the primary permanency goal for the child.<sup>42</sup>

### *ICWA (See the ICWA Bench Card.)*

1. The court must ask:<sup>43</sup>
  - a) Is there reason to know that the child is an Indian child?
  - b) What efforts have been made since the last hearing to determine whether the child is an Indian child?
  - c) What efforts have been made by the Department to work with all tribes of which the child may be a member and to verify whether the child is a member or eligible for membership?
2. The court must determine whether the Department is using active efforts to work with all tribes of which the child may be a member to verify whether the child is a member or eligible for membership.
3. If there is reason to know the child is an Indian child, but the court does not have enough evidence to determine the child's status, the court must treat the child as an Indian child.<sup>44</sup>

### *Placement*

1. If a group of siblings was removed from the home but was not placed together, the court must ask about:
  - 1) the Department's efforts to place the siblings together, 2) the reasons the siblings were not placed together, and 3) about the Department's plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>45</sup>
2. The hearing must include a review of the Department's consideration of options for in-state and out-of-state placement of the child. In the case of a child in an out-of-state placement, the court shall determine if the out-of-state placement continues to be in the best interest of the child.<sup>46</sup>

### *Educational Stability*

The court must ask about the Department's efforts to ensure educational stability for the child, including efforts made to keep the child in the same school or the reasons why staying in the same school is not in the child's best interest.<sup>47</sup>

### *Psychotropic medication*

If the child is placed in the Department's custody and the child is being treated with psychotropic medications, the Department must document and the court must inquire about the type of medication, the dosage and the medical professional who prescribed the medication. The court may make any additional relevant inquiry.<sup>48</sup>

### *Youth Age 12 and Older*

For youth age 12 and older, the Department must provide additional information and the court must ask additional questions and make additional findings regarding the permanency plan, including the plan for the youth's transition to successful adulthood.<sup>49</sup> Refer to the Transition to Successful Adulthood bench card.

## ORDER

1. The order must adopt, modify, or reject the permanency plan.<sup>50</sup>
2. The permanency plan as approved by the court should be entered into the record as an order of the court.<sup>51</sup>
3. The court may approve a plan with a primary permanency goal and a concurrent permanency goal.<sup>52</sup>
4. If the permanency plan has a primary permanency goal of termination of parental rights and adoption, the Department must file a petition to terminate parental rights within 30 days of the approval of the plan.<sup>53</sup>
5. The court may authorize the Department to suspend further efforts at reunification, pending further order of the court, when the court approves a permanency plan that does not include a permanency goal of reunification.<sup>54</sup>
6. Deadline for achieving reunification:



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- a) If the child has been in the temporary or legal custody of the Department for 15 of the last 22 months, the Department must file a petition to terminate parental rights prior to the last day of the 15<sup>th</sup> month, unless the court makes one of these findings.<sup>55</sup>
    - The child is placed permanently with a relative.
    - There are compelling reasons why termination of parental rights is not in the child's best interest.
    - The Department has failed to provide reasonable efforts to reunify the child with the family.
  - b) If the deadline is approaching (or has passed), the court should enter orders as appropriate, which may include making the finding based on information already before the court, setting deadlines for further proceedings for the court to make the finding, or ordering the Department to file a petition to terminate parental rights, or a motion for relief from that responsibility.
7. Schedule the next hearing.

## ADDITIONAL QUESTIONS

1. What are the specific safety issues that caused the child to be removed from the home, and what is preventing the child from returning home today?
2. Have the parents made sufficient progress on the case plan to warrant a short period of continued efforts at reunification, for up to three months?<sup>56</sup>
3. **If the child is an Indian child, and the child is in the custody of the Department, does the child's placement comply with ICWA? (See ICWA bench card.)**
4. **Is the Department fully exploring placement options with a fit and willing relative:**
  - a) **Who are the members of the child's extended family (including out-of-state family, adult siblings, and fictive kin)?**
  - b) **Who has been contacted?**
  - c) **Are there placement options?**<sup>57</sup>
5. Has the child been moved since the last hearing? If so:
  - a) Why?
  - b) What further efforts are needed to ensure the child's placement stability?
  - c) Does the new placement support the child's cultural identity?
6. Parents
  - a) Do you understand what happened here today?
  - b) Do you understand what the next steps are?
  - c) Do you have any questions for the court?
7. Department and Guardian *ad Litem*:
  - a) Do you understand what is required of the Department and/or Guardian *ad Litem* prior to the review hearing?
  - b) Do you have any questions for the court?

## ENDNOTES

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<sup>1</sup> I.C. § 16-1622(2)(b).

<sup>2</sup> *Id.*

<sup>3</sup> I.C. § 16-1622(3).

<sup>4</sup> I.C. § 16-1622(2)(b).

<sup>5</sup> I.C. § 16-1629(9) I.J.R. 45(c).

<sup>6</sup> 45 C.F.R. § 1356.21(b)(2)(ii).

<sup>7</sup> 45 C.F.R. § 1356.21(b)(2)(i) and (ii).

<sup>8</sup> I.C. § 16-1613(1); I.J.R. 52(a).

<sup>9</sup> I.C. § 16-1620(5); I.J.R. 40(a) and (b).

<sup>10</sup> I.J.R. 40(b).

<sup>11</sup> *Id.*

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- <sup>12</sup> I.C. § 16-1613(1) and (2).
- <sup>13</sup> I.J.R. 40(c).
- <sup>14</sup> I.R.E. 101(e)(6); I.J.R. 51(b).
- <sup>15</sup> I.J.R. 40(a) and (b).
- <sup>16</sup> I.R.E. 502, I.R.E. 505 *See also* I.R.E. 504(d)(1) Husband/wife privilege; b) I.R.E. 503(d)(4) Physicians and psychotherapists; c) I.R.E. 516(d)(3) School counselors; d) I.R.E. 517(d)(3) Licensed counselors; and e) I.R.E. 518(d)(5) Licensed social workers.
- <sup>17</sup> I.J.R. 38.
- <sup>18</sup> I.J.R. 43(2).
- <sup>19</sup> I.C. § 16-1622(2)(a).
- <sup>20</sup> I.C. § 16-1506(2).
- <sup>21</sup> I.C. § 16-1622(2)(h)(ii).
- <sup>22</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(a).
- <sup>23</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(d)(v).
- <sup>24</sup> I.C. § 16-1622(2)(h)(i).
- <sup>25</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(a).
- <sup>26</sup> I.C. § 16-1622(2)(i).
- <sup>27</sup> I.C. § 16-1622(2)(a).
- <sup>28</sup> *Id.*
- <sup>29</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(c).
- <sup>30</sup> I.J.R. 44(a)(1).
- <sup>31</sup> Idaho Code § 16-1621(3)(b)(iii) and (c).
- <sup>32</sup> I.C. § 16-1621(3).
- <sup>33</sup> I.C. § 16-1622(2)(a) refers to the court ordering a “trial home visit” and states that a “trial home visit means that a child is returned to the care of the parent or guardian from whom the child was removed with the department continuing to have legal custody of the child.” Trial home visit is the term used in the federal system but it is left up to the states to develop a definition. In other places in the CPA, the term “extended home visit” is used in place of “trial home visit.”
- <sup>34</sup> I.C. § 16-1622(2)(a).
- <sup>35</sup> I.C. § 16-1622(2)(d), § 16-1622(2)(a), § 16-1621(3)(d)(i).
- <sup>36</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(d)(ii).
- <sup>37</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(d)(iii).
- <sup>38</sup> I.J.R. 46(a).
- <sup>39</sup> I.J.R. 44(a)(2).
- <sup>40</sup> I.C. § 16-1622(2)(a).
- <sup>41</sup> I.C. § 16-1622(2)(a), § 16-1621(3)(d)(viii).
- <sup>42</sup> I.C. § 16-1622(2)(c).
- <sup>43</sup> I.C. § 16-1622(2)(i).
- <sup>44</sup> 25 C.F.R. § 23.107.
- <sup>45</sup> I.C. 16-1622(2)(h)(ii).
- <sup>46</sup> I.C. § 16-1622(2)(d).
- <sup>47</sup> I.C. § 16-1622(2)(h)(i).
- <sup>48</sup> I.C. § 16-1622(2)(j).
- <sup>49</sup> I.C. § 16-1622(2)(e).
- <sup>50</sup> I.C. § 16-1622(2)(b).
- <sup>51</sup> *See* I.C. § 16-1620(6) (providing that the plan shall be incorporated in an order of the court at a 30-day permanency hearing), § 16-1621(5) (providing that a case plan shall be incorporated in an order of the court), and § 16-1622(2) (making no provision with respect to annual permanency hearings).
- <sup>52</sup> I.C. § 16-1622(2)(a).
- <sup>53</sup> I.J.R. 46(b).
- <sup>54</sup> I.C. § 16-1622(2)(k).
- <sup>55</sup> I.C. § 16-1622(2)(g).
- <sup>56</sup> I.J.R. 44(a).
- <sup>57</sup> I.C. § 16-1629(11); 42 U.S.C. § 671(a)(29).

# TERMINATION OF PARENTAL RIGHTS

## *Bench Card*

### **PURPOSE**

1. Provide for voluntary and involuntary severance of the parent and child relationship.
2. Provide permanency for the child(ren).<sup>1</sup>

### **WHEN**

1. A petition may be filed at any time after the entry of a decree finding that the child is within the jurisdiction of the court under the Child Protective Act (CPA).<sup>2</sup>
2. A petition to terminate parental rights must be filed:
  - a. Within thirty (30) days of a judicial determination that an infant has been abandoned or reasonable efforts are not required because aggravated circumstances were present, unless there are compelling reasons why it would not be in the best interests of the child; or,<sup>3</sup>
  - b. Within thirty (30) days of an order approving a permanency plan with a permanency goal of termination of parental rights and adoption.<sup>4</sup>
  - c. Thirty (30) days after a child is delivered to a safe haven, or as soon as practicable thereafter;<sup>5</sup> or,
  - d. If the child has been in the temporary and/or legal custody of the department for fifteen (15) of the most recent twenty-two (22) months, the department shall file, prior to the last day of the 15<sup>th</sup> month, a petition to terminate parental rights, unless the court finds that: (i) the child is placed permanently with a relative; (ii) there are compelling reasons why termination of parental rights is not in the best interests of the child; or (iii) the department has failed to provide reasonable efforts to reunify the child with her family.<sup>6</sup>

### **WHO MAY BE PRESENT**

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>7</sup>
2. IJR 40 provides that the Department will provide notice of all hearings after the adjudicatory hearing to the following persons, and that the following persons have the right to be heard at all hearings following the adjudicatory hearing:
  - a. A child eight (8) years of age and older who is the subject of the hearing.
  - b. The foster parent of the child who is the subject of the hearing.
  - c. The pre-adoptive parent.
  - d. A relative who is providing care while the child is in the custody of the Department.It is unclear whether this rule applies to proceedings on the petition to terminate.
3. The child may be excluded from hearings at any time in the discretion of the court. If the child testifies, a counselor, friend, or other person shall be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>8</sup>

### **EVIDENCE**

1. The Rules of Evidence apply.<sup>9</sup>
2. Standard is clear and convincing evidence.<sup>10</sup>
3. Privileges in effect at the termination of parental rights hearing are the lawyer/client privilege and the clergy privilege. There is no other privilege as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child.<sup>11</sup>

# TERMINATION OF PARENTAL RIGHTS

## *Bench Card*

### REQUIRED FINDINGS

Any order terminating parental rights must be in writing and must recite the findings upon which the order is based.<sup>12</sup>

1. The court has jurisdiction.<sup>13</sup>
2. Grounds:
  - a. In the best interests of the child and any one or more of the following:<sup>14</sup>
    - i. The parent has abandoned the child;<sup>15</sup> or
    - ii. The parent has neglected the child: (1) as defined in I.C. § 16-1602 (31), *or* (2) the parent(s) has failed to comply with the court's orders or the case plan in a CPA case and: (i) The Department has had temporary or legal custody of the child for fifteen (15) of the most recent twenty-two (22) months; and (ii) reunification has not been accomplished by the last day of the 15<sup>th</sup> month in which the child has been in the temporary or legal custody of the Department<sup>16</sup> or
    - iii. The parent has abused the child;<sup>17</sup> or
    - iv. The presumptive parent is not the biological parent; or
    - v. The parent is unable to discharge her or his parental responsibilities and there are reasonable grounds to believe the condition will continue for a prolonged indeterminate period of time and will be injurious to the child's health, morals, or well-being; or
    - vi. The parent is incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority.
  - b. The court may grant an order terminating the relationship and may rebuttably presume that such termination of parental rights is in the best interests of the child where:<sup>18</sup>
    - i. The parent caused the child to be conceived as a result of rape, incest, lewd conduct with a minor under the age of 16, or sexual abuse of a minor under the age of 16; or
    - ii. The following circumstances are present: (a) abandonment, chronic abuse or chronic neglect of the child; (b) sexual abuse against a child of the parent; (c) torture of a child; any conduct described in the Idaho Code § 18-8303(1); battery or an injury to a child that results in serious or great bodily injury to a child; voluntary manslaughter of a child, or aiding or abetting such voluntary manslaughter, soliciting such voluntary manslaughter or attempting or conspiring to commit such voluntary manslaughter; or (d) the parent has committed murder, aided or abetted a murder, solicited a murder or attempted or conspired to commit murder; or
    - iii. The child is an abandoned infant except in a parental termination action brought by one (1) parent against another parent.
  - c. The court may grant termination of parental rights where it finds that termination is in the best interests of the parent *and* the child.<sup>19</sup>
  - d. The parent(s) has voluntarily consented to the termination of the relationship. Voluntary terminations cannot be used as a basis for a subsequent finding of aggravated circumstances.<sup>20</sup>
3. Appoint authorized agency as a guardian and vest legal custody in such agency.<sup>21</sup>
4. Fix responsibility for child support as appropriate.<sup>22</sup>
5. Set review hearings every six (6) months and permanency every twelve (12) months until adoption or final placement.<sup>23</sup>

# TERMINATION OF PARENTAL RIGHTS

## *Bench Card*

6. In an ICWA case: ***(See the ICWA Bench Card)***
  - a. Findings must include the testimony of a qualified expert witness:
    - i. That continued custody of the child by the parent or Indian custodian is, beyond a reasonable doubt, likely to result in serious emotional or physical damage to the child; and
    - ii. That the Department has made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.<sup>24</sup>
  - b. Consent must be executed in writing and recorded before a judge. The judge must certify that the terms and consequences of the consent were explained in detail and fully understood by the parent, and that the parent fully understood the explanation in English or it was interpreted into a language the parent understood. The consent can be withdrawn at any time prior to entry of a final decree of termination or adoption.<sup>25</sup>

## ENDNOTES

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<sup>1</sup> I.C. § 16-2001(1)(a) and (b).

<sup>2</sup> I.J.R. 48(a).

<sup>3</sup> I.C. § 16-1624 (3); § 16-1602(5).

<sup>4</sup> I.C. § 16-1624(2); I.J.R. 46(b).

<sup>5</sup> I.C. § 39-8205(5).

<sup>6</sup> I.C. § 16-1622(2)(g); 42 U.S.C. § 675(5)(e).

<sup>7</sup> I.C. § 16-2009; I.J.R. 52(a).

<sup>8</sup> I.C. § 16-1613(1) and (2); I.J.R. 52(a).

<sup>9</sup> I.R.E. 101(e)(6); I.C. § 16-2009; I.J.R. 51(c).

<sup>10</sup> I.C. § 16-2009.

<sup>11</sup> I.R.E. 502, I.R.E. 505 *See also* I.R.E. 504(d)(1) Husband/wife privilege; b) I.R.E. 503(d)(4) Physicians and psychotherapists; c) I.R.E. 516(d)(3) School counselors; d) I.R.E. 517(d)(3) Licensed counselors; and e) I.R.E. 518(d)(5) Licensed social workers.

<sup>12</sup> I.C. § 16-2010(1).

<sup>13</sup> I.C. § 16-2010(1); § 16-2003.

<sup>14</sup> I.C. § 16-2005(1).

<sup>15</sup> I.C. § 16-2002(5).

<sup>16</sup> I.C. § 16-2002(3).

<sup>17</sup> I.C. § 16-2002(4), § 16-1602(1).

<sup>18</sup> I.C. § 16-2005(2).

<sup>19</sup> I.C. § 16-2005(3).

<sup>20</sup> I.C. § 16-2005(4), § 16-1602(6)(c).

<sup>21</sup> I.C. § 16-2010(2)(a)(iii).

<sup>22</sup> I.C. § 16-2010(2)(b).

<sup>23</sup> I.C. § 16-2010(4); I.C. 16-1622(1)(a) and (2)(b).

<sup>24</sup> 25 U.S.C. § 1912(d).

<sup>25</sup> 25 U.S.C. § 1913.

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# CPA-RELATED ADOPTION

## Bench Card

### PURPOSE

1. To establish a new legal parent-child relationship for a child who has been the subject of a CPA proceeding.
2. To establish permanency for the child.<sup>1</sup>

### NOTICE<sup>2</sup>

1. Any person whose consent to adoption is required pursuant to Idaho Code § 16-1504 and whose rights have not previously been terminated.
2. Unwed fathers whose rights have not previously been terminated if the unwed father:
  - a. has registered notice of commencement of paternity proceedings pursuant to Idaho Code § 16-1513;
  - b. is recorded on the birth certificate as the child's father;
  - c. is living openly in the household of the child's mother and holding himself out as the child's father; or,
  - d. is married to the child's mother at the time she executes her consent to the child's adoption.<sup>3</sup>
3. The spouse of the Petitioner if not joined in the petition.

### REQUIRED CONSENT<sup>4</sup>

1. The child to be adopted, if the child is over 12 years of age;
2. The spouse of the adoptive parent;<sup>5</sup>
3. Any legally-appointed custodian or guardian of the child;
4. The Director of the Department;<sup>6</sup>
5. If parental rights have not been terminated:
  - a. Both parents or the surviving parent of an adoptee who was conceived or born within a marriage;
  - b. The mother of an adoptee born outside of marriage;
  - c. Any person who has been adjudicated to be the child's biological father prior to the mother's execution of consent;
  - d. An unmarried biological father who has complied with Idaho Code § 16-1504(2);
  - e. An unmarried biological father who has filed a voluntary acknowledgement of paternity with the vital statistics division of the Department pursuant to Idaho Code § 7-1106; and
  - f. The father of an illegitimate child who has adopted the child by acknowledgement.

### PETITION AND WHO MAY ADOPT

1. Any adult who has resided in Idaho for the prior six (6) months AND who is fifteen years older than the child OR who is 25 years of age or older may adopt a child.<sup>7</sup>
2. If the person proposing to adopt the child is not the proposed adoptive parent named in the permanency plan, then the adoption judge must stay the adoption until the permanency plan is amended by the court in the child protection case.<sup>8</sup>
3. Petition must be filed by the person(s) proposing to adopt.<sup>9</sup>
4. Petition must be filed with the court having jurisdiction over the CPA, unless the court has relinquished jurisdiction.<sup>10</sup>
5. If the court has relinquished jurisdiction, the petition must be filed in the county where the prospective adoptive parents reside.<sup>11</sup>



## WHO MUST BE PRESENT

1. The child to be adopted.
2. The person adopting the child.
3. The spouse of the petitioner if a natural parent of the child.<sup>12</sup>

## EVIDENCE

The court shall enter an order granting adoption if the requirements regarding consent and Idaho Code § 16-1501 are proven to the satisfaction of the court, and the court is also satisfied that the interests of the child will be promoted by the adoption.<sup>13</sup>

## REQUIRED FINDINGS

1. The social investigation conducted by, or submitted to, the Department for oversight prior to the placement for adoption must have a positive recommendation from the investigator and must be approved by the court<sup>14</sup>, or a motion may be made to the court to dismiss the petition.
  - a. In instances where the prospective adoptive parent is a grandparent or stepparent to the child, such social investigation shall be completed only upon order of the court.<sup>15</sup>
2. Consent to adoption must be knowing and voluntary; the consent of all persons for whom consent is required has been given.<sup>16</sup>
3. The requirements of Idaho Code § 16-1501 are proven to the satisfaction of the court.<sup>17</sup>
4. The interests of the child will be promoted by the adoption. The court's authority is limited to granting the petition.<sup>18</sup>

## ENDNOTES

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<sup>1</sup> I.C. § 16-1508.

<sup>2</sup> I.C. § 16-1505(1).

<sup>3</sup> I.C. § 16-1504(1)(b), (d)-(f).

<sup>4</sup> I.C. § 16-1504.

<sup>5</sup> I.C. § 16-1503.

<sup>6</sup> I.C. § 16-1504(7).

<sup>7</sup> I.C. § 16-1506(1), *See* I.C. § 16-1502 for exceptions.

<sup>8</sup> I.C. § 16-1506(2).

<sup>9</sup> I.C. § 16-1506(1).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> I.C. § 16-1506(6), I.C. § 16-1507.

<sup>14</sup> I.C. § 16-1506(4).

<sup>15</sup> *Id.*

<sup>16</sup> I.C. § 16-1506(2) and (6).

<sup>17</sup> I.C. § 16-1506(6).

<sup>18</sup> I.C. § 16-1507.

# INDIAN CHILD WELFARE ACT (ICWA)

## *Bench Card*

### **PURPOSE <sup>1</sup>**

To protect the best interests of Indian children and promote the stability and security of **federally recognized** Indian tribes and families by establishing minimum federal standards - in addition to the Idaho CPA standards - for the removal of Indian children from their homes for placement in foster care or for adoption.

### **WHEN ICWA APPLIES <sup>2</sup>**

ICWA applies to emergency proceedings and child custody proceedings involving Indian children.

1. Emergency Proceedings: any emergency removal of an Indian Child from her or his parents. In Idaho, the shelter care hearing in an ICWA case is the emergency proceeding.
2. Child Custody Proceeding: foster care placement, termination of parental rights, pre-adoptive placements, guardianships and adoption but not custody disputes in divorce proceedings, placement of delinquent Indian children (except status offenses) or voluntary placements where the Indian parent can reclaim the child upon demand. The child custody proceeding starts at the adjudicatory hearing.
3. Indian Child: An unmarried person under 18 who is either: (1) a member of a federally recognized Indian tribe or (2) the biological child of a member and eligible for membership. Each tribe determines its own rules for eligibility.

### **JURISDICTION <sup>3</sup>**

1. Exclusive Jurisdiction: Pursuant to ICWA, the tribe has exclusive jurisdiction if a child resides or is domiciled on the reservation or is a ward of the tribal court, except where such jurisdiction is otherwise vested in the state by existing federal law.
2. Concurrent Jurisdiction: All other ICWA cases have concurrent state and tribal court jurisdiction.
3. Transfer Jurisdiction: Upon request of a parent, the Indian custodian, or the tribe, the state court must transfer jurisdiction to the tribal court unless: 1) a parent objects; 2) the tribal court declines; or 3) the state court finds good cause not to transfer. Request to transfer may be made at any stage of the proceedings. The burden of establishing good cause to the contrary is on the party opposing the transfer.
4. Emergency Jurisdiction: A state court may take temporary, emergency jurisdiction for a child who resides on the reservation while a child is off reservation if clearly necessary to prevent the child from suffering imminent risk of abuse or neglect. Jurisdiction shall terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. If the child cannot be transferred to the tribe or returned safely to the parent, the case may proceed in state court in compliance with ICWA requirements for a child custody proceeding.<sup>4</sup>
5. Intervention: If the case remains in state court, the tribe can intervene at any stage of the proceedings.

### **EMERGENCY PROCEEDING**

1. Does any participant know or have reason to know the child is an Indian child? This inquiry must be made of each party throughout the life of the case until the child's status is determined. All responses must be on the record.<sup>5</sup>

# INDIAN CHILD WELFARE ACT (ICWA)

## *Bench Card*

2. Has a request been made to transfer the case to tribal court? If the case is not transferred, has a party opposing transfer shown that there is good cause to deny transfer?<sup>6</sup>
3. Is removal necessary to prevent imminent physical damage or harm to the child?<sup>7</sup>

### **NOTICE OF CHILD CUSTODY PROCEEDING<sup>8</sup>**

Where **Idaho Department of Health and Welfare either knows or has reason to know that the child may be an Indian child**, notice of the child custody proceeding must be provided in accordance with ICWA, even if no conclusive determination has been made that ICWA is applicable.

1. Notice must be given to the child's parents, Indian custodian and the child's tribe by registered mail or by personal delivery. Copies of notices must be given to the regional office of the BIA.
2. The Notice must identify the child, and include:
  - a) a copy of the petition,
  - b) the name and address of petitioner and their counsel,
  - c) a statement regarding right to intervene,
  - d) appointment of counsel,
  - e) location and other information regarding court, including next hearing date/time,
  - f) right to seek transfer,
  - g) potential future legal consequences regarding custodial rights, and
  - h) information regarding confidentiality.

### **TIMING<sup>9</sup>**

No foster care placement or termination proceeding can be held until at least 10 days after receipt of notice by the parent, tribe and Indian custodian. The adjudicatory hearing is the applicable proceeding regarding the 10-day requirement. Upon receiving notice of the proceedings, the tribe, parent or Indian custodian has the right upon request to be granted twenty (20) days from the date notice is received, to prepare for the proceeding.

### **APPOINTMENT OF COUNSEL<sup>10</sup>**

1. Indigent parent(s) and indigent Indian custodian(s) have the right to appointed counsel in any removal, placement or termination proceeding.
2. Counsel for the child may be appointed in the discretion of the court upon a finding that such appointment is in the best interests of the child.

### **FINDINGS**

In addition to any state law, findings and federal findings required under ASFA, there are two additional findings the court must make in an ICWA case (in a CPA case at the adjudication and in a TPR case at the termination trial). If necessary, a separate ICWA hearing can be set to address these issues. These findings cannot be waived or found by way of stipulation.

# INDIAN CHILD WELFARE ACT (ICWA)

## *Bench Card*

1. **Active Efforts Finding:** The state must show that **active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.**<sup>11</sup> “Active efforts” is defined in the BIA Regulations as “affirmative, active, thorough, and timely efforts to maintain or reunite a child with his or her family.”<sup>12</sup> Aggravating circumstances is not an exception to the active efforts requirement.
2. **Serious Physical or Emotional Harm Finding Supported by the Testimony of a Qualified Expert Witness:** The state must show, by **clear and convincing evidence** in a CPA case, and **beyond a reasonable doubt** in a termination of parental rights proceeding 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.**<sup>13</sup>

Who qualifies as an expert?<sup>14</sup>

1. A person qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.
2. A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the child's tribe.

The social worker assigned to the case may not serve as a qualified expert witness.

## **PLACEMENT PREFERENCES**<sup>15</sup>

ICWA sets forth placement preferences when placing Indian children in foster care or an adoptive placement. A tribe may change the order of preference via tribal resolution.

1. **Foster Care or Pre-adoptive Placement:** The child must be placed in the least restrictive setting which most approximates a family and meets any special needs of the child. A preference must be given, in absence of good cause to the contrary, to placement with (in the following order):
  - a. A member of the Indian child's extended family;
  - b. A foster home licensed or approved or specified by the Indian tribe;
  - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - d. An institution for children approved by an Indian tribe.
2. **Adoptive Placement:** A preference must be given, in absence of good cause to the contrary, to placement with:
  - a. A member of the child's extended family;
  - b. Other members of the Indian child's tribe;
  - c. Other Indian families.
3. **Good Cause to Deviate:** Request of biological parent or child of sufficient age; 2) presence of a sibling attachment maintained only through a particular placement; 3) extraordinary physical or emotional needs of the child (need expert testimony); 4) unavailability of suitable families for placement after diligent search. Burden is on party seeking deviation.<sup>16</sup>

# INDIAN CHILD WELFARE ACT (ICWA)

*Bench Card*

## ENDNOTES

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<sup>1</sup> 25 U.S.C. § 1902.

<sup>2</sup> 25 U.S.C. § 1903; 25 C.F.R. § 23.103

<sup>3</sup> 25 U.S.C. §§ 1911 and 1922; 25 C.F.R. § 23.110

<sup>4</sup> 80 F.R. 10146 § C.3(d).

<sup>5</sup> 25 C.F.R. § 23.107(a)

<sup>6</sup> 25 U.S.C. § 1911(b); 25 C.F.R. § 23.115

<sup>7</sup> 25 U.S.C. § 1922; 25 C.F.R. § 23.113(e)

<sup>8</sup> 25 U.S.C. § 1912 and 25 C.F.R. § 23.112.

<sup>9</sup> 25 U.S.C. § 1912(a).

<sup>10</sup> 25 U.S.C. § 1912(b).

<sup>11</sup> 25 U.S.C. § 1912(d).

<sup>12</sup> 25 C.F.R. § 23.2 (definition of “active efforts”).

<sup>13</sup> 25 U.S.C. § 1912 (e) and (f); 25 C.F.R. § 23.121.

<sup>14</sup> 25 C.F.R. § 23.122.

<sup>15</sup> 25 U.S.C. § 1915, and 25 C.F.R. §§ 23.129 – 23.132.

<sup>16</sup> 25 C.F.R. § 23.132.

# INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

## *Bench Card*

### **PURPOSE**

To meet the needs of children for safe and appropriate placements outside the state of Idaho and to facilitate cooperation between Idaho and other states to improve services and protection for children in need of placement.

### **WHEN**

1. The consent of the court must be obtained whenever the Department makes a decision to place a child out of state.<sup>1</sup>
2. The ICPC applies when the child is in the custody of the Department, the Department seeks to place the child out of state, and:
  - a. is being placed with a parent or relative; OR
  - b. is entering foster care or a placement for the purpose of adoption; OR
  - c. is being placed in a group home and/or residential facility.<sup>2</sup>

### **JURISDICTION**

Idaho courts must retain jurisdiction sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in Idaho. The court's jurisdiction continues until the child reaches the age of majority or until the child is discharged with the concurrence of the appropriate authority in the receiving state.<sup>3</sup>

### **ICPC REQUIREMENTS**

1. The Department must provide written notice to the receiving state of its intent to send, bring or place the child in the receiving state.<sup>4</sup>
2. The Department must respond to any requests from the receiving state for additional information supporting the out-of-state placement of the child.<sup>5</sup>
3. The Department must receive notification in writing by the appropriate public agency in the receiving state that the proposed placement does not appear to be contrary to the interests of the child prior to sending the child to the receiving state.<sup>6</sup>

### **PRIORITY PLACEMENTS**

A party or the court on its own motion may request that the court enter an order for priority placement under the ICPC. To be valid, the order for priority placement must contain findings that placement is with a close relative **and:**

- a. an unexpected dependency due to a sudden incarceration, incapacitation, or death of a parent or guardian; OR
- b. one child in the sibling group is under age 5; OR
- c. the child is in an emergency placement; OR
- d. the court finds the child has a substantial relationship with the proposed placement.<sup>7</sup>

# INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

## *Bench Card*

If an appropriate order is entered and processed and the receiving state does not respond within twenty (20) business days of receipt of the request, the Idaho court may inform an appropriate court in the receiving state, provide the court with copies of relevant documentation in the case, and request assistance.<sup>8</sup>

When the court orders a priority placement under Regulation 7, a specific order and supporting affidavit is required. For more information, please see the Idaho Supreme Court website at: <http://www.isc.idaho.gov/child-protection/law>

### **ADDITIONAL CONSIDERATIONS**

1. To ensure stability for the child, the court should monitor whether there is a possibility of an out-of-state placement and status of placement options for the child as early in the case as possible.
2. ICPC placements are often invoked so children may be placed with relatives. Courts should be especially conscious of the possibility of out-of-state placement with kin.

### **ENDNOTES**

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<sup>1</sup>I.C. § 16-1629(8).

<sup>2</sup>I.C. § 16-2102.

<sup>3</sup>I.C. § 16-2102 Art. 5.

<sup>4</sup>I.C. § 16-2102 Art. 3(b).

<sup>5</sup>I.C. § 16-2102 Art. 3(c).

<sup>6</sup>I.C. § 16-2102 Art. 3(d).

<sup>7</sup>ICPC Reg. No. 7.

<sup>8</sup>ICPC Reg. No. 7.

# IJR 16 EXPANSION FOR JUVENILE JUDGES

*(CASES COMING FROM JUVENILE CORRECTIONS TO CP PROCEEDINGS)*

*Bench Card*

## PURPOSE

1. To direct the Department to investigate the circumstances of the juvenile and report to the court; and/or,
2. To determine whether a Juvenile Corrections Act (JCA) proceeding should be expanded to a Child Protection Act proceeding.<sup>1</sup>

## WHEN

1. At any stage of a JCA proceeding, when the court has reasonable cause to believe that a juvenile living or found within the state is neglected, abused, abandoned, homeless, or whose parents or legal custodian fails or is unable to provide a stable home environment.<sup>2</sup>
2. If the proceeding is expanded, the JCA court may, in its discretion, order the juvenile placed in shelter care. The CPA court must hold a shelter care hearing within 48 hours of the child being placed in shelter care, excluding Saturdays, Sundays and holidays.<sup>3</sup>
3. The CPA court must hold an adjudicatory hearing within thirty (30) days of the JCA court's determination to expand the proceedings.<sup>4</sup>

## WHO MAY BE PRESENT

The Department of Juvenile corrections has standing as an interested party in the CPA case if the juvenile is in the custody of the Department of Juvenile Corrections.<sup>5</sup>

## EVIDENCE

The Rules of Evidence apply in the JCA proceeding unless it is a detention hearing or a sentencing hearing. The evidentiary standard is reasonable cause.<sup>6</sup>

## REQUIRED FINDINGS

1. There is reasonable cause to believe the juvenile is living or found within the state and is neglected, abused, abandoned, homeless, or where his/her parents or other legal custodian(s) have failed or are unable to provide a stable environment.<sup>7</sup>
2. If the child is placed in shelter care, such shelter care is in the best interest of the juvenile and needed for the juvenile's protection.<sup>8</sup>
3. If:
  - a. An order expanding a JCA proceeding is issued, and
  - b. The court orders that the juvenile be removed from his/her home, and
  - c. If the expansion order is the first order sanctioning removal of the child from the home, then

The court must also determine whether it is contrary to the welfare of the child to remain in the home, and it is in the best interest of the child to be removed from the home pending further proceedings. This finding must be in writing and case-specific.<sup>9</sup>



# IJR 16 EXPANSION FOR JUVENILE JUDGES

*(CASES COMING FROM JUVENILE CORRECTIONS TO CP PROCEEDINGS)*

*Bench Card*

## ORDER

1. The order expanding the JCA proceeding to a CPA proceeding must be in writing and contain the factual basis supporting the order.<sup>10</sup>
2. The order, as set forth in IJR 16(g), expanding the Juvenile Corrections Act proceedings to Child Protective Act proceedings, serves the function of the CP Petition and should substantially conform to the format found in IJR 16(g).

## ENDNOTES

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<sup>1</sup> I.J.R. 16(a).

<sup>2</sup> *Id.*

<sup>3</sup> I.J.R. 16(b).

<sup>4</sup> I.J.R. 16(d).

<sup>5</sup> I.J.R. 16(f).

<sup>6</sup> I.R.E. 101(e)(6); I.J.R. 51(a).

<sup>7</sup> I.J.R. 16(a).

<sup>8</sup> I.J.R. 16(b).

<sup>9</sup> 45 C.F.R. § 1356.21(c); I.C. § 16-1615(5); I.J.R. 16(g).

<sup>10</sup> I.J.R. 16(a).

# IJR 16 EXPANSION FOR CP JUDGES

(CASES COMING FROM JUVENILE CORRECTIONS TO CP PROCEEDINGS)

## *Bench Card*

### **PURPOSE**

To conduct the initial and subsequent hearings in a child protection case that was expanded from a Juvenile Corrections Act (JCA) case.<sup>1</sup>

### **WHEN**

1. If a JCA proceeding is expanded, the JCA court may, in its discretion, order the juvenile placed in shelter care. The CPA court must then hold a shelter care hearing within 48 hours of the child being placed in shelter care, excluding Saturdays, Sundays, and holidays.<sup>2</sup>
2. The CPA court must hold an adjudicatory hearing within thirty (30) days of the JCA court's determination to expand the proceedings.<sup>3</sup>

### **WHO MAY BE PRESENT**

1. The general public shall be excluded, and only such persons shall be admitted as are found by the court to have a direct interest in the case.<sup>4</sup>
2. The child may be excluded from hearings at any time at the discretion of the court. A counselor, friend, or other person may be permitted to remain in the courtroom at the witness stand as the child testifies.<sup>5</sup>
3. The Department of Juvenile corrections has standing as an interested party in the CPA case if the juvenile is in the custody of the Department of Juvenile Corrections.<sup>6</sup>

### **CPA PETITION**

1. The order expanding the JCA proceeding to a CPA proceeding serves as the petition in the CPA case. No further petition is required. The expansion order must be given to the juvenile's parent(s), guardian(s), or custodian(s), the Department, the prosecuting attorney and other counsel of record, and the Department of Juvenile Corrections if the juvenile is currently under commitment.<sup>7</sup>
2. A petition may be filed in the CPA proceeding, to include other children that come within the jurisdiction of the CPA but who were not before the JCA court. A petition to include other children in the CPA case must be filed at least fourteen (14) days prior to the adjudicatory hearing.<sup>8</sup>

### **EVIDENCE**

1. The Rules of Evidence do not apply to shelter care hearings held after the expansion of a JCA proceeding to a CPA proceeding; they do apply in the CPA proceeding only to that part of the adjudicatory hearing where jurisdiction and/or aggravated circumstances is/are determined.<sup>9</sup>
2. The burden going forward with the evidence at the adjudicatory hearing remains with the prosecutor.<sup>10</sup>

# IJR 16 EXPANSION FOR CP JUDGES

*(CASES COMING FROM JUVENILE CORRECTIONS TO CP PROCEEDINGS)*

*Bench Card*

## ENDNOTES

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<sup>1</sup> I.J.R. 16.

<sup>2</sup> I.J.R. 16(b).

<sup>3</sup> I.J.R. 16(d).

<sup>4</sup> I.C. § 16-1613(1); I.J.R. 39(h); I.J.R. 52(a)

<sup>5</sup> I.C. § 16-1613(1) and (2).

<sup>6</sup> I.J.R. 16(f).

<sup>7</sup> I.J.R. 16(c) and (d).

<sup>8</sup> I.C. § 16-1603(2); I.J.R. 16(d).

<sup>9</sup> I.R.E. 101(e)(6); I.J.R. 39(e), I.J.R. 41(c), and I.J.R. 51(b).

<sup>10</sup> I.J.R. 16(d).

# PSYCHOTROPIC MEDICATIONS FOR CHILDREN IN CARE

*Bench Card*

## PURPOSE

To monitor psychotropic medication use in children diagnosed with a mental health disorder.

## WHAT

Psychotropic medications are prescribed to manage psychiatric and mental health disorders or issues. They include mood stabilizers, antipsychotics, anti-anxiety medications, and stimulants<sup>1</sup>.

## WHO<sup>2</sup>

Youth in care who have been diagnosed with a mental health disorder and have been prescribed medication to manage issues and symptoms. Common school-age child and adolescent diagnoses include:

- a. Mood disorders including depression, depression with psychotic features and bipolar disorder;
- b. Anxiety disorders including obsessive-compulsive disorder, PTSD, and generalized anxiety disorder;
- c. Thought disorders including schizophrenia and psychotic disorder;
- d. Attention deficit and disruptive behavior disorders;
- e. Elimination disorders; and/or
- f. Other disorders of infancy, childhood or adolescence including separation anxiety disorder (SAD), reactive attachment disorder (RAD), anorexia and bulimia.

## RED FLAG WARNINGS

The following circumstances may warrant further investigation<sup>3</sup>:

1. **Black Box Warning** – The FDA places black box warning labels on prescription medications with a high potential for adverse effects. This is the strongest warning the FDA can impose. Medicines with black box warning are still FDA approved, but their use requires particular attention and caution regarding potentially dangerous or life-threatening side effects.  
NOTE: All antidepressant medications carry a black box warning that using the drugs can increase the risk of suicidal tendencies and behaviors in children and adolescents.
2. **Polypharmacy** – The prescribing of more than one psychotropic medication can result in increased side-effects and risks. Whenever multiple medications are used, there should be a rationale provided as to why each is prescribed.
3. **Medication in Children under Five** – Young children are often more sensitive to medication side effects as compared to older youth. Any consideration of such medication in a child or infant below the age of five should be very carefully evaluated by a clinician with special training and experience with this young age group.

## OTHER CONSIDERATIONS

**Off-Label Use** – Many medications used with children are often used off-label, meaning they are used to treat symptoms for which they were not FDA approved to treat. Using medications off-label is legal; however, concerns have been raised about risks of widespread off-label use.

# PSYCHOTROPIC MEDICATIONS FOR CHILDREN IN CARE

*Bench Card*

## ADDITIONAL QUESTIONS

1. What is the child's diagnosis which warrants medication?
2. What is the medication needed for?
3. Who prescribed the medication? (e.g. adequate credentials)
4. What other modes of treatment or intervention will also be provided?
5. Were you able to obtain an accurate medical, behavioral, and psychological history from parents and past providers?
  - a. What else has been tried?
  - b. Has counseling been tried over a substantial period of time?
  - c. Has the child had a psychiatric and/or medical examination?
6. Who will monitor the ongoing use of this medication and how often will the youth be seen?
7. What are the possible side effects of this medication and how will they be handled?
8. What evidence supports the use of this medication with children?
  - a. What do we know about how this medication works in children?
9. How will this child be able to comply with the prescribed medication?
10. Does this child agree with taking this medication?
11. Who gave permission to place this child on medication?
12. How will this medication help improve this child's functioning?
13. Is a second opinion warranted in this case?

## ENDNOTES

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<sup>1</sup> For more information on commonly prescribed psychotropic medication and side effects see: pgs. 9-11, Practice and Policy Brief. Psychotropic Medication and Children in Foster Care: Tips for Advocates and Judges. JoAnne Solchany, PhD, ARNP. October, 2011. Adapted from National Alliance on Mental Illness. Commonly Prescribed Psychotropic Medications, *available* at [www.nami.org](http://www.nami.org) (last visited March 29, 2018).

<sup>2</sup> Practice and Policy Brief. Psychotropic Medication and Children in Foster Care: Tips for Advocates and Judges. JoAnne Solchany, PhD, ARNP. October, 2011 (last visited March 29, 2018).

<sup>3</sup> A Guide for Public Child Serving Agencies on Psychotropic Medications for Children and Adolescents. American Academy of Child and Adolescent Psychiatry, February 2012.

# TRANSITION TO SUCCESSFUL ADULTHOOD

## Bench Card

### PURPOSE

To ensure that the needs of youth in care, age 12 and over, are met regarding:

- Permanency
- Planning and skills necessary for transition to successful adulthood
- Normalcy: Engaging in age or developmentally appropriate extracurricular, enrichment, cultural, or social activities

### WHEN<sup>1</sup>

At every review and permanency hearing for youth age 12 and older.

### WHO MAY BE PRESENT

In addition to the individuals identified in the Review Hearing or Permanency Hearing Bench Cards:

1. Youth age 12 and older are required to attend their review and permanency hearings unless they decline to do so in writing, decline through counsel, or the court excuses them for good cause.<sup>2</sup>
2. Up to two individuals identified by the youth who have been involved in case planning for the youth.<sup>3</sup>

### EVIDENCE

See Review Hearing/Permanency Hearing Bench Cards.

### STIPULATIONS

See Review Hearing/Permanency Hearing Bench Cards.

### QUESTIONS THE COURT MUST ASK AND FINDINGS THE COURT MUST MAKE

#### FOR YOUTH AGE 12 AND OLDER

1. Permanency
  - a. Ask the youth about his desired permanency outcome and discuss with the youth the current permanency plan.<sup>4</sup> (Another planned permanency living arrangement (APPLA) is not an available permanency goal for youth under age 16.)<sup>5</sup>
  - b. If a group of siblings was removed from the home but was not placed together, the Department must document, and the court must ask about:
    - i. the Department's efforts to place the siblings together,
    - ii. the reasons the siblings were not placed together, and
    - iii. the Department's plan to ensure frequent visitation or ongoing contact among the siblings, unless visitation or contact would be contrary to the wellbeing of one or more siblings.<sup>6</sup>
2. Normalcy: Opportunities to engage in age or developmentally appropriate activities

Best practice: Ask the youth and other participants about ongoing opportunities for the youth to engage in age or developmentally appropriate activities.<sup>7</sup>

# Transition to Successful Adulthood Bench Card

## FOR YOUTH AGE 14 AND OLDER – ALL PREVIOUS QUESTIONS **PLUS**:

### 1. Permanency

- a. Review and discuss with youth the progress made on services needed to finalize the permanency goal and to assist the youth in transitioning successfully to adulthood.<sup>8</sup> (APPLA is not an available permanency goal for youth under age 16.)

### 2. Skills for Transition to Successful Adulthood

- a. Confirm that the Department has invited youth to participate in the development of the case plan.<sup>9</sup>
- b. Confirm that the Department has provided the youth with a written document identifying the youth's rights regarding education, health, visitation, court participation, and receipt of an annual credit report.<sup>10</sup>
- c. Review the portion of the case or permanency plan that sets forth the plan for the youth's transition to successful adulthood.
- d. Best practice: Confirm that the youth understands her/his rights.<sup>11</sup>
- e. Best practice: For eligible youth age 14 and older, confirm that the Department developed the youth's transition to successful adulthood plan. The court should review the plan with the youth.<sup>12</sup>

## FOR YOUTH AGE 16 AND OLDER – ALL PREVIOUS QUESTIONS **PLUS**:

### 1. Permanency where the goal is APPLA

- a. Determine whether the Department has documented sufficient intensive, ongoing, unsuccessful efforts to achieve reunification, adoption, guardianship, or placement with a fit and willing relative, including an adult sibling, while remaining in the custody of the Department.<sup>13</sup>
- b. Make written, case specific **findings** that:
  - i. APPLA is the best permanency goal for the youth, AND
  - ii. There are compelling reasons why it is not in the best interest of the youth to be placed permanently with a parent, in an adoptive placement, in a guardianship, or in the legal custody of the Department in a placement with a fit and willing relative, including an adult sibling.<sup>14</sup>
- c. Best practice: Consider specific details of APPLA placement to ensure that the placement:
  - i. Provides placement stability
  - ii. Is in the least restrictive setting
  - iii. Provides ongoing connection with family and other important adults
  - iv. Includes services and support that meet the youth's needs.<sup>15</sup>
- d. At a permanency hearing, make a written, case specific finding that the Department is making reasonable efforts to finalize the youth's specific APPLA permanency goal.<sup>16</sup>

### 2. Normalcy: Opportunities to engage in age or developmentally appropriate activities

- a. Confirm that the Department has sufficiently documented the steps it has taken to ensure that the youth's foster parents or child care institution is following the reasonable and prudent parent standard when making decisions about the youth participating in extracurricular, enrichment, cultural, or social activities.<sup>17</sup>
- b. Confirm that the Department has documented ongoing opportunities for the youth to participate in age or developmentally appropriate extracurricular, enrichment, cultural, or social activities.<sup>18</sup>

## FOR YOUTH AGE 17 AND OLDER – ALL PREVIOUS QUESTIONS **PLUS**:

### 1. Permanency

- a. Best Practice: Beginning at age 17, review and discuss with the youth his or her Transition Plan, developed by the Department with direction from the youth. The Transition Plan should be in alignment with the youth's case plan and transition to successful adulthood plan.<sup>19</sup>

# Transition to Successful Adulthood Bench Card

- b. The Transition Plan should be specific to the needs of the youth and at a minimum, address housing, health insurance, education, local opportunities for continued support and employment services.<sup>20</sup>
- c. Ninety days prior to the youth's 18<sup>th</sup> birthday at a review hearing, the court must review and discuss the transition plan with the youth for the purpose of ensuring that the plan provides the services necessary to allow the youth to transition to a successful adulthood.<sup>21</sup>
  - i. The Department shall file a report that includes the Department's transition plan for the youth;
  - ii. Discuss the transition plan with the youth;
  - iii. Review the transition plan with the youth to ensure the plan provides the services necessary to allow the youth to transition to successful adulthood
- d. Best Practice: Confirm that prior to the youth's 18<sup>th</sup> birthday, the Department has or will provide the youth with an original or copy of:
  - i. The youth's birth certificate
  - ii. Social security card
  - iii. State identification card or driver's license
  - iv. Health insurance information and cards used to access medical care
  - v. Medical records<sup>22</sup>

## ORDER

See Review Hearing/Permanency Hearing Bench Cards.

## ADDITIONAL QUESTIONS

1. Have arrangements been made in the following areas:
  - a. Health care power of attorney
  - b. Educational training vouchers (ETVs)
  - c. Support structure and contacts in the community
2. If the youth has a developmental or physical disability, or a serious mental health diagnosis:
  - a. What has been completed to ensure the youth has the skills necessary to live independently?
  - b. Has SSI been applied for?
  - c. Has the youth been referred to adult services for disabilities?
3. Ask the youth:
  - a. What are your future educational plans?
  - b. Where are you going to live when you turn 18?
  - c. How do you plan to access health care when you turn 18?
  - d. Are you getting the help you need?
  - e. Who will you call when you need help? Do you have that person's contact information?

## ENDNOTES

<sup>1</sup> This Bench Card is to be used in conjunction with the Review and Permanency Bench Cards for youth age twelve (12) and older.

<sup>2</sup> I.C. § 16-1620(4)(a); §16-1622(1)(a)(v); §16-1622(2)(e).

<sup>3</sup> 42 U.S.C. § 675(1)(B).

<sup>4</sup> I.C. § 16-1620(4)(a); § 16-1622(1)(a)(v); and § 16-1622(2)(e).

<sup>5</sup> I.C. § 16-1622(2)(f)

<sup>6</sup> I.C. § 16-1622(1)(a)(iv); § 16-1622(2)(h)(ii).

<sup>7</sup> ABA Center on Children and the Law, *Issue Brief: The Role of the Courts in Implementing the Strengthening Families Act*, Juvenile Law Center, Feb. 2016, at 22.

<sup>8</sup> I.C. § 16-1620(4)(a); § 16-1622(1)(a)(v); § 16-1622(2)(e).

<sup>9</sup> 42 U.S.C. § 675(5)(C)(iv).



# Transition to Successful Adulthood Bench Card

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<sup>10</sup> I.C. § 16-1620(3)(h)(ii), § 16-1621(3)(a)(ii), § 16-1622(1)(a)(v); 42 USC § 675(1).

<sup>11</sup> 42 USC § 675A(b)(2).

<sup>12</sup> IDHW Standard for Working with Older Youth, pg. 6,

<http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/WorkingOlderYouth.pdf> (last visited March 29, 2018).

<sup>13</sup> I.C. § 16-1620(3)(i)(i), § 16-1621(3)(d)(viii)(1), § 16-1622(1)(a)(vii)(1), § 16-1622(2)(f)(ii).

<sup>14</sup> I.C. § 16-1622(1)(a)(viii); § 16-1622(2)(f).

<sup>15</sup> ABA Center on Children and the Law, *Issue Brief: The Role of the Courts in Implementing the Strengthening Families Act*, Juvenile Law Center, Feb. 2016, at 6.

<sup>16</sup> I.C. § 16-1622(2)(c).

<sup>17</sup> I.C. § 16-1602(37), § 16-1620(3)(i)(iii), § 16-1621(3)(d)(viii)(3), § 16-1622(1)(a)(vi)(1).

<sup>18</sup> I.C. § 16-1620(3)(i)(iv), § 16-1621(3)(d)(viii)(4), § 16-1622(1)(a)(vi)(2).

<sup>19</sup> 42 USC § 675(5)(H); IDHW Standard for Working with Older Youth, Pg. 9,

<http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/WorkingOlderYouth.pdf> (last visited March 29, 2018).

<sup>20</sup> 42 USC § 675(5)(H); IDHW Standard for Working with Older Youth, pg. 9,

<http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/WorkingOlderYouth.pdf> (last visited March 29, 2018).

<sup>21</sup> I.C. § 16-1622(3).

<sup>22</sup> 42 USC § 675(5)(I); IDHW Standard for Working with Older Youth, pg. 13,

<http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/WorkingOlderYouth.pdf> (last visited March 29, 2018).

# NCTSN BENCH CARD

## FOR THE TRAUMA-INFORMED JUDGE

Research has conclusively demonstrated that court-involved children and adolescents present with extremely high rates of traumatic stress caused by their adverse life experiences. In the court setting, we may perceive these youth as inherently disrespectful, defiant, or antisocial, when, in fact, their disruptive behavior may be better understood in the context of traumatic stress disorders. These two Bench Cards provide judges with useful questions and guidelines to help them make decisions based on the emerging scientific findings in the traumatic stress field. These cards are part of a larger packet of materials about child and adolescent trauma available and downloadable from the [NCTSN Trauma-Informed Juvenile Justice System Resource Site\\*](#) and are best used with reference to those materials.

- 1. Asking trauma-informed questions can help judges identify children who need or could benefit from trauma-informed services from a mental health professional. A judge can begin by asking, “Have I considered whether or not trauma has played a role in the child’s<sup>1</sup> behavior?” Use the questions listed below to assess whether trauma-informed services are warranted.**

**TRAUMA EXPOSURE:** Has this child experienced a traumatic event? These are events that involve actual or threatened exposure of the child to death, severe injury, or sexual abuse, and may include domestic violence, community violence, assault, severe bullying or harassment, natural or man-made disasters, such as fires, floods, and explosions, severe accidents, serious or terminal illness, or sudden homelessness.

**MULTIPLE OR PROLONGED EXPOSURES:** Has the child been exposed to traumatic events on more than one occasion or for a prolonged period? Repeated or prolonged exposure increases the likelihood that the child will be adversely affected.

**OUTCOMES OF PREVIOUS SANCTIONS OR INTERVENTIONS:** Has a schedule of increasingly restrictive sanctions or higher levels of care proven ineffective in this case? Traumatized children may be operating in “survival mode,” trying to cope by behaving in a defiant or superficially indifferent manner. As a result, they might respond poorly to traditional sanctions, treatments, and placements.

**CAREGIVERS’ ROLES:** How are the child’s caregivers or other significant people helping this child feel safe or preventing (either intentionally or unintentionally) this child from feeling safe? Has the caregiver been a consistent presence in the child’s life? Does the caregiver acknowledge and protect the child? Are caregivers themselves operating in survival mode due to their own history of exposure to trauma?

**SAFETY ISSUES FOR THE CHILD:** Where, when and with whom does this child feel safest? Where, when and with whom does he or she feel unsafe and distrustful? Is the home chaotic or dangerous? Does a caregiver in the household have a restraining order against another person? Is school a safe or unsafe place? Is the child being bullied at school or does the child believe that he or she is being bullied?

**TRAUMA TRIGGERS IN CURRENT PLACEMENT:** Is the child currently in a home, out-of-home placement, school, or institution where the child is being re-exposed to danger or being “triggered” by reminders of traumatic experiences?

**UNUSUAL COURTROOM BEHAVIORS:** Is this child behaving in a highly anxious or hypervigilant manner that suggests an inability to effectively participate in court proceedings? (Such behaviors include inappropriate smiling or laughter, extreme passivity, quickness to anger, and non-responsiveness to simple questions.) Is there anything I, as a judge, can do to lower anxiety, increase trust, and enhance participation?

CONTINUED ON BACK →

- 2. It is crucial to have complete information from all the systems that are working with the child and family. Asking the questions referenced below can help develop a clearer picture of the child's trauma and assess needs for additional information.**

**COMPLETENESS OF DATA FOR DECISIONS:** Has all the relevant information about this child's history been made available to the court, including child welfare and out-of-jurisdiction or out-of-state juvenile justice information?

**INTER-PROFESSIONAL COOPERATION:** Who are the professionals who work with this child and family? Are they communicating with each other and working as a team?

**UNUSUAL BEHAVIORS IN THE COMMUNITY:** Does this child's behavior make sense in light of currently available information about the child's life? Has the child exhibited extreme or paradoxical reactions to previous assistance or sanctions? Could those reactions be the result of trauma?

**DEVELOPMENT:** Is this child experiencing or suffering from emotional or psychological delays? Does the child need to be assessed developmentally?

**PREVIOUS COURT CONTACTS:** Has this child been the subject of other court proceedings? (Dependency/Neglect/Abuse; Divorce/Custody; Juvenile Court; Criminal; Other)

**OUT-OF-HOME PLACEMENT HISTORY:** How many placements has this child experienced? Have previous placements been disrupted? Were the disruptions caused by reactions related to the child's trauma history? How did child welfare and other relevant professionals manage these disruptions?

**BEHAVIORAL HEALTH HISTORY:** Has this child ever received trauma-informed, evidence-based evaluation and treatment? (Well-intentioned psychiatric, psychological, or substance abuse interventions are sometimes ineffective because they overlook the impact of traumatic stress on youth and families.)

- 3. Am I sufficiently considering trauma as I decide where this child is going to live and with whom?**

**PLACEMENT OUTCOMES:** How might the various placement options affect this child? Will they help the child feel safe and secure and to successfully recover from traumatic stress or loss?

**PLACEMENT RISKS:** Is an out-of-home placement or detention truly necessary? Does the benefit outweigh the potential harm of exposing the child to peers who encourage aggression, substance use, and criminal behavior that may possibly lead to further trauma?

**PREVENTION:** If placement, detention or hospitalization is required, what can be done to ensure that the child's traumatic stress responses will not be "triggered?" (For example, if placed in isolation or physical restraints, the child may be reminded of previous traumatic experiences.)

**DISCLOSURE:** Are there reasons for not informing caregivers or staff at the proposed placement about the child's trauma history? (Will this enhance care or create stigma and re-victimization?)

**TRAUMA-INFORMED APPROACHES:** How does the programming at the planned placement employ trauma-informed approaches to monitoring, rehabilitation and treatment? Are staff knowledgeable about recognizing and managing traumatic stress reactions? Are they trained to help children cope with their traumatic reactions?

**POSITIVE RELATIONSHIPS:** How does the planned placement enable the child to maintain continuous relationships with supportive adults, siblings or peers?

- 4. If you do not have enough information, it may be useful to have a trauma assessment done by a trauma-informed professional. Utilizing the NCTSN BENCH CARD FOR COURT-ORDERED TRAUMA-INFORMED MENTAL HEALTH EVALUATION OF CHILD, you can request information that will assist you in making trauma-informed decisions.**

<sup>1</sup> The use of "child" on this bench card refers to any youth who comes under jurisdiction of the juvenile court.

\*<http://learn.nctsn.org/course/view.php?id=74>

# Idaho Court Interpreters – Bench Card

## Spoken Languages

### Language Access Committee

#### Providing Language Access to the Courts

Federal and state regulations mandate courts to provide meaningful access to the proceedings and to court sponsored services. To comply with such requirements communication must be accurate and exact. As such, Idaho Courts employ highly-skilled individuals to provide high-level interpretation and translation services for less than English proficient (LEP) individuals.

The responsibility of providing linguistic access does not end at a courtroom door, since I.C.A.R 52 provides that an interpreter must be available during court proceedings as well as during court sponsored services. Indeed, courts make reasonable efforts to ensure that both federally funded and non-funded entities which the court uses to provide services have policies addressing linguistic needs of clients.

#### When to Appoint an Interpreter in Court

The need for an interpreter will normally be communicated by counsel, court staff or the non-English speaker. However, in circumstances when such need is not stated and a qualified individual appears to have a limited understanding or ability to communicate, then the court should conduct a brief *voir dire* **on the record** to make the determination.

#### Sample Voir Dire

It is recommended that the court avoid questions that can be answered with a simple “yes” or “no” should be avoided.

- Please tell the court your name.
- What is your address?
- How did you get to court today?
- What kind of work do you do?
- What is the highest grade you completed in school?
- How comfortable are you understanding and speaking English?

*It is always recommended that the court err on the side of caution.* Therefore, if there is any doubt about the person’s ability to comprehend or adequately express himself or herself in English, then an interpreter should be appointed.

#### Interpreter Qualifications

I.C.A.R 52 (d) (2) establishes the following priority of appointment for interpreters:

- a) Certified – Master Level or Certified;
- b) Conditionally Approved;
- c) Registered.

The courts may appoint an interpreter of lower priority only when good cause exists. In some instances, said cause may need to be stated on the record.

#### Determining Qualifications

Merely being bilingual does not qualify a candidate to interpret. Interpreters must have specialized training, skills and knowledge. They must understand and be willing to comply with the professional code of ethics.

The candidate must also be able to perform the three modes of interpreting (i.e., simultaneous, consecutive and sight translation) when so appropriate.

***Children, relatives and friends should never be used to interpret. Neither judges, nor attorneys should function as interpreters.***

If a certified interpreter is not available, it is strongly recommended that the court conduct a brief *voir dire* to determine the interpreter’s qualifications before allowing such person to participate in the proceeding. The following questions are recommended:

- What training / credentials do you hold as an interpreter?
- What is your native language? How did you learn the foreign language?
- Have you interpreted in court before?
- Describe your familiarity with legal terminology.
- Are you related or a close friend to anyone in this case?
- Are you familiar with the Idaho Code of Professional Responsibility of Interpreters?

#### Interpreter Oath

Once the court is satisfied with the interpreter’s qualification and oath must be administered. Some interpreters may have an oath already on file with the Trial Court Administration office.

If the Court ascertains the need to swear in the interpreter, the following script is recommended:

*"Do you solemnly swear or affirm that you will interpret and/or translate accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by law and the Idaho Code of Professional Responsibility for Interpreters in the Judiciary?"*

Note: An interpreter who has not taken this oath should not be permitted to interpret.

### **Facilitate Communication in a Proceeding**

- State the interpreter's name and qualification level on the record.
- Advise the parties on the role of the interpreter, and instruct them to speak loudly and clearly. Allow only one person to speak at a time.
- Speak directly to the less-English proficient (LEP), not to the interpreter. The interpreter will interpret everything in first person in order to keep the record accurate.
- Allow the interpreter to communicate briefly with the LEP person to ensure understanding and to identify communication problems.
- Ask the LEP whether they are able to understand the interpreter. Instruct them to raise their hand if something is not understood.
- Allow the interpreter to view the court file to become familiar with names, places and technical vocabulary.
- Refrain from asking the interpreter to restate or explain something said. Interpreters are ethically prohibited from doing so.
- The interpreter must convey all information to the witness or party, therefore he or she is always working. Advise the interpreter to notify the court when breaks are needed.
- Request the presence of two interpreters if a proceeding is scheduled to last more than 2-hours.

### **Clarifying the Role of the Interpreter**

It is recommended that the court explain the interpreter's role to all present. The following script may be read prior to the commencement of the case in order to minimize disruption.

#### **To the Jury:**

##### Proceeding Interpreter:

"This court seeks a fair trial for all regardless of the language a person speaks and regardless of how well they may or may not speak English. Bias against or for

persons who have little or no proficiency in English because they do not speak English is not allowed. Therefore, do not allow the fact that the party requires an interpreter to influence you in any way".

##### Witness Interpreting:

"Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter was present. Do not allow the fact that testimony is given in a language other than English to affect your view of his/her credibility. If any of you understand the language of the witness, disregard completely what the witness says in his/her language. Consider as evidence only what is provided by the interpreter in English. Even if you think an interpreter has made a mistake, you must ignore it completely and make your deliberations on the basis of the official interpretation."

#### **To the Witness:**

"I want you to understand the role of the interpreter. The interpreter is here only to interpret the questions that you are asked and to interpret your answers. The interpreter will say in English everything you say in your language, so do not say anything you don't want everyone to hear. If you do not understand a question asked, request clarification from the person who asked it. Remember you are giving testimony to this court, not to the interpreter. Therefore, please speak directly to the attorney or me, not to the interpreter. Do not ask the interpreter for advice. Please speak in a loud clear voice so that everyone and not just the interpreter can hear."

### **Addressing Allegations of Interpreter Error**

Bear in mind that the certified interpreter is a trained professional and the court's expert in language.

- *Corrections made by the interpreter or the team* should be accepted. If an error has been made, the interpreter will correct the record stating "the interpreter wishes to correct an error..."
- *Corrections alleged by someone else.* Such situations should be handled outside the presence of the jury. Notwithstanding the allegation, the interpreter should be presumed to have interpreted correctly and the burden of proof should be on the person challenging the interpretation.



# Idaho Court Interpreters – Bench Card

## Interpreters for the Deaf, Deaf-Blind & Hard of Hearing

### Language Access Committee

#### Requesting Accommodations

The request for an accommodation will normally be communicated by counsel, court staff or the deaf or hard of hearing person. Deaf, deaf-blind and hard of hearing individuals have different degrees of hearing and vision loss, and judges should never assume that an individual has English literacy skills or ability to lip-read. Instead, courts should work closely with parties and interpreters to determine an effective communication method.

Generally speaking, the amount and type of hearing and / or vision loss will determine the type of reasonable accommodation to use. Auxiliary aids could include, but are not limited to: specialized interpreter services; computer-assisted transcription services; assisted listening devices. ADA requires courts to ask the individuals what is the most effective way to communicate with them.

In circumstances when a request has not been made, and a party appears to have a limited understanding or ability to communicate, then the court should conduct a brief *voir dire* **on the record** to make such determination.

#### Sample Voir Dire

**You have the right to participate and understand these proceedings.** Tell the court the best way to communicate with you, so you understand what is being said.

- Please tell the court your name.
- What is your address?
- How did you get to court today?
- What kind of work do you do?
- What is the highest grade you completed in school?
- How comfortable are you understanding and speaking English?

Note: Questions that can be answered with a simple “yes” or “no” should be avoided.

#### Interpreter Qualifications

The Administrative Office of the Courts provides testing only for spoken languages. Certifications for Interpreters for the Deaf, Deaf-Blind and Hard of Hearing are awarded by the Registry for the Deaf. This is a national organization providing support to interpreters and courts. Interpreters holding a valid

Specialist Legal Certification (SC;L) are recognized as Idaho Certified Interpreters.

When such an interpreter is not available it is recommended that the court contact the Administrative Office of the Court for additional accepted credentials. Courts may appoint an interpreter with no SC;L certification based on good cause. It should be noted that in some instances, said cause may have to be stated on the record.

#### Determining Qualifications

Merely being bilingual does not qualify a candidate to interpret. Interpreters must have specialized training, skills and knowledge. Additionally, they must also be able to perform the three modes of interpreting (i.e., simultaneous, consecutive and sign translation) when so appropriate.

Candidates must understand and be willing to comply with the Code of Professional Responsibilities for Interpreters in the Judiciary and understand what, if any, applicability does the RID Ethics Code have in court settings. ***Children, relatives and friends should never be used to interpret. Additionally neither judges, nor attorneys should function as interpreters.***

If a certified interpreter is not available, it is strongly recommended that the court conduct a brief *voir dire* to determine the interpreter’s qualifications before allowing such person to participate in the proceeding. To do so, the following questions are recommended:

- What training / credentials do you hold as an interpreter?
- What is your native language? How did you learn the other language?
- Have you interpreted in court before?
- Are you related to or a close friend of anyone in this case?
- Are you familiar with the Idaho Code of Professional Responsibility of Interpreters?
- What specialized training have you had?
- Are there any professional or personal issues that may influence your interpretation?

#### Interpreter Oath

Once the court is satisfied with the interpreter’s qualification an oath must be administered. Some interpreters may have an oath already on file with the Trial Court Administration’s

office. If the court ascertains the need to swear in the interpreter, the following script is recommended:

*"Do you solemnly swear or affirm that you will interpret and/or translate accurately, completely, and impartially, using your best skill and judgment in accordance with the standards prescribed by law and the Idaho Code of Professional Responsibility for Interpreters in the Judiciary?"*

**NOTE:** An interpreter who has not taken this oath should not be permitted to interpret.

### **Facilitate Communication in a Proceeding**

- State the interpreter's name and qualification level on the record.
- Advise the parties on the role of the interpreter, and instruct them to speak loudly and clearly. Allow only one person to speak at a time.
- Speak directly to the deaf, hard of hearing person- not to the interpreter. The interpreter will interpret everything in first person in order to keep the record accurate.
- Allow the interpreter to communicate briefly with the deaf or hard of hearing person to ensure understanding, and to identify communication problems.
- Ask the individual whether they are able to understand the interpreter. Instruct them to raise their hand if something is not understood.
- Allow the interpreter to view the court file, exhibits, photos and other visual record to become familiar with names, places and technical vocabulary.
- Refrain from asking the interpreter to restate or explain something said. Interpreters are ethically prohibited from doing so.
- The interpreter must convey all information to the witness or party, therefore he or she is always working. Advise the interpreter to notify the court when breaks are needed.
- Request the presence of two interpreters if a proceeding is scheduled to last more than 2-hours.

**NOTE:** Deaf persons with minimal language skills may require specialized interpreting services.

### **Clarifying the Role of the Interpreter**

It is recommended that the court explain the interpreter's role to all present. The following script may be read prior to the commencement of the case in order to minimize disruption.

#### **To the Jury:**

#### Proceeding Interpreter:

"This court seeks a fair trial for all regardless of the language a person speaks and regardless of how well they may or may not speak English. Bias against or for persons who have little or no proficiency in English because they do not speak English is not allowed. Therefore, do not allow the fact that the party requires an interpreter to influence you in any way".

#### Witness Interpreting:

"Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter was present. Do not allow the fact that testimony is given in a language other than English to affect your view of his/her credibility. If any of you understand the language of the witness, disregard completely what the witness says in his/her language. Consider as evidence only what is provided by the interpreter in English. Even if you think an interpreter has made a mistake, you must ignore it completely and make your deliberations on the basis of the official interpretation."

#### **To the Witness:**

"I want you to understand the role of the interpreter. The interpreter is here only to interpret the questions that you are asked and to interpret your answers. The interpreter will say in English everything you say in your language, so do not say anything you don't want everyone to hear. If you do not understand a question asked, request clarification from the person who asked it. Remember you are giving testimony to this court, not to the interpreter. Therefore, please speak directly to the attorney or me, not to the interpreter. Do not ask the interpreter for advice. Please speak in a loud clear voice so that everyone and not just the interpreter can hear."

### **Addressing Allegations of Interpreter Error**

Bear in mind that the certified interpreter is a trained professional and the court's expert in language.

- *Corrections made by the interpreter or the team* should be accepted. If an error has been made, the interpreter will correct the record stating "the interpreter wishes to correct an error..."
- *Corrections alleged by someone else.* Such situations should be handled outside the presence of the jury. Notwithstanding the allegation, the interpreter should be presumed to have interpreted correctly and the burden of proof should be on the person challenging the interpretation.