CHAPTER 5:
The Adjudicatory Hearing

5.1 INTRODUCTION

The adjudicatory hearing is a two-phase process. The first is the adjudication phase, in which the court determines whether the child falls within the jurisdiction of the court pursuant to the Child Protective Act ("CPA") due to being abandoned, abused, neglected, homeless, lacking a stable home environment, or living/visiting in the same household as another child who is within the jurisdiction of the CPA.[1] Adjudication provides the basis for on-going state intervention with a family. In addition, if the petition alleges aggravated circumstances[2], the court at the adjudicatory hearing must determine whether the parent(s) subjected the child to aggravated circumstances.

Disposition is the second phase of the adjudicatory hearing. At the time of the adjudicatory hearing, the child is usually in the temporary custody of the Department as a result of the court's order after a shelter care hearing. The child may instead be at home, and there may be a protective order in place.[3] Disposition is the process by which the court determines whether to place the child in the legal custody of IDHW or to place the child in the child's own home under the protective supervision of the Department.[4] The court may initiate or extend a protection order "to preserve the unity of the family and to ensure the best interest of the child".[5]

5.2 TIMING OF THE ADJUDICATORY HEARING AND PRETRIAL CONFERENCE

Idaho law requires that the adjudicatory hearing be held within 30 days after the filing of the petition.[6] In addition, a pretrial conference must be held within three to five days prior to the adjudicatory hearing.[7] The statute provides for the pretrial conference to be held outside the presence of the court, but the recommended best practice is for the judge to be available to accept stipulations or to resolve pretrial issues.

Note re Terminology: In this manual, "prosecutor" refers to both a county prosecutor and/or a deputy attorney general; "GAL" refers to both a guardian *ad litem* and/or a CASA; "Indian child" refers to all native children as defined by ICWA; and "IDHW" and "the Department" are used interchangeably to refer to the Idaho Department of Health and Welfare.

[1] IDAHO CODE ANN. § 16-1619(4) (Supp. 2014); § 16-1603 (2009); IDAHO JUV. R. 41(a).

[2] § 16-1602(5) (Supp. 2014).

[3] § 16-1615(f) (2009); See also Chapter 4 regarding shelter care and protective orders.

[4] § 16-1619(5) (Supp. 2014); IDAHO JUV. R. 41(a). The nature and extent of judicial authority regarding placement and conditions on placement under Idaho law is discussed later in this chapter.

[5] § 16-1619(9).

[6] § 16-1619(1).

[7] § 16-1619(2).

Adjudication has important long-term implications for the child and the family. A timely adjudication can reduce the length of time a child spends in out-of-home placement. Often it is necessary for the court to make a definitive decision whether a child has been abused or neglected before parents will begin to work with the Department. Additionally, the time in which the adjudication is completed may control the timing of later judicial proceedings.

The timeliness of the adjudicatory hearing will also impact the timeliness of required federal IV-E findings. If the adjudicatory hearing is the first hearing sanctioning the removal of the child from the home, the order must include the finding that it is contrary to the welfare of the child to remain in the home.[8] Additionally the court must, in all cases in which the child was removed, determine whether the Department made reasonable efforts to prevent the need for placement of the child in foster care. Federal law requires the court to make a documented, case-specific finding of reasonable efforts and requires that this finding be made within 60 days from the date the child was removed from the home.[9] This omission cannot be corrected at a later date to reinstate the child's eligibility for funding. **If these findings are not timely made, an otherwise eligible child will lose eligibility for federal foster care match funds.**

Idaho Juvenile Rule 41(b) provides that "The hearing may not be continued more than 60 days from the date the child was removed from the home, unless the court has made case-specific, written findings, as to whether the Department made reasonable efforts to prevent the need to remove the child from the home." Best practice is to grant a continuance only for compelling reasons and only for a short period of time. Generally, only a genuine personal emergency of a party or counsel warrants a continuance. Awaiting the outcome of criminal proceedings, even criminal proceedings related to the child protection case, is not a compelling reason to continue an adjudicatory hearing.[10]

5.3 SUBMISSION OF REPORTS TO THE COURT

Idaho law provides that after a petition has been filed, IDHW must investigate the circumstances of the child and the child's family, prepare a written report, and file the report with the court prior to the pretrial conference.[11] Idaho law further requires the guardian *ad litem* to conduct an independent investigation of the circumstances of the child, to prepare a written report, and to file the report with the court at least five days prior to the adjudicatory hearing.[12] The purpose of these reports is to provide information and recommendations to the court regarding disposition. These reports also facilitate the exchange of essential information between the parties.

Neither report is admissible for purposes of determining issues during the adjudication phase[13] because they typically contain hearsay information or other information that does not comply with the rules of evidence. They can nonetheless be extremely useful for other purposes

[8] For additional information on the required Contrary to the Welfare finding, please refer to Chapter 4 on Shelter Care and Chapter 12 on required IV-E findings.
[9] 42 U.S.C. § 671(a)(15)(B)(1) (2012); 45 C.F.R. § 1356.21(b)(1) (2011).
[10] NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 21 (1995).
[11] § 16-1616(1)-(2) (2009).
[12] § 16-1633(1)-(2) (Supp. 2014).
[13] § 16-1616(3) (2009).

prior to disposition. The reports often serve as the primary discovery mechanism in child protection cases, ensuring that essential information is distributed to all parties prior to the adjudicatory hearing.[14] The availability of this information prior to the pretrial conference promotes reasoned and informed settlement of cases prior to trial. The reports can also be used as the basis for the court's written findings of fact and conclusions of law.

5.4 AGREEMENTS BY THE PARTIES

Most cases are resolved by agreement of the parties. Therefore, court practices and procedures for uncontested or stipulated cases are particularly important.[15] Idaho Juvenile Rule 38 provides that "the court may enter orders or decrees based upon such stipulations only upon a reasonable inquiry by the court to confirm that the parties entered into the stipulation knowingly and voluntarily, that the stipulation has a reasonable basis in fact, and that the stipulation is in the best interests of the child. Any order entered based on a stipulation must include any case-specific findings as required by the statute or these rules."

Before accepting a stipulation, the court must conduct sufficient inquiry on the record to ensure that the agreement has been carefully considered by all the parties, especially the parents and the guardian *ad litem*, and that the parties are entering into the agreement knowingly and voluntarily. The court must determine that the parties have thoroughly considered the reports by IDHW and the guardian *ad litem*, that the parties understand the content and consequences of the stipulation, and that the parties have had sufficient opportunity to confer with their attorneys.

Parties may stipulate to adjudication, disposition, or both. The court must ensure that the stipulation is comprehensive and that it addresses all of the key decisions that the court must or should make at the adjudicatory hearing. The court must resolve any issues not addressed by the stipulation. The key decisions that the court must make at the adjudicatory hearing, including both adjudication and disposition phases, are described below.

5.5 EVIDENTIARY ISSUES AT THE ADJUDICATORY HEARING

The Idaho Rules of Evidence apply to the adjudication phase of the hearing.[16] The standard of proof at the adjudicatory hearing is preponderance of the evidence.[17] The Idaho Rules of Evidence also apply at a hearing on aggravated circumstances.[18]

The reports of IDHW and the guardian *ad litem,* may not be considered during the adjudication phase, as they may contain hearsay.[19] Attempts to present hearsay evidence during

[14] Neither the CPA nor the Idaho Juvenile Rules prohibit the use, in CPA cases, of the formal methods of discovery available in civil cases generally. However, the use of formal discovery by the state against the parents may in some instances raise constitutional issues regarding the parents' rights against self-incrimination; IDAHO. R. CRIM. P. 26–37. To the extent that information can be voluntarily exchanged, delays in the case that can jeopardize permanency and funding for the child are also avoided.
[15] IDAHO JUV. R. 38 (sets forth minimum standards for court approval of stipulations by the parties).
[16] IDAHO R. EVID. 101; IDAHO JUV. R. 41(c), 51(b).
[17] § 16-1619(4) (Supp. 2014).
[18] IDAHO JUV. R. 41(c).
[19] § 16-1616(3) (2009).

the adjudication phase can be a particular problem. Hearsay evidence is commonly relied on by caseworkers and law enforcement officers in investigating a case. For example, caseworkers or law enforcement officers may rely on a doctor's written report of a medical diagnosis in concluding that a child is abused or neglected. Accordingly, a doctor's testimony will be necessary at the adjudicatory hearing. Since the rules of evidence apply, the caseworker cannot testify as to a doctor's diagnosis, and the caseworker's testimony cannot be used as a basis to admit a doctor's written report. Regular communication and active cooperation between the prosecutor, caseworkers, and law enforcement officers is essential to marshal evidence to support the petition prior to the adjudicatory hearing.

The Idaho Rules of Evidence do not apply to the disposition phase of the adjudicatory hearing. In the disposition phase, the court may consider any information relevant to its decision regarding the child's disposition, including the reports of IDHW and the guardian *ad litem*.[20]

5.6 INDIAN CHILD WELFARE ACT CONSIDERATIONS

It is critical that the court ensure compliance with the Indian Child Welfare Act.[21] Compliance with the ICWA is essential to preserve the unique interests of the Indian child and the child's tribe and to avoid disruption and delay in both placements and court proceedings. At the adjudicatory hearing, the court must make specific findings as to whether the child is an Indian child or whether further efforts are needed to determine if the child is an Indian child. If the child is an Indian child, the court must make specific findings as to whether notice has been given as required by the ICWA (and further explained in the new Guidelines from the Bureau of Indian Affairs) and whether further efforts are needed to comply with the notice requirements of the ICWA. If further efforts are needed, appropriate orders detailing those efforts should be included in the court's decree. Finally, the substantive standards governing the case (for example, the need for a qualified expert witness and the active efforts findings) are unique and apply at the adjudicatory hearing. Failure to comply with the ICWA can render the court's decision void. Chapter 11 of the manual contains a detailed discussion of the Indian Child Welfare Act.

5.7 WHO SHOULD BE PRESENT

The CPA provides that hearings under the Act are not open to the general public and that only persons who are "found by the court to have a direct interest in the case" may be present.[22] Thus relatives, family friends, and others are generally not permitted to be present at the hearing. Generally, the presence of the following persons is required:

- Judge
- County Prosecutor or Deputy Attorney General
- Mother, father, guardian, and/or other custodian[23]
- Attorney for parents (separate attorneys if conflict warrants)
- Indian Custodian, the child's Tribe, and attorney, if applicable

[20] §§ 16-1619(5) (Supp. 2014), 16-1633(2).
[21] *See generally* 25 U.S.C. § 1901–1922 (2012).
[22] § 16-1613(1) (2009). Additional information on the roles of the participants below can be found in Chapter 2.
[23] §§ 16-1611(1), (3). See Chapter 12 of this manual for more information on issues surrounding putative fathers.

- Child, in appropriate circumstances, if eight (8) years of age or older
- Attorney for the child[24]
- Guardian *ad litem* and attorney for guardian *ad litem*
- IDHW personnel with knowledge of the facts and authority to enter into agreements
- A representative of the Department of Juvenile Corrections, if the child is placed in its custody, and
- Court reporter, security personnel, and interpreter(s), as needed.

5.8 WITNESSES

A. In General

Witnesses may be required if the adjudicatory hearing is contested. The key witnesses at the adjudication phase are those who have knowledge of the circumstances giving rise to the petition, such as law enforcement officers involved in the removal of the child, doctors who have examined the child's injuries or diagnosed the child's physical or developmental condition, or other witnesses to the incidents of abuse, neglect, or abandonment.

The primary issues at disposition are placement and reasonable efforts to avoid placement. Key witnesses may include friends, family members, or service providers who have been or may be called upon to provide resources for the child and/or the parents.

B. Child Witnesses

In the adjudication phase of a contested adjudicatory hearing, the proceeding is formal and the key issue is whether the child is abused, neglected, or otherwise comes within the jurisdiction of the CPA. The disposition phase is less formal, and the key issues are placement and reasonable efforts to avoid placement. Any time a child is considered a witness, the court and attorneys should pay close attention to the potential trauma to the child resulting from attending the hearing and testifying.[25] Every effort should be made to make the child's testimony unnecessary. If the child's testimony is required, alternatives to in-court testimony should be pursued to minimize the trauma to the child.[26] The CPA specifically provides for a person having a supportive relationship with the child to remain in the courtroom at the witness stand during the child's testimony.[27]

5.9 KEY DECISIONS THE COURT SHOULD MAKE AT THE ADJUDICATORY HEARING

A. Phase 1: Adjudication

1. Is the child within the jurisdiction of the CPA?

[24] *See* § 16-1614 (Supp. 2014) (regarding appointment of counsel for children).
[25] See Chapter 12 of this manual for a discussion of issues surrounding children and youth in court in non-witness capacities.
[26] §§ 9-1801 to 1808 (2010).
[27] § 16-1613(2) (2009).

The first issue the court must determine is whether the child is within the jurisdiction of the CPA. The finding of jurisdiction is the core finding of the CPA proceeding. There are six grounds for a child to be within the jurisdiction of the Act:

1. Abuse
2. Neglect
3. Abandonment
4. Lack of a stable home environment
5. Homelessness
6. The child resides in or visits a household where another child is within the jurisdiction of the CPA[28]

Detailed information on each of these grounds for jurisdiction can be found in Chapter 3 of this manual.

The burden of proof is on the state, and the standard of proof is by a preponderance of the evidence. Idaho law requires the court to make a finding on the record regarding the facts and conclusions of law that bring the child within the jurisdiction of the CPA.[29]

Some confusion results from the use of the word "jurisdiction" in the Idaho statute. A child is within the *jurisdiction of the court* if the child lives or is found within the state. The child is within the *jurisdiction of the CPA* if the court determines that one of the six bases for jurisdiction exists.

A decree finding the child within the jurisdiction of the CPA continues until the child turns eighteen or until the court orders otherwise.[30] Prior to the child's eighteenth birthday, the case remains under the continuing jurisdiction of the court until the safety threats to the child are permanently eliminated and the child may safely return to or remain in the home without continuing Departmental supervision.[31] At that point in time, the case may be dismissed by court order.

2. Has the parent subjected the child to aggravated circumstances?

If aggravated circumstances are an issue, allegations regarding the circumstances may be included in the petition and determined at the adjudicatory hearing. The concept of aggravated circumstances was added to child protection law to promote permanency for the child. The purpose is to identify those cases in which no effort will be made at reunification, so that efforts to find and place the child in a new safe and loving home can be initiated promptly.[32]

There is no requirement that aggravated circumstances be alleged in the petition or determined at the adjudicatory hearing. Aggravated circumstances could be asserted later, either by amendment of the petition or by written motion, with notice and opportunity for hearing.[33]

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[28] § 16-1603.
[29] § 16-1619(4) (Supp. 2014).
[30] § 16-1619(7).
[31] § 16-1604 (2009).
[32] 45 C.F.R. § 1356.21(b)(3)(i) (2012).
[33] *See* §§ 16-1610(i)(iii) (Supp. 2014); Idaho Juv. R. 41(a).

However, because a finding of aggravated circumstances will fundamentally alter the process of the case, such allegations should be made at the earliest possible point in the case.

Section 16-1602(5) defines aggravated circumstances:

> (a) Aggravated circumstances includes but are not limited to circumstances in which the parent has engaged in any of the following:
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> (i) Abandonment, chronic abuse, or chronic neglect of the child. Chronic neglect or chronic abuse of a child shall consist of abuse or neglect that is so extreme or repetitious as to indicate that return of the child to the home would result in unacceptable risk to the health and welfare of the child.
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> (ii) Sexual abuse against a child of the parent. Sexual abuse, for the purposes of this section, includes any conduct described in of sections 18-1506, 18-1506A, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108, or 18-6608, Idaho Code.
>
> (iii) Torture of a child; a sexual offense as set forth in section 18-8303(1), Idaho Code; 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;
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> (b) The parent has committed murder, aided or abetted a murder, solicited a murder, or attempted or conspired to commit murder; or
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> (c) The parental rights of the parent to another child have been terminated involuntarily."[34]

The statute provides that the list of aggravated circumstances is **not** exclusive. In determining whether other acts not part of the statutory list constitute aggravated circumstances, the court should be guided by two factors: whether the circumstances are similar in severity to those listed in the statute and whether the circumstances are such that no effort should be made to reunify the family.

If aggravated circumstances are found, then:

1. IDHW is not required to make reasonable efforts to prevent removal or to reunify the family.[35]
2. The next step in the case is a permanency hearing, the purpose of which is to identify the alternative permanent plan and placement for the child.[36]
3. The Department must file a petition to terminate parental rights, unless the court finds compelling reasons why termination is not in the best interests of the child.[37]

B. Phase 2: Disposition

The Idaho Child Protective Act sets forth two alternatives for disposition of the child.[38] The court must determine who has *custody* of the child: the parents or the Department. If the court

[34] § 16-1602(5) (Supp. 2014).
[35] §§ 16-1619(6)(d); 16-1620(1), (8); 45 C.F.R § 1356.21(b)(3)(i) (2012).
[36] § 16-1620(1) (Supp. 2014).
[37] §§ 16-1620(1), 1624(3).
[38] § 16-1619(5).

determines that the child cannot return home, the court must place the child in the custody of the Department. In the alternative, the child may remain in the legal custody of his/her parents, under the protective supervision of the Department.[39]

The court's analysis should focus on three primary factors:

1. *Threats of Danger to the Child*. A specific family situation or behavior, emotion, motive, perception, or capacity of a family member which are specific and observable, immediate, out-of-control, and have severe consequences.[40]
2. *Vulnerability of the Child*. A child is vulnerable when he/she lacks the capacity to protect him/herself. Age is only one of many factors which may impact a child's vulnerability.[41]
3. *Protective Capacities of the Parents and Family*. The knowledge, understanding, perceptions, observable behaviors, feelings, attitudes, and motivations that contribute to the parent's ability and willingness to protect the child.[42]

1. Custody with Parents and Protective Supervision by the Department

The court must determine whether it is in the child's best interest to place the child in the custody of his or her parents under the supervision of the Department.[43] At all times, the health and safety of the child is the primary concern.[44] Placement of the child at home under the Department's supervision is appropriate if the placement of the child in the home can be made subject to conditions that will ensure the health and safety of the child while in the home. Otherwise, placement of the child in the legal custody of IDHW is necessary to ensure the health and safety of the child while reunification efforts are made. Where aggravated circumstances have been found, no effort is to be made at reunification, and the child must be placed in the custody of the Department.[45]

If the parents demonstrate a commitment to participating in the services and resolving the problems, then requirements for the parents to participate in the services and to comply with specific behavioral directives may be conditions that would enable the child to remain safely at home under IDHW supervision.

When determining whether the child may be placed in her or his own home, the court should evaluate whether a plan to ensure the child's safety is sufficient, feasible, and sustainable. The safety plan must control or significantly reduce the safety issues identified in the investigation. If the family's protective capacities are insufficient, the safety plan should determine what will protect the child by examining how and when threats emerge. It should also specify what actions or services are required to control those threats.[46]

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[39] § 16-1619(5)(a).
[40] THERESE ROE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 9-10, "Benchcard B" (2009).
[41] *Id.* at 11-13, "Benchcard C."
[42] *Id.* at 13-16, "Benchcard D." These criteria are discussed in more detail in Chapter 2, pages 13-17.
[43] § 16-1619(5)–(6).
[44] § 16-1601 (2009).
[45] 45 C.F.R. § 1356.21(b)(3)(i) (2012).
[46] LUND & RENNE, *supra* note 40, at 25-32, "Benchcard G" (2009).

A plan for ensuring the child's safety may contain conditions such as:

- Engaging the support or assistance of extended family
- Controlling who can be present or reside in the home
- Allowing inspection of the home
- Requiring drug testing and no failed tests
- Identifying what services will be provided to strengthen the parents' protective capacities
- Requiring the home to meet the basic needs of the child (i.e. water, power, heat, etc.).
- Eliminating unsafe conditions in the home.

The court should include these terms and conditions in the order for protective supervision.[47] In cases where a child has been abused by only one parent, it may be that the child can be safely returned to the non-abusing parent, subject to a protective order restricting contact with the other parent.[48]

If the safety threats to the child cannot be controlled or eliminated, removal from protective supervision will be required and a new disposition decision will be necessary. Redisposition is discussed in detail in Chapter 4.

2. Custody with the Department

When it is not possible to control or eliminate the threats of danger, the child must be placed in the custody of IDHW. The court should carefully review why a safety plan is insufficient, unfeasible, or unsustainable and should begin the discussion of the conditions for return home (which will be addressed in the case plan). A decree placing the child in the custody of the Department continues until the child turns eighteen or until the court orders otherwise.[49] The Department may not place a child in the home from which the court ordered the child removed without first obtaining the approval of the court.[50]

3. Contrary to the Welfare

Federal law requires a case-specific finding that it is contrary to the welfare of the child to remain in the home in the first court order sanctioning removal of the child from the home.[51] Generally, this finding has been made prior to the adjudicatory hearing (either at the shelter care hearing or in the order for removal in the summons).[52] Idaho law requires that this finding be made at the adjudicatory hearing in every case.[53] There are specific requirements for this finding that are necessary to ensure a child's eligibility for federal funding. These requirements are discussed in detail in Chapters 4 and 12 of this Manual.

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[47] § 16-1619(9) (Supp. 2014).
[48] §§ 16-1619(9), 1602 (31). Chapter 4 discusses protection orders in detail.
[49] § 16-1619(7).
[50] § 16-1629(8).
[51] 45 C.F.R. § 1356.21(c) (2012).
[52] Chapter 3 of this Manual contains further information about orders for removal; Chapter 4 contains further information on Shelter Care hearings.
[53] § 16-1619(6) (Supp. 2014).

4. Reasonable Efforts to Prevent or Eliminate the Need for Placement of the Child in the Custody of the Department

The court is required to make a finding regarding the Department's efforts to prevent the need for removal under state and federal law. Under federal law, the finding must be made no later than 60 days after the child has been removed from the home.[54] If the finding is not made within the deadline, an otherwise eligible child will lose eligibility for federal IV-E match funds and the omission **cannot be corrected** at a later date to reinstate the funding.

The finding must be explicitly documented and made on a case-by-case basis.[55] This requirement can be met by incorporating by reference affidavits or reports from the Department or others describing the efforts made and why those efforts were reasonable under the circumstances. If the finding is made on the record, but is not documented in the order, it can be only be corrected by preparation of a transcript that verifies that the required determinations have been made.[56]

Idaho law also contains a requirement for a finding of reasonable efforts to prevent removal. This finding is required when the child is removed from protective supervision. To ensure the finding is timely made, this requirement is found in both the shelter care provision and the adjudicatory provision. Any of the following findings satisfy the reasonable efforts requirement:

1. Reasonable efforts were made but were not successful in eliminating the need for foster care placement of the child;
2. The Department made reasonable efforts to prevent removal but was not able to safely provide preventive services;
3. Reasonable efforts to temporarily place the child with related persons were made but were not successful; or
4. Reasonable efforts were not required as the parent had subjected the child to aggravated circumstances as determined by the court.[57]

The court may find that the Department failed to make reasonable efforts to prevent removal from protective supervision. If a finding of "no reasonable efforts" is made, an otherwise eligible child's eligibility for IV-E match funds will be lost. If the court is considering a "no reasonable efforts" finding, to preserve federal IV-E funding for the child, recommended best practice is for the court to hold a continued hearing within the 60-day deadline to hear additional evidence as to the Department's efforts to prevent the need for removal.

5. Amended Disposition: Removal of the Child from Protective Supervision

When the child is under the protective supervision of the Department, there may be circumstances when a subsequent removal is necessary for the safety of the child. The CPA provides a procedure and standards for amending the child's disposition.[58]

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[54] 45 C.F.R. § 1356.21(b)(1)(i) - (ii) (2012).
[55] 45 C.F.R. § 1356.21(d).
[56] *Id.*
[57] § 16-1619(6) (Supp. 2014).
[58] § 16-1623 (Supp. 2014).

A peace officer may remove the child who is under protective supervision pursuant to an earlier court order where the child is endangered in his or her surroundings and prompt removal is necessary to prevent serious physical or mental injury. In addition, the court may order, based upon facts presented to the court, that the child should be removed because continuation would be contrary to the welfare of the child and vesting legal custody of the child in the Department is in the best interest of the child (similar to an order for removal).[59]

Upon removal from protective supervision, the child must be taken to a place of shelter care and the court must hold a hearing within 48 hours of the child's removal from the home. Parents must be given notice of the hearing.[60] At the hearing, the child's disposition is determined in the same manner and upon the same basis as at the disposition phase of the adjudicatory hearing.[61] The court's determinations must include the same written, case-specific findings regarding contrary to the welfare/best interest of the child and the reasonableness of the Department's efforts to prevent removal as at the disposition phase of the adjudicatory hearing. Both are further discussed below.

If the court has made a finding of aggravated circumstances, the Department may request that the court find that reasonable efforts to prevent removal or to reunify the family were not required.[62]

5.10 OTHER CONSIDERATIONS

A. Role of the Court in Reviewing the Placement Decision

When a child is placed in the custody of IDHW, Idaho law vests authority in the Department to determine the child's placement, subject to review by the court.[63] Idaho law establishes priorities for the child's placement. The first priority is for placement with a "fit and willing relative."[64] The second priority is for placement with a "fit and willing non-relative with a significant relationship with the child."[65] Finally, the third priority is for placement with "foster parents and other licensed persons."[66]

Because the placement is critical to the child's well-being, the court should make careful inquiry as to the Department's proposed placement for the child at the disposition phase of the adjudicatory hearing. Idaho judges and practitioners must be familiar with the following specific provisions of Idaho and federal law and the Idaho Supreme Court decision in *Roe v. State* ("*Roe 2000"*).[67]

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[59] § 16-1623(1)(a).
[60] § 16-1623(2), (3), and (6).
[61] § 16-1623(4).
[62] 45 C.F.R. § 1356.21(b)(3) (2012).
[63] § 16-1629(8).
[64] § 16-1629(11).
[65] *Id*.
[66] *Id.*
[67] *In Re Doe*,134 Idaho 760, 9 P.3d 1226 (2000).

In *Roe 2000*, a grandmother who had established a strong relationship with her granddaughter sought to intervene in a child protection case to seek permanent custody of her granddaughter. The Idaho Supreme Court affirmed the trial court's decision denying intervention by the grandmother.[68] The Court further stated:

> If Roe were allowed to intervene, her participation as a party would essentially transform the CPA action into a custody proceeding. A CPA action is not intended to provide a forum for multiple claimants to litigate their right to custody. Once the Department has legal custody of a child under the CPA, the Department and not the court has the authority to determine where the child should live. *See* I.C. § 16-1623(h). Even though the court retains jurisdiction over the child as long as state custody continues, *see* I.C. 16-1629(8), the CPA provides the court only limited authority to review the Department's placement decisions.[69]

The Court did not provide further guidance as to the scope and nature of permissible judicial review of IDHW's placement decisions. This leaves a major question as to the nature and extent of judicial review of the Department's placement decision at the adjudicatory hearing and leaves the trial courts and the parties facing a serious dilemma in cases where the placement of the child is a major issue that needs to be resolved. Nonetheless, the placement of the child is of such importance to the child's well-being that the existence of these questions should not discourage the court and the parties from careful inquiry as to the Department's proposed placement of the child.

Finally, federal law requires that placement authority be vested in the state agency for the child to be eligible for federal funds.[70] However, the U.S. Department of Health and Human Services ("USDHHS") has a website with questions and answers about ASFA, in which the USDHHS states that "[a]s long as the court hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow payments."[71] Attorneys who are faced with this issue are encouraged to do significant additional research.

B. Services Provided by the Department

By the time of the adjudicatory hearing, information regarding the reasons the child came into care should be available and enable the parties to move forward with services necessary for a successful resolution of the case. To the extent this information is known at the adjudicatory hearing, best practice is for the court's disposition decree to specify the services to be provided to the child and the family, and the services in which the family is to be required to participate, pending the next hearing. The purpose is to keep the case moving forward, as there is often no

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[68] *Id*. at 767, 9 P.3d at 1233.
[69] *Id*.
[70] 45 C.F.R. §1356.71(d)(1)(iii) (2012).
[71] Responsibility for Placement and Care, Section 8.3A.12 of the Children's Bureau's Child Welfare Policy Manual, Questions and Answers on the Final Rule, 65 Fed. Reg. 4020 (January 25, 2000)) http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=31 (last visited: Mar. 15, 2015).

good reason to wait for the case plan hearing when information is already available that will enable the parties to start making progress towards reunification.

For example, a parent may have a known substance abuse issue. One of the necessary steps will be a drug and alcohol evaluation to determine the nature and extent of the problem and the treatment options available to address the problem. The child may have known developmental or behavioral problems. Ordering an evaluation of the child to determine the nature and extent of the child's special needs and the options available to address those needs is necessary. The court's order can require that the Department complete evaluations and identify service options prior to the next hearing and that the recommended or agreed upon option(s) be included in the case plan or permanency plan.

The key to reaching an appropriate settlement at the adjudicatory hearing can be determining the issues that brought the child into care and the services that can help the family resolve those issues. If the Department has identified services it will provide to assist the family in addressing the problems that created the child protection case, the parents may be willing to agree to adjudication and disposition, enabling them to access those services more quickly and to resolve the problems.

C. Timing of the Case Plan or Permanency Hearing

The court should set the date and time of the next hearing on the record prior to the conclusion of the adjudicatory hearing. The next hearing to be scheduled depends on whether the court found aggravated circumstances. If aggravated circumstances are not found and the child is placed in the custody of IDHW or with a parent under protective supervision, then IDHW must prepare a written case plan and the court must have a case plan hearing. If aggravated circumstances are found, then the Department must prepare a written permanency plan and the court must hold a permanency hearing. The case plan or permanency hearing must be scheduled for a date within 30 days of the adjudicatory hearing and the case or permanency plan must be filed with the court no later than five days prior to the hearing.[72]

When the court schedules the next hearing, it should also enter any orders needed for the next hearing. This should include an order requiring the filing of the Department's plan, the GAL's report, and the deadlines for filing them. Transport orders may also be needed if a parent is in jail or prison or the child is in detention or in the custody of juvenile corrections. If an essential participant is in custody in another state, it may be necessary to make arrangements for that person to appear by telephone.

5.11 THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT THE ADJUDICATORY HEARING

The court must make written findings of fact and conclusions of law, in language understandable by the parties and with enough detail to support the court's actions. As in other stages of the proceedings, the burden of preparing findings can be greatly reduced by incorporating well-

[72] §§ 16-1620, 16-1621 (Supp. 2014). See Chapter 6 of this manual for a full discussion of the case plan hearing, and Chapter 7 regarding permanency hearing.

prepared reports submitted by IDHW and/or the guardian *ad litem*. The written findings, conclusions, order, and decree shall include the following:

- If any necessary parties were not present, a finding that proper notice was given (or if a necessary party has not been served, a finding and order that further efforts to identify, locate, and serve a necessary party are required).[73]
- If the decree/orders are entered based on the stipulation of the parties, findings that the stipulation is reasonable and appropriate and that the parties entered into it knowingly and voluntarily.[74]
- If the child is found to be within the jurisdiction of the CPA, findings that specifically set forth the reasons for state intervention.[75]
- If aggravated circumstances are found, findings that specifically set forth the nature of the aggravated circumstances.[76]
- Findings as to the child's ICWA status. If the child is an Indian child, the court should make a finding that the Indian child's tribe and Indian custodian have received proper notice under the Act (and if not, findings and an order that further efforts are required). If the case is governed by the ICWA, additional findings must be made by the court.[77]
- If the order is the first order sanctioning removal of the child from the home, the court must make case-specific findings that removal is in the child's best interests and that it is contrary to the welfare of the child to remain in the home. It may incorporate by reference an affidavit that describes the specific circumstances.[78]
- Within 60 days of the child's removal, the court must make case-specific findings as to the reasonableness of the Department's efforts to prevent the need for removal of the child from the home.[79] Reasonable efforts to prevent a child's removal from the home or to reunify the child and family are not required if the IV-E agency obtains a judicial determination that such efforts are not required because a court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances.[80]
- Decree placing child in the custody of IDHW or in the custody of a parent under the Department's supervision, until the child's 18th birthday (or until otherwise ordered by the court prior to the child's 18th birthday).[81]
- If the child is to be placed in the child's own home under Department supervision, the safety plan necessary to eliminate threats to the child's safety and welfare in the home, and a protective order, where appropriate.[82]
- Services the Department is to provide to the child, the child's parents, and the foster parents, and services in which the parent(s) will be required to participate.

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[73] This finding is not specifically required by Idaho Code section 16-1619. However, sections 16-1610(d) and (e) make clear that the parents and those having legal custody of the child are to be named in the petition. Section 16-1611 provides for service of summons on the parents. In view of the requirements of the petition and the summons, the finding of whether necessary parties are present at the adjudication is a recommended best practice.
[74] IDAHO JUV. R. 38.
[75] §§ 16-1603 (2009), 16-1619(4) (Supp. 2014).
[76] § 16-1620.
[77] For a detailed discussion on the guidelines related to an ICWA case, please see Chapter 11.
[78] § 16-1619(6); IDAHO JUV. R. 41(f).
[79] §§ 16-1619(6)(a) to (c); IDAHO JUV. R. 41(e).
[80] 45 C.F.R. § 1356.21(b)(3).
[81] § 16-1619(7).
[82] § 16-1619(9).

- An order scheduling the next hearing and any orders necessary to prepare for the next hearing.

For an example of written Findings of Fact and Conclusions of Law, please see the standard recommended forms, available on the Idaho Supreme Court's Child Protection website.