



PRELIMINARY PROTECTIVE
HEARING BENCHCARD



Preliminary Protective Hearing Benchcard

CASE MANAGEMENT – BEFORE THE HEARING

Persons who should be present at the preliminary protective hearing²

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

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

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

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

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

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

Review relevant documents.

REVIEW THE PETITION.³

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

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

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

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

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

CONDUCTING THE PRELIMINARY PROTECTIVE HEARING

Opening the Hearing

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

Due Process Considerations

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

- **REPRESENTATION**

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

- **UNDERSTANDING AND COMPETENCY**

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

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

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

Engage parents and any children or relatives present.

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

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

REFLECTIONS ON THE DECISION-MAKING PROCESS TO PREVENT BIAS

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

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

Indian Child Welfare Act (ICWA) Determination

The court should require that the applicability of the ICWA be determined before proceeding with the preliminary protective hearing. If the court has reason to believe ICWA applies, the court should proceed accordingly.

- If yes, different standards apply. Refer to the ICWA Checklist.⁶
- If yes, determine whether there was **clear and convincing evidence**, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in **serious emotional or physical damage to the child** (25 U.S.C. § 1912(e)).

Key ICWA inquiries the court should make:

- Is the child under 18, unmarried, and:
 - A member of a federally recognized tribe, or
 - Eligible for membership in a federally recognized Indian tribe, and
 - The biological child of a member of a federally recognized tribe?
- Was the child in the custody of a parent or Indian custodian?
- If the child is an Indian child, does the child reside, or is the child domiciled, on a reservation, or is the child already a ward of a tribal court, depriving the court of jurisdiction? If the child resides or is domiciled on a reservation but is temporarily off the reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child.
- Has the agency mailed proper notice to the child's putative father, including a father who has acknowledged paternity, even if he has not legally established paternity?
- Was proper notice and inquiry mailed to all tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination?
- If the child's tribe is not known at this time, was written notice sent to the U.S. Secretary of the Interior?
- What efforts, if any, have been made by the agency to identify extended family or other tribal members or Indian families, for placement of the child? Has the agency attempted to create a family chart or genogram soliciting assistance from neighbors, family, or members of the Indian community who may be able to offer information?

- Is the parent able to read and/or understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

Key ICWA decisions the court must make:

- Is it in the best interests of the child to appoint counsel for the child?
- If the state law makes no provision for the appointment of counsel, has the court notified the U.S. Secretary of the Interior upon appointment of counsel so that reasonable fees and expenses may be appropriated?
- In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family resides, or with which the parent or extended family is affiliated?
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Will parties voluntarily agree to participate in services?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?

Legal threshold for removal

- Has the agency made a ***prima facie* case or probable cause showing that supports the removal** of the child or that continued residence in the home would be contrary to the welfare, or that placement would be in the best interests of the child? (45 C.F.R. § 1356.21(b)(1))
 - What case-specific evidence supports this finding?
 - Have the family’s cultural background, customs, and traditions been taken into account in evaluating the event and circumstances that led to the removal?
 - Have the parent(s)’ cultural or tribal liaison/ relevant other(s) been asked if there is a culturally based explanation for the allegations in the petition?

If probable cause is found:

- Make specific findings of fact regarding the necessity for removal, and outline the specific reasonable efforts to prevent removal, or alternatively, show that the agency is not required to make such efforts.
- **Determine whether remaining in the home is contrary to the welfare of the child, specifying the immediate safety concerns (42 U.S.C. § 672(a)(102)).**
- **Determine whether placement in shelter care is in the best interests of the child and that no reasonable options exist to allow the child to remain at home.**

Reasonable efforts (to prevent removal)

- **While federal law requires the judge to determine whether reasonable efforts have been made to prevent or eliminate the need for removal within 60 days of the date of removal (45 C.F.R. §1356.21(b)(1)), this finding should be made at the PPH when the removal can first be challenged.**
- What were the specific safety risks leading to removal?
- What services were considered and offered to allow the child to remain at home? Were these **services culturally appropriate**? Were these services rationally related to the safety threat?
- What was done to create a **safety plan** to allow the child to remain at home or in the home of another person without court involvement?
 - Have non-custodial parents and paternal and maternal relatives been identified and explored? What is the plan to do so?
- Were there any **pre-hearing conferences** or meetings that included the family?
 - Who was present?
 - What was the outcome?
- How has the agency intervened with this family in the past? Has the agency's previous contact with the family influenced its response to this family now?

FEDERALLY REQUIRED TITLE IV-E FINDINGS AT THE PPH

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

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

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

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

Reasonable efforts to allow the child to safely return home

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

- **What services can be arranged to allow the child to safely return home today?**
 - How are these services rationally related to the *specific* safety threat?
 - How are the parents, extended family, and children being engaged in the development and implementation of a plan for services, interventions, and supports?
 - How will the agency assist the family in accessing services?
 - Does the family believe that these services, interventions, and supports will meet their current needs and build upon strengths?
 - Has the family been given the opportunity to ask for additional or alternate services?
 - What evidence has been provided by the agency to demonstrate that the services, interventions, or supports for this family have effectively met the needs and produced positive outcomes for families with similar presenting issues and demographic characteristics?
 - How are the services, interventions, and supports specifically tailored to the culture and needs of *this* child and family?
 - How do they build on family strengths? How is the agency determining that the services, interventions, and supports are culturally appropriate?

Appropriateness of placement

- **Is the placement appropriate?** (42 U.S.C. § 675(5))
- When and where did the caseworker last see the child? What was the nature of the contact?
- **Is the placement the least restrictive** (most family-like) and most appropriate available and in close proximity to the parents? (42 U.S.C. § 675(5))
- **If the child is placed in foster care/shelter, have kinship care options been fully explored?**
If not, what is being done to explore relatives? If so, why were the relatives deemed inappropriate?
- **If the child is placed in kinship care**, what steps have been taken to ensure the relative is linked with all available training, services, and financial support?
- How does the placement support the family/child's involvement in the initial plan?
- What are the terms of **meaningful family time** with parents, siblings, and extended family members?

- **Do the terms of family time match the safety concerns? Is it supervised? Specifically, why must it be supervised?** Is the time and location of family time logistically possible for the family and supportive of the child’s needs?
- **Are siblings placed together?** If not, has the agency documented that joint placement would be contrary to the safety or well-being of any sibling? If not, what efforts have been made to place the siblings together?
- Does the caregiver have the necessary knowledge and skill to treat a child according to the **“reasonable and prudent parent standard?”** (P.L. 113-83 111(a); § 471(a)(24); § 475(11))
 - Will the placement ensure children participate in age or developmentally-appropriate events (which promote a sense of “normalcy”) by promoting their engagement in social, extracurricular, enrichment, and cultural activities? (P.L. 113-83 111(a); § 471(a)(24); § 475(11))
- How is the placement culturally and linguistically appropriate?
 - From the family and child’s perspective, is the current placement culturally and linguistically appropriate? How does the placement support the child’s cultural identity? In what way does the placement support the child’s connection to the family and community?
- Is the placement in proximity to the **child’s educational setting** or does it otherwise support educational continuity?
- **If the child has a history of trauma**, does the placement have necessary support and training to help the child stabilize and begin the healing process?
 - **If the child is a victim of sex trafficking** or at risk of becoming a sex trafficking victim, does the caregiver have the necessary support and training to help the child? (P.L. 113-183)



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

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

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

Trauma:

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

Child Well-Being:

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

CONCLUDING THE PRELIMINARY PROTECTIVE HEARING

Case Management – Prepare for the next hearing

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

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

Engage parents, children, and family members.

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

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

III. THE PRELIMINARY PROTECTIVE HEARING BENCHCARD ENDNOTES

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

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

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

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

⁵ See the Federal Law Chapter.

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

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