

# **FUNDAMENTALS OF ICWA THROUGH THE SOCIAL WORK LENS**

# Introduction

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# Agenda

Introduction

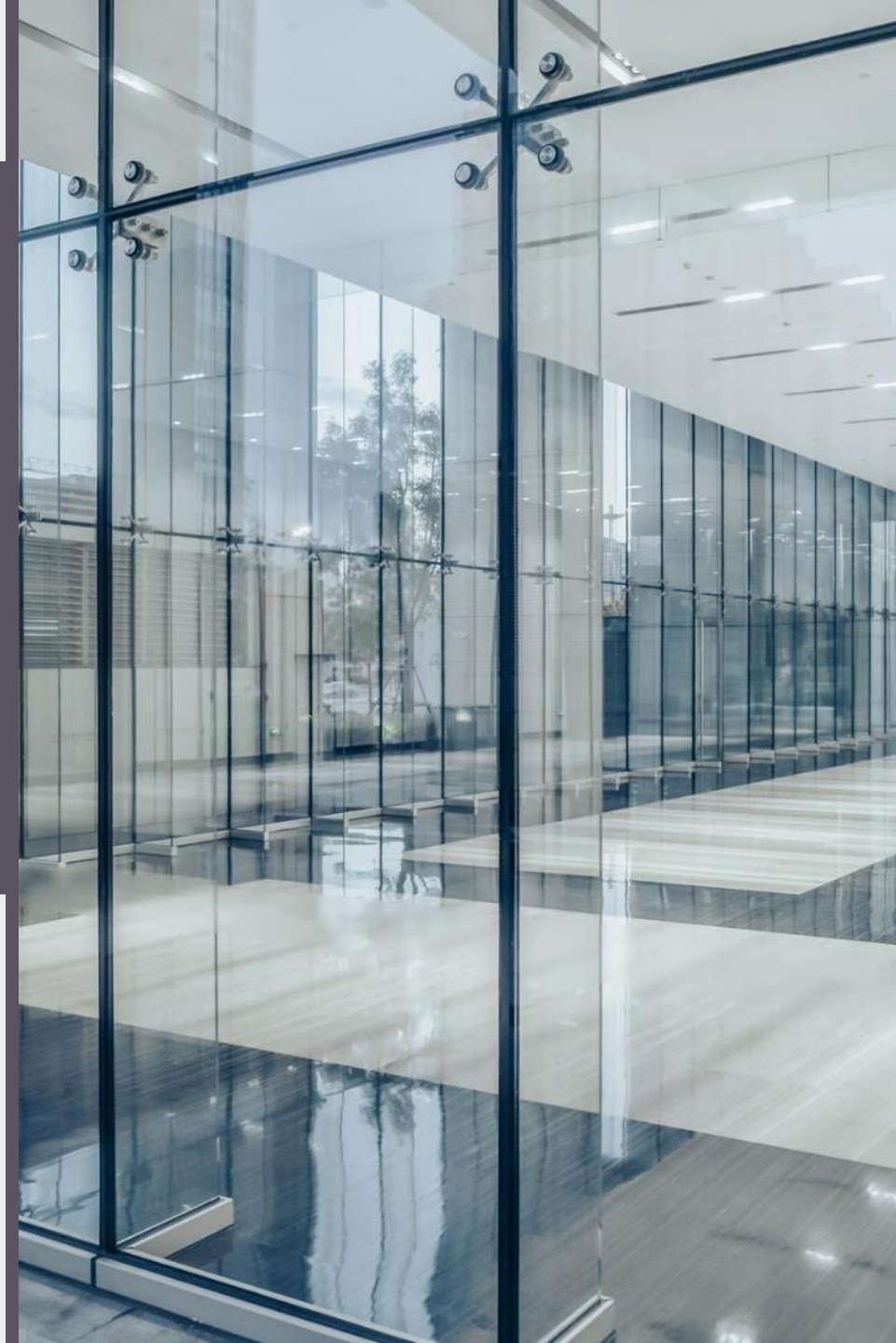
Historical Background

What is ICWA?

State companion and Caseworker impacts

Cultural awareness

# **HISTORICAL BACKGROUND**



# 1974 Hearings

- Testimony of Federal and State policies in support of removing Indian children and placing them with white families for the purpose of assimilation
- Montana – foster care placement of Indian Children was 13 times higher than non-Indian children
- South Dakota – 40% of all State petitioned adoptions were Indian children (7% of the population was Indian); foster care placement of Indian children was 16 times higher.

# **1974 Hearings**

- **Washington State – Adoption rate of State petitioned adoptions was 19 times higher for Indian children than non-Indian children; foster care placements were 10 times higher**

# 1974 Hearings

Testimony of Calvin Isaac, Choctaw tribal Chief:

“One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by non-tribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of our children are, at best, ignorant of our cultural values and, at worst, have contempt for the Indian way and convinced that removal, usually to a non-Indian household or institution can only benefit an Indian child.”

# 1974 Hearings

## Testimony of Dr. Robert Bergman – Indian Health Service

“Separating Indian children from their parents and tribes has been one of the major aims of governmental Indian services for generations. The assumption is that children and particularly those in any kind of difficulty would be better off being raised by someone other than their own parents. The purpose of the first boarding school on the Navajo reservation as stated in its charter in the 1890’s was ‘to remove the Navajo child from the influence of his savage parents’.”



# **1974 Hearings**

## **Citation:**

**Indian Child Welfare Program, Hearings  
before the Subcommittee on Indian  
Affairs of the Senate Committee on  
Interior and Insular Affairs, 93<sup>rd</sup> Cong.,  
2d Sess.**



# What is ICWA?

Statute and Rule



# **Indian Child Welfare Act of 1978**

25 U.S.C. §§ 1901-1963

## **Final Rule on Procedure**

25 C.F.R. Part 23

**BUT WHAT DOES IT  
MEAN?**

ICWA governs State child-custody proceedings in multiple ways, including:

- (1) by recognizing Tribal jurisdiction over decisions for their Indian children;
- (2) by establishing minimum Federal standards for the removal of Indian children from their families;
- (3) by establishing preferences for placement of Indian children with extended family or other Tribal families; and
- (4) by instituting protections to ensure that birth parents' voluntary relinquishments of their children are truly voluntary

Source: Bureau of Indian Affairs  
ICWA FAQ, June 17, 2016

## Objectives of the Indian Child Welfare Act

# Step by Step

ICWA applies whenever an Indian child is the subject of:

■ 25 CFR 23.103

A) A child-custody proceeding; including

i) An involuntary proceeding;

ii) a voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including foster-care, preadoptive or adoptive placement, or termination of parental rights; OR

B) An emergency proceeding

But what  
does it  
MEAN?!?

- “Indian child” has its own meaning within the statute
- *Indian child* means any unmarried person who is under age 18 and either:
- 1) *is a member or citizen of an Indian Tribe; or*
- 2) *is eligible for membership or citizenship in an Indian Tribe **AND** is the biological child of a member/citizen of an Indian Tribe*

Ok, so...

- “Indian Tribe” is **ALSO** specially defined:
- ***Indian Tribe*** means any Indian tribe, band, nation or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act



# So when does ICWA apply?

After expanding those defined terms, ICWA applies whenever a child under 18 (and unmarried) - and is either a member of a federally recognized tribe or is eligible for membership in a federally recognized tribe, and at least one parent is also a member of a federally recognized tribe – is the subject of a child custody proceeding or an emergency proceeding

# Examples?

## ICWA DOES NOT APPLY

Respondent mother and Respondent father are not eligible for enrollment in any federally recognized tribe, but live on a reservation because someone lets them

## ICWA APPLIES

Respondent father is not an enrolled member of any tribe, however non-respondent mother is enrolled in a federally recognized tribe and the child is eligible for enrollment with that tribe

# Harder examples?

## ICWA DOES NOT APPLY

Respondent mother is not enrolled in any tribe, however non-respondent father is enrolled in a **Canadian** tribe that is not federally recognized by the BIA, and the child is eligible for enrollment in that tribe.

## ICWA DOES NOT APPLY

Respondent mother is eligible for enrollment in a recognized tribe however is not enrolled as a member. Father is unknown.

# Harder examples continued

## ICWA APPLIES

Subject child has been raised by maternal grandmother, and lives on the reservation of a recognized tribe. Grandmother is enrolled in said tribe. Neither respondent parent is eligible for enrollment, however the tribe has determined that the child is eligible, and the child is enrolled.

## ICWA DOES NOT APPLY

Both respondent parents are enrolled members of different recognized tribes. Each tribe has separately determined that the child is not eligible for enrollment because it is eligible for enrollment in the other tribe.

# Don't forget the inquiry!

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Family Court is required to ask each person involved in the proceeding if they know or have reason to know that the child is an Indian child.

# Now what?

Once the Court determines that ICWA applies a number of heightened evidentiary requirements are triggered:

- Notice requirement
- Heightened removal standard
- 30 day hearing
- Heightened TPR standard
- Active efforts

REGISTERED MAIL/ RETURN RECEIPT REQUESTED

Date:  
Docket #

Secretary of the Interior  
United States Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

Dear Secretary:

Pursuant to the federal Indian Child Welfare Act of 1978 (25 USC 1912), the Department of Social Services/ Administration for Children's Services, as petitioner in the above proceeding, is attempting to give notice to the parent(s) or Indian custodian(s) of a child custody proceeding now pending in the court named below. A hearing in this proceeding has been scheduled for \_\_\_\_\_ at \_\_\_\_\_ a.m. before the Honorable \_\_\_\_\_, Judge. The name, address and phone number of the courthouse are: \_\_\_\_\_.

The \_\_\_\_\_ Department of Social Services/Administration for Children's Services is sending this notification to the Secretary of the Interior because it does not possess complete information regarding the name and location of the parent(s)/Indian custodian(s) of the above referenced child and the applicable Tribe/Nation. The extent of the information in our possession is as follows.

The name of the child(ren) in question is \_\_\_\_\_, born \_\_\_\_\_ in \_\_\_\_\_. It is believed that \_\_\_\_\_ is a member of or eligible for membership in the \_\_\_\_\_ Tribe/ Nation or is the biological child of a member of the \_\_\_\_\_ Tribe/ Nation who resides or is domiciled within an Indian reservation.

Father: \_\_\_\_\_, born \_\_\_\_\_ in \_\_\_\_\_  
Address: \_\_\_\_\_ (Tribe/ Nation enrollment number)

Mother: \_\_\_\_\_, born \_\_\_\_\_ in \_\_\_\_\_  
Address: \_\_\_\_\_ (Tribe/Nation enrollment number)

Indian custodian(s):  
Address: \_\_\_\_\_

Attached is additional information regarding the child ancestry.

The parent(s) or Indian custodian(s) and the child's Tribe/Nation have the right to intervene at any point in this proceeding. The parent(s), Indian custodial and the Tribe/Nation have the right to petition the above-named court to transfer this proceeding to the Tribe's/Nation's jurisdiction. Upon such petition, the court shall transfer such proceeding to the Tribe's/Nation's jurisdiction, absent good cause the contrary or the Tribe's/Nation's court declining such transfer.

No proceeding involving the above-named child(ren) may take place until at least ten (10) days after receipt of this notice. Upon request, the parent(s), Indian custodian(s) of the child and the child's Tribe/Nation must be granted an additional twenty (20) days to prepare for this proceeding.

The above referenced proceeding may have significant legal consequences on the future custodial parental rights of the parent or Indian custodial of the child(ren) referenced above. Enclosed is a copy of the petition, complaint or other legal document filed with the court to initiate this proceeding.

If the parent(s) or Indian custodian(s) of the child wish legal counsel but cannot afford attorney fees, court-appointed counsel may be requested and the court must appoint counsel upon a finding that you can not afford counsel.

If you need more information, call me at \_\_\_\_\_. Your earliest response would be most appreciated.

Respectfully,

Caseworker

Attorney

cc: New York State Office of Children  
and Family Services  
Native American Services  
295 Main Street  
Buffalo, New York 14203

attachment

# Standard for removal

At emergency removal: required finding that removal or placement is “necessary to prevent imminent physical damage or harm to the child”

**Compare to FCA 1027(b)(i): “necessary to avoid imminent risk to the child’s life or health”**

**EMERGENCY REMOVAL UNDER ICWA IS NOT 1024**



HEARING PURSUANT TO A “CUSTODY PROCEEDING” MUST BE HELD WITHIN 30 DAYS, ON NOTICE TO THE TRIBE AND THE BIA.

§23.121(A) THE COURT MUST NOT ORDER A FOSTER-CARE PLACEMENT OF AN INDIAN CHILD UNLESS CLEAR AND CONVINCING EVIDENCE IS PRESENTED, INCLUDING THE TESTIMONY OF ONE OR MORE QUALIFIED EXPERT WITNESSES, DEMONSTRATING THAT THE CHILD’S CONTINUED CUSTODY BY THE CHILD’S PARENT OR INDIAN CUSTODIAN IS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO THE CHILD.

**What was  
this about 30  
days?**

# Additional evidentiary requirements

**§23.121:**

**(b): The court must not order a termination of parental rights unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses...**

**(c): For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody... will result in serious emotional or physical damage..."**

# Additional evidentiary requirements

**(d): Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child**

# I need a qualified what-now?

## WHAT IS A QUALIFIED EXPERT WITNESS?

**§23.122: Who may serve as a qualified expert witness?**

Qualifications are defined by regulation

- Should be qualified to testify about the child's tribe
- Must be qualified to testify regarding whether the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage

# Where do I find one?

- **The regulations suggest starting with the child's tribe**
- **OCFS Native American Services**
- [Ocfs.ny.gov/programs/nas/](https://ocfs.ny.gov/programs/nas/)
- (716) 847-3123

# What is an “active effort”?

## § 23.2 Definitions

*Active efforts* means affirmative, active, thorough, and timely efforts  
... Active efforts must involve assisting the parent or parents... and  
accessing or developing the resources necessary to satisfy the case  
plan. To the maximum extent possible, active efforts should be  
provided in a manner consistent with the prevailing social and  
cultural conditions and way of life of the Indian child’s Tribe...

# FACT-FINDING UNCHANGED!

The Supreme Court, Appellate Division, Pizzuto, J., held that Indian Child Welfare Act did not preempt state law permitting “preponderance of evidence” standard in fact-finding hearing.  
Affirmed.

[New York City Dep't of Soc. Servs. on Behalf of Oscar C., Jr. v. Oscar C., 192 A.D.2d 280, 600 N.Y.S.2d 957 \(2<sup>nd</sup> Dept. 1993\)](#)

**Ok, I understand all of that and have decided to ignore it.**

**§23.114 What are the requirements for determining improper removal?**

**(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.**



# IS THERE ANY WAY TO AVOID THIS?

- The heightened standards apply to foster-care placement.
- The Tribe decides who its members are.

# New York Companion Statute

## Social Services Law §§2 and 39

36. Indian child shall mean any unmarried person who:

(a) is under the age of eighteen; or

(b) is under the age of twenty-one, entered foster care prior to his/her eighteenth birthday and remains in care, and who:

(i) is a member of an Indian tribe, or

(ii) is eligible for membership in an Indian tribe, or

(iii) is the biological child of a member of an Indian tribe and is residing on or is domiciled within an Indian reservation.

# New York Companion Statute (cont.)

Also expands definition of Indian tribe to those tribes recognized by the State of New York

Are there any Indian tribes that are recognized by the State of New York that are not federally recognized?

Ask Suffolk County!

# How does this affect our examples?

Example Facts	Different under state law?	Why?	
Parents ineligible but live on reservation	No	Domicile rule requires membership	
Non-respondent mother is enrolled and child is eligible	No	ICWA already applied	
Grandmother custodian	No	ICWA already applied	
Both tribes have deemed child ineligible	No	Tribe is final authority on eligibility	
Canadian father	No	Canadian tribe is not recognized by New York	
Unknown father	No	Child has not been deemed eligible	

## Indian Child Welfare Act

Office of Indian  
Services

**Human Services**

**Indian Child  
Welfare Act**

Adoption  
Decree

ICWA Notice

ICWA Legal  
Options

Locate a Tribe

Search for a  
Tribe

Child and Adult  
Protection

Financial  
Assistance

Housing  
Program

Individuals  
Indian Money  
Accounts

Welfare  
Assistance

Contact Human  
Services

Division of Self-  
Determination

The purpose of the Indian Child Welfare Act (ICWA) is "...to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture..." (25 U.S.C. 1902). ICWA provides guidance to States regarding the handling of child abuse and neglect and adoption cases involving Native children and sets minimum standards for the handling of these cases.

### Search Agent



#### ICWA Designated Agents Listing

The regulations implementing the Indian Child Welfare Act (ICWA) authorize Indian Tribes to designate an agent other than the Tribal Chairman for service of ICWA notices. This person is called the "ICWA Designated Agent." The ICWA Designated Agent can also assist with your ICWA questions.

The Bureau of Indian Affairs (BIA) publishes the names and addresses of ICWA Designated Agents each year in the Federal Register. The BIA also publishes a list of ICWA Designated Agents on its website, which is updated every 3 months. Please refer to the list on the BIA's website for the most current and up-to-date contact information for ICWA Designated Agents.



**Find Agent**

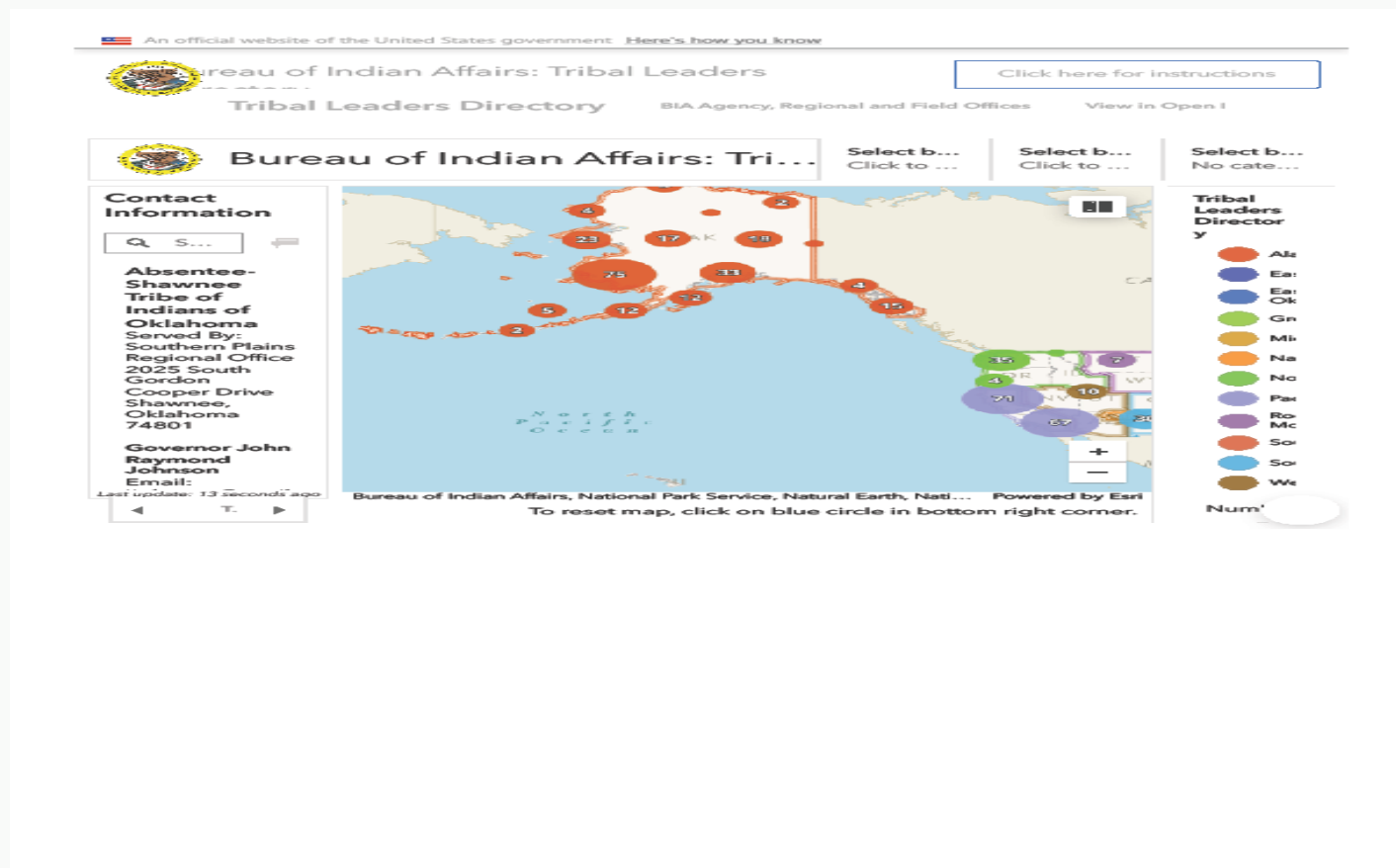
# Implications for Casework

ICWA screening and compliance begins before filing.

- Caseworkers should be flagging cases with Native American family members.
- Even if the child is not identified as being an Indian child by a parent or other involved individual!
- "Grandpa lives on the reservation"
- "We used to live on the reservation but now we don't"

# Investigate FIRST

- Relative Resource Form
- Verify Tribal enrollment directly with the Nation
- Reach out to Nation counsel/contact



# What are the right words?

**Indian child – Statutory language with specific meaning**

**Indian tribe – Statutory language with specific meaning**

**“The Nation” refers to the people that belong to a specific Indian tribe**

**Reservation – statutory language that refers to a geographical area**

**BIA WEBSITE WILL PROVIDE FULL FORMAL NAME OF EACH NATION**

# The Nation as a Party

In ICWA cases, one or more Indian tribe will be an interested party.

In such cases, the tribe has the right to divest the State court of jurisdiction, and resolve the case under tribal law.

- Indian tribes are “dependent sovereigns”
- Sovereign immunity applies
- View as a partner, not an adversary



# Cultural Awareness

**ICWA exists to end past policies of intentional discrimination.**

- **By making the tribe a stake-holder in the legal proceedings**
- **By setting uniform standards for legal review nationwide**
- **By requiring the State to prove its case to a higher standard**
- **By requiring proof that is culturally informed**

**THANK YOU**

E-mail additional questions:  
[Thomas.Turturo@dfa.state.ny.us](mailto:Thomas.Turturo@dfa.state.ny.us)