Webinar Objectives

The health, safety and welfare of children living in Indian country may be jeopardized by adults using and/or abusing drugs and alcohol.

This webinar will cover the following:
• Mandatory Reporting Obligations
• Potential Federal Charges for Exposure to Drugs
• Rights and Protections Provided to Child Victims in Federal Court

Mandatory Reporting of Suspected Child Abuse
Child Abuse Reporting Laws in Indian Country:

- Tribal Laws & Ordinances
- Various State Laws

Reporting of Child Abuse - 18 U.S.C. § 1169

- Anyone who is a ...........
- Knows or has reasonable suspicion that
  - A child was abused in Indian Country, or
  - Actions are being taken, or are going to be taken, that would reasonably be expected to result in abuse of a child in Indian Country; and
- Fails to immediately report such abuse or actions described above to the local child protective services agency or local law enforcement agency
- Shall be fined or imprisoned for not more than 6 months, or both.

Which professions are covered by § 1169?

A. Physician, surgeon, dentist, podiatrist, chiropractor, nurse, dental hygienist, optometrist, medical examiner, emergency medical technician, paramedic, or health care provider,
B. Teacher, school counselor, instructional aide, teacher’s aide, teacher’s assistant, or bus driver employed by and tribal, Federal, public or private school,
C. Administrative officer, supervisor of child welfare and attendance, or truancy officer of any tribal, Federal, public or private school,
D. Child day care worker, headstart teacher, public assistance worker, worker in a group home or residential or day care facility, or social worker,
Which professions are covered by § 1169?

E. Psychiatrist, psychologist, or psychological assistant,
F. Licensed or unlicensed marriage, family, or child counselor,
G. Person employed in the mental health profession, or
H. Law enforcement officer, probation officer, worker in a juvenile rehabilitation or detention facility, or person employed in a public agency who is responsible for enforcing statutes and judicial orders

18 U.S.C. § 1169(b)

- Any person who –
  - supervises, or has authority over, a person who is a mandatory reporter under federal law, and
  - inhibits or prevents that person from making a report
  - Shall be fined or imprisoned for not more than 6 months or both.

§ 1169(c) Definitions: What must you report?

- “Child” means an individual who
  - is not married, and
  - has not attained eighteen years of age.
- “abuse” includes any case in which a child is dead or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, and
  - such condition is not justifiably explained or may not be the product of an accidental occurrence; and
- any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution.
18 U.S.C. § 1169(d) – Immunity Provision

- “any person making a report ……which is based upon their reasonable belief and which is made in good faith shall be immune from civil or criminal liability for making that report.”

§ 1169(c): who do you report to?

- “Local Law Enforcement Agency”
  – Means that Federal, tribal, or State law enforcement agency that has the primary responsibility for the investigation of an instance of alleged child abuse within the portion of Indian Country involved

- “Local Child Protective Services Agency”
  – Means that agency of the Federal Government, of a state, or of an Indian tribe that has the primary responsibility for child protection on any Indian reservation or within any community in Indian Country

Indian Child Protection and Family Violence Act
(25 U.S.C. §§ 3202 and 3203)

- Certain professionals are required to report suspected abuse to the “local law enforcement agency.”
  – Terms are defined to mean the Federal, State or Tribal agency that has the primary responsibility for child protection or the investigation of child abuse within the portion of the Indian Country involved.

- Where the report indicates the victim or abuser is an Indian and a preliminary inquiry indicates a criminal violation has occurred, the local law enforcement agency, if other than the FBI, must report the occurrence immediately to the FBI (25 U.S.C. § 3203(b)(2))
Receiving Agency Reporting Procedures
(25 U.S.C. § 3203)

- Reports received by L.E. or Soc. Svcs. shall notify the other agency immediately and prepare a written report within 36 hours.
- Responsible law enforcement & child protection agency shall immediately initiate an investigation of such allegation and shall take immediate, appropriate steps to secure the safety and well-being of the child or children involved.
- Upon completion of the investigation, the agency shall prepare a final written report.


- Photos, x-rays, medical exams, psychological exams, and interviews of an Indian child alleged to have been subject to abuse in IC shall be allowed without parental consent if local child protective services or local law enforcement officials have reason to believe the child has been subject to abuse.
- In any case in which officials of the local law enforcement agency or local child protective services agency have reason to believe that an Indian child has been subject to abuse in IC, the officials of those agencies shall be allowed to interview the child without first obtaining the consent of the parent, guardian, or legal custodian.

Victims of Child Abuse Act
42 U.S.C. § 13031

- Mandated Reporters –
  - The federal child abuse reporting law requires certain professionals (including police, probation, prosecutors, juvenile and detention facility employees, and social workers) working on federal land or in a federally operated (or contracted) facility, who learn of facts that give reason to suspect that a child has suffered an incident of child abuse, to as soon as possible make a report to an investigative agency designated by the Attorney General to receive and investigate such reports.
  - 42 U.S.C. § 13031(a)
Definition of Child abuse
42 U.S.C. § 13031(c)

- “child abuse” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child
- “mental injury” means harm to a child’s psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response or cognition

Agencies Designated by the AG to Receive Reports

- Reports of child abuse on federal lands or in federally operated (or contracted) facilities pursuant to 42 U.S.C. § 13031 shall be made to the local law enforcement agency or local child protective services agency that has jurisdiction to investigate reports of child abuse or to protect child abuse victims in the area or facility in question. When no such agency has entered into a formal written agreement with the AG to investigate such reports, the FBI shall receive and investigate such reports. (28 C.F.R. § 81.3 (2010))

Reporting Form and Immunity for Good Faith Reports

- The report of suspected child abuse should be made by a method best suited to giving immediate notice. According to 42 U.S.C. § 13031(e), use of a standardized form is encouraged, but shall not take the place of the immediate making of reports by other means when circumstances dictate.
- Reports are presumed to have been made in good faith and reporters are immune from civil and criminal liability arising from the report unless they act in bad faith. 42 U.S.C. § 13031(f).
Sanctions for Failure to Report

- A covered professional who, while working on federal land or in a federally operated (or contracted) facility in which children are cared for or reside, learns of facts that give reasons to suspect that a child has suffered an incident of child abuse and fails to timely report shall be fined or imprisoned not more than one year or both

- 18 U.S.C. § 2258

Mandatory Reporting of Child Maltreatment
Adam Walsh Child Protection and Safety Act of 2006

- Amended the Major Crime Act (18 U.S.C. § 1153)
- Felony Child Abuse or Neglect
- Undefined in Federal Law, so assimilate state statute.

United States v. Yarlott, Yarlott and White Bear

All three defendants charged with felony child abuse or neglect:
1. The D is an Indian person;
2. The crime occurred in Indian country;
3. The D knowingly caused or permitted a child less than 18 years old to inhale or be exposed to or have contact with meth; and
4. The crime took place in a car where a child might reasonably be expected to be.

18 U.S.C. § 3509 – Child Victims’ and Child Witnesses’ Rights
Requirements of 18 U.S.C. § 3509(9)(d)

- Privacy protection
  - Keep documents disclosing child’s name and other identifying information in a secure place and disclose only to persons with a need to know (§ 3509(d)(1))
  - Applies, in part, to all employees of the government connected with the case, including DOJ employees, any law enforcement agency involved in the case, and any person hired by the government to provide assistance in the proceedings
  - File documents disclosing child’s name or other identifying information under seal (§ 3509(d)(2))

Requirements of 18 U.S.C. § 3509

- Privacy protection
  - Protective orders – non-disclosure of child’s name in court, closure of courtroom during child’s testimony (§ 3509(d)(3), (e))
  - Court may permit disclosure of information to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a GAL, or an adult attendant, or to anyone whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child (§ 3509(d)(4))

Penalties for violation of 18 U.S.C. § 3509

- 18 U.S.C. § 403 punishes the knowing or intentional violation of the privacy protection accorded by section 3509 as criminal contempt
- Punishable by a maximum of one year imprisonment, or a fine, or both
Requirements of 18 U.S.C. § 3509

- Guardians ad litem (18 U.S.C. § 3509(h))
  - May be appointed to protect best interests of child in cases where child is victim of, or witness to, abuse or exploitation offense
  - Prosecutors should consider whether moving for appointment of a GAL would be appropriate in any case involving child victim or witness
  - Can attend all proceedings in which child participates and make recommendations to court concerning child’s welfare

- Presumption that a child is competent to testify (§ 3509(c))
  - Party attacking presumption must file written motion and offer of proof that child is incompetent – standard is compelling reason for examination
  - Allegation that child is mildly retarded or is simply reciting a narrative about the alleged incident is not enough, because it does not show child cannot understand and answer questions, or that child does not know difference between truth and lie
  - Exam usually conducted by court
  - Related point: leading questions may be permitted of child witnesses under FRE 611(c) if needed to develop child’s testimony

- Adult Attendant (18 U.S.C. § 3509(i))
  - Provides emotional support to child testifying at or attending a proceeding
  - An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child’s testimony or otherwise prompt the child.
  - If child testifying by closed circuit TV or at deposition, need to have contemporaneous videotape recording of attendant
Requirements of 18 U.S.C. § 3509

- Alternatives to live, in-court testimony by child
  - Closed circuit TV testimony (§ 3509(b)(1)); videotape testimony (§ 3509(b)(2))
  - Used when child unable to testify in open court in the presence of the defendant because of:
    - fear
    - substantial likelihood, established by expert testimony, that child would suffer emotion trauma from testifying
    - child suffers a mental or other infirmity
    - defendant’s (or his counsel’s) conduct causes child to be unable to continue testifying

- Alternatives to live, in-court testimony by child, continued
  - Supreme Court has found alternatives don’t violate defendant’s Confrontation Clause rights (Maryland v. Craig, 497 U.S. 836 (1990))
  - But: in some cases courts have found CC violations where there either was no evidence that child was afraid of defendant, or that fear was not dominant reason child could not testify
  - Best course: when appropriate, establish that fear of defendant (or emotional trauma) is dominant reason child cannot testify in open court

- Closing the Courtroom (18 U.S.C. § 3509(e))
  - When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case.
  - Court must determine on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child’s inability to effectively communicate. Such an order will be narrowly tailored to serve the Government’s specific compelling interest.
Requirements of 18 U.S.C. § 3509

- Designation of case as one of special public importance (18 U.S.C. § 3509(j))
  - Cases with child witnesses can be given precedence over any other
  - Minimizes length of time the child must endure stress of involvement with criminal process
- Testimonial aids (18 U.S.C. § 3509(l))
  - Court can permit child to use anatomical dolls, drawings, mannequins, etc. to help child testify

Use of Multidisciplinary Teams

- 18 U.S.C. § 3509(g)
  - Medical diagnoses and evaluation of services
  - Telephone consultation services in emergencies and other situations
  - Psychological and psychiatric diagnoses and evaluation services for the child, parent, etc.
  - Expert medical, psychological and related professional testimony
  - Case service coordination
  - Training services

Requirements of 18 U.S.C. § 3509

- Victim Impact Statement (18 U.S.C. § 3509(f))
  - In preparing the presentence report, the probation officer shall request information from the multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected.
Fact Scenario

John Doe is an elementary school principal working in a public school district that encompasses an Indian reservation. Principal Doe overhears two students talking in the cafeteria. He hears 12 year old Jane tell her friend Mary that her father came into her bedroom during the night and touched her breast over her nightgown. Jane is an Indian child and lives in Indian country. Principal Doe calls Jane into his office and questions her about what he overheard in the cafeteria. Principal Doe asks Jane specific questions about how she was touched by her father in an attempt to discern if the touching was for the purpose of discipline, hygiene or sexual contact. Jane becomes very quiet and ultimately denies that her father touched her. Confident that no abuse occurs, Principal Doe sends Jane back to class and takes no further action.

Questions for Fact Scenario

1. Is Principal Doe a mandatory reporter under federal law?
2. Does it make a difference that the school is a public school and not a federal or tribal school?
3. Assuming that Principal Doe is a mandatory reporter, did the conversation he overheard between Jane and Mary trigger any reporting obligation?
4. If so, to whom or with whom should Principal Doe have filed a report of suspected abuse?
5. What are the possible penalties for failing to report suspected abuse?
6. Was Principal Doe obligated to interview Jane prior to making any report to law enforcement or child protection officials?
7. Principal Doe maintains that he interviewed Jane and that she denied any abuse. Principal Doe argues that because of her denials he had no reason to suspect abuse and therefore, no reporting obligations. Is this accurate?