

**A LOOK AT CHILD SAFETY IN SUBSTITUTE CARE THROUGH A NATIVE AMERICAN LENS**

A Look at Safety Through the Public Knowledge Report, the BIA Regulations and DHS Administrative Rule

This is the cover of a report. The main title is in large, white, bold, sans-serif font on a dark grey background. To the right, on a reddish-brown background, is the subtitle in a smaller, white, sans-serif font.

**DISPROPORTIONALITY IN THE SYSTEM**

Public Knowledge Report

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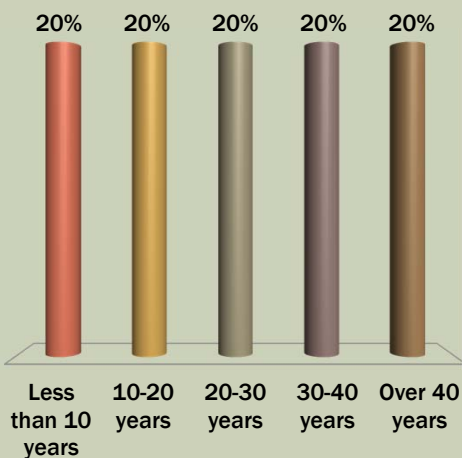
## IMPACT ON CHILD AND YOUTH SAFETY

- Public Knowledge Report highlights the relationship between Safety and Disproportionality
  - **Safety is considered** from the child and youth perspective and **through an equity lens** to eliminate disproportionality and disparate treatment.
- Cultural Competency and Equity are a Foundation of the system

## DISPROPORTIONALITY

HOW LONG HAS IT BEEN SINCE ICWA WAS PASSED?

- A. Less than 10 years
- B. 10-20 years
- C. 20-30 years
- D. 30-40 years
- E. Over 40 years



## HISTORY AND PURPOSE OF ICWA

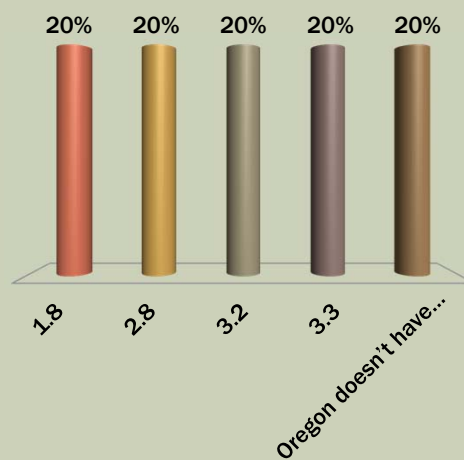
On November 8, 1978, utilizing its power over Indian affairs and its "responsibility for the protection and preservation of Indian tribes and their resources," while acknowledging "that there is **no resource more vital to the continued existence and integrity of Indian tribes than their children,**" Congress enacted the Indian Child Welfare Act (the Act or *ICWA*).

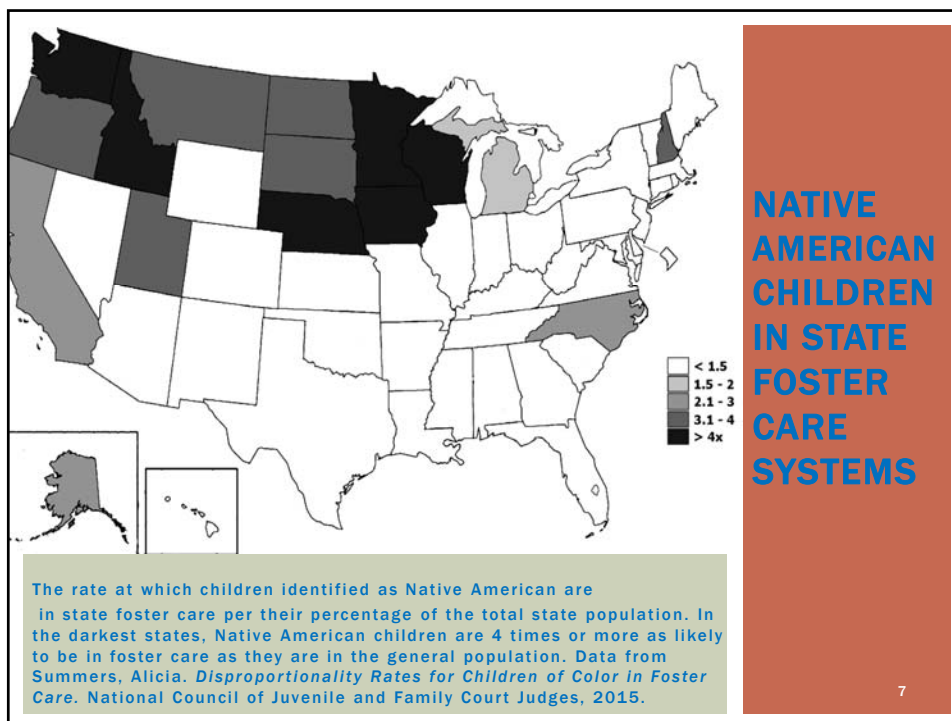
The Act was passed because Congress found that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children" by courts and welfare departments and placed in non-Indian foster homes and institutions. In 2016, the **Bureau of Indian Affairs** (BIA) revisited the *ICWA* and **added a subpart to the regulations to improve *ICWA* implementation** (see 25 C.F.R § 23).

## DISPROPORTIONALITY

WHAT IS THE CURRENT DISPROPORTIONALITY RATE IN OREGON FOR NATIVE AMERICAN CHILDREN?

- A. 1.8
- B. 2.8
- C. 3.2
- D. 3.3
- E. Oregon doesn't have disparity in its Native population in foster care



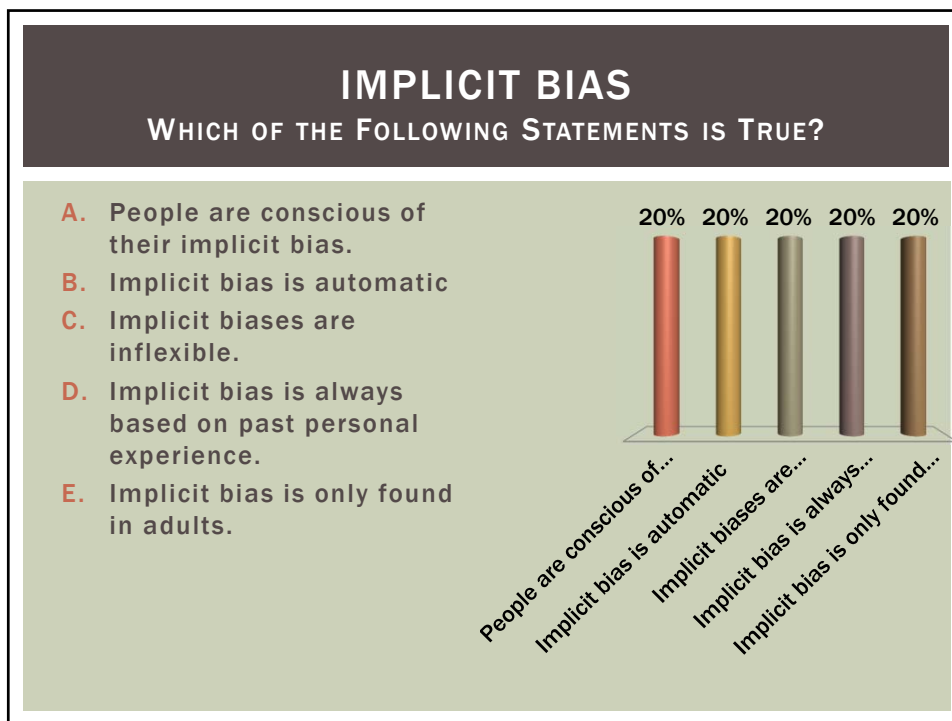


## ADDRESSING DISPARITY

- Governor's Task Force on Disproportionality recommended ongoing training for child welfare workers, supervisors, and leaders focused on "implicit bias and structural racism, family engagement inclusion, and team decision making"

How does ICWA address disparity?





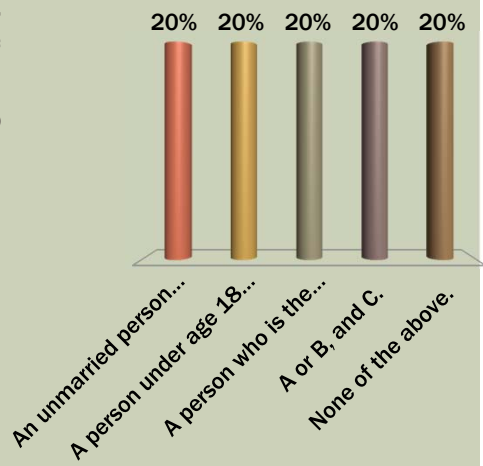
## IT BEGINS WITH INQUIRY

- The ICWA only applies in proceedings involving an “Indian child,” as defined in the ICWA.
- The BIA regulations require more efforts to determine if ICWA applies. They require the court to:
  - Ask each participant in every child custody proceeding,
  - Record all responses, and
  - Instruct participants to inform the court if they receive subsequent information that the child may be an Indian child.
- Clarifies the terms child custody proceeding and hearing. There may be multiple hearings involved in a single child-custody proceeding – **an activity that may culminate in a foster-care placement** (including guardianship), pre-adoptive placement, adoptive placement, a termination of parental rights, an emergency proceeding or a voluntary proceeding.

## IS THE CHILD AN “INDIAN CHILD?” §23.107

### AN “INDIAN CHILD” AS DEFINED BY ICWA IS:

- A. An unmarried person under age 18 who is a member of a tribe.
- B. A person under age 18 who is eligible for enrollment in a tribe.
- C. A person who is the biological child of a member of a tribe.
- D. A or B, and C.
- E. None of the above.



## IS THE CHILD AN “INDIAN CHILD?”

### §23.107

- The ICWA only applies in proceedings involving an “Indian child,” as defined in the ICWA.
  - Unmarried person
  - Under age 18
  - Who is either
    - a member of a **federally recognized** tribe,\* or
    - is eligible for **membership** with a federally recognized tribe **and** is the biological child of a member.

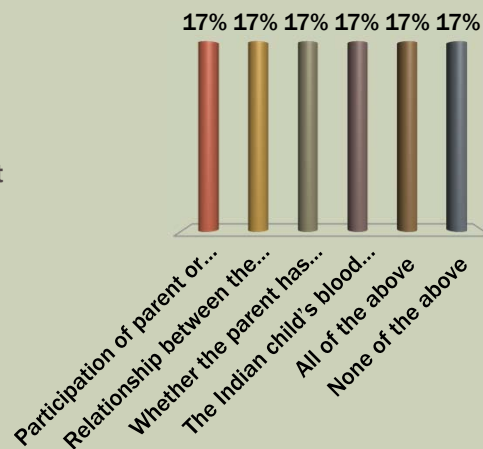


\*See 81 Fed. Reg. 26826 (May 4, 2016) for current list.

DHS rule and the BIA regulations state that if ICWA applies **it will not cease to apply because the child reaches 18** during the pendency of the proceeding.

## IN DETERMINING WHETHER OR NOT THE CHILD IS AN INDIAN CHILD, THE COURT MAY CONSIDER:

- A. Participation of parent or child in cultural, social, religious, or political activities
- B. Relationship between the Indian child and the parent
- C. Whether the parent has ever had custody of the child
- D. The Indian child's blood quantum
- E. All of the above
- F. None of the above



## DEPARTMENT RESPONSIBILITIES

- **CPS worker must inquire** whether the *child* is an *Indian child (1270)*.
  - If the parents are not available must work with any available **extended family member**
  - The caseworker **must document each action** to determine the child's Tribal membership in the ORKIDS within 5 business days of the assessment being complete.
  - The caseworker **must continue to inquire** to obtain a child's status regarding tribal membership or eligibility for membership **until the determination is completed**.
- The caseworker **must assist the parent or Indian custodian** in completing and submitting information to the tribe(s) to determine membership
- When the Department receives tribal confirmation regarding the child's status, the caseworker must:
  - (A) **Document in the Department's information system** either:
    - The written determination by the tribe of the child's membership or eligibility for membership; or
    - The written determination by the tribe declaring the *child* is ineligible for membership or enrollment.
  - (B) Incorporate **into all documents** presented at subsequent court hearings the written statement(s) regarding membership or enrollment status

## WHAT CAN CRB DO TO INCREASE THE STATE'S COMPLIANCE WITH ICWA?



Engage tribes early \* Make sure the tribe is invited to the review

## SAFE AND APPROPRIATE PLACEMENTS

CRB Findings



## FINDING #1

- ▶ Has DHS made active efforts to **prevent** or **eliminate** the need for removal of the children from the home
  - Applies if this is the **FIRST** review of the case
  - *What efforts, if any, did DHS make to avoid placing the child out of the home in the Mock Review case?*

## ACTIVE EFFORTS

### Public Knowledge Report

- No doubt that **preventative work with families to keep children and youth safely at home and out of substitute care will ease the demand in the System.**
- Focus on keeping more children and youth at home with supports in place. As a few review participants put it, **"there is no reason these children and youth shouldn't be at home if we can't keep them safe."**
- A focus on court and state **intervention while the child or youth is still at home (in appropriate cases) with supports and services in place will help."**

### ICWA Regulations

- Before ordering an involuntary foster care placement the court must conclude that **Active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful.**
  - The Active efforts must be documented in detail in the record.
  - Regulations give 11 examples
    - To maximum extent possible, consistent with prevailing social & cultural conditions and way of life of Tribe, and
    - Tailored to facts & circumstances of the case.

## STANDARD OF EVIDENCE

- Foster care placement
  - Clear and convincing evidence
  - Testimony of Qualified Expert Witness(es)(QEW) that continued custody by the child's parents or Indian custodian is likely to result in **"serious emotional or physical damage"** to the child.
  
- TPR
  - Beyond a reasonable doubt
  - QEW
    - That continued custody by the child's parent or Indian custodian is likely to result in **"serious emotional or physical damage"** to the child.



## CAUSAL RELATIONSHIP/EXPERT WITNESS

- The evidence must show a causal relationship between
  - The particular conditions in the home and
  - The likelihood that continued custody of the child will result in **serious emotional or physical damage** to the Indian child.

*DHS rule requires documentation that **efforts have been made to counsel and modify the behavior of the parent** or Indian custodian or the conditions in the home **and why those efforts have not been successful.***
  
- Without a causal relationship, evidence that shows only community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the standard of evidence.

## DEPARTMENT'S ACTIVE EFFORTS

- Involve **assisting** the *parent* or parents or *Indian custodian* through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan;
- Be provided in a manner consistent with the **prevailing social and cultural conditions and way of life** of the Indian child's tribe whenever possible;
  - ICWA & Native Culture is not a one-size fits all
- Be conducted **in partnership** with the *Indian child* and the Indian child's parents, Indian custodians, extended family members and the tribe whenever possible; and
- Be tailored to the facts and circumstances of the case.

## PRIOR TO DETERMINATION TO REMOVE

- **DHS active efforts** must include efforts to:
  - **Counsel and modify the behavior** of the parents or *Indian custodian*.
  - **Ameliorate any present danger safety threat.**
- Must involve the Indian child's extended family members, tribe(s), and tribal organizations at the earliest possible point during the assessment to **reduce the potential for cultural bias** when evaluating home and family conditions and making decisions affecting Indian children and families.

## DEMONSTRATING ACTIVE EFFORTS

- Assure that **resources have been diligently sought** to provide services to the family.
- **Collaborate** with the *parent* or *Indian custodian*, and the *Indian child*, if the *child* is competent, **when formulating the case plan**.
- **Actively assist and engage** with the *Indian family* in achieving the case plan objectives and work with the *parent*, *parents*, or *Indian custodian* to engage them in remedial services and rehabilitation programs to prevent the breakup, or support the reunification of the family.
- Contact potential service providers within the child's tribal community and other community resources to identify placement resources and **culturally appropriate services**.
- Contact and **consult with the Indian child's extended family** members to determine whether additional support for the *Indian child* and the Indian child's parents is available from any *extended family member*.

## ACTIVE EFFORTS

- If you had to make an active efforts finding rather than a reasonable efforts finding in the Hart case would you have looked at any additional factors? Asked additional questions?
  - AFFIRMATIVE
  - ACTIVE
  - THOROUGH
  - TIMELY
- *Given this was Lindsay's second time in care, what efforts were made to prevent re-entry?*
- *Given that Lindsay was already in care when Colton was born, were there sufficient efforts to prevent placement?*
- *Should there have been anything different, if this was an ICWA case?*

## FINDING #2

- Has DHS made diligent efforts to place the child with a relative or person who has a caregiver relationship
  - Applies in **ALL** cases
  - *Is the child placed with a relative?*
  - *Are there any other available relatives?*
  - *Are siblings placed together?*

## SAFE AND APPROPRIATE PLACEMENTS

The Public Knowledge report states that **more appropriate placements could prevent abuse of children and youth in substitute care.**

Substantiated **abuse in care occurs more often in non-relative foster homes than other placement types**, and has stayed stable for the last four years.

The **exception process** enables more relative caregivers to be certified, which is often in the best interest of the child or youth being removed from their home, a preferred placement option to non-relative care.

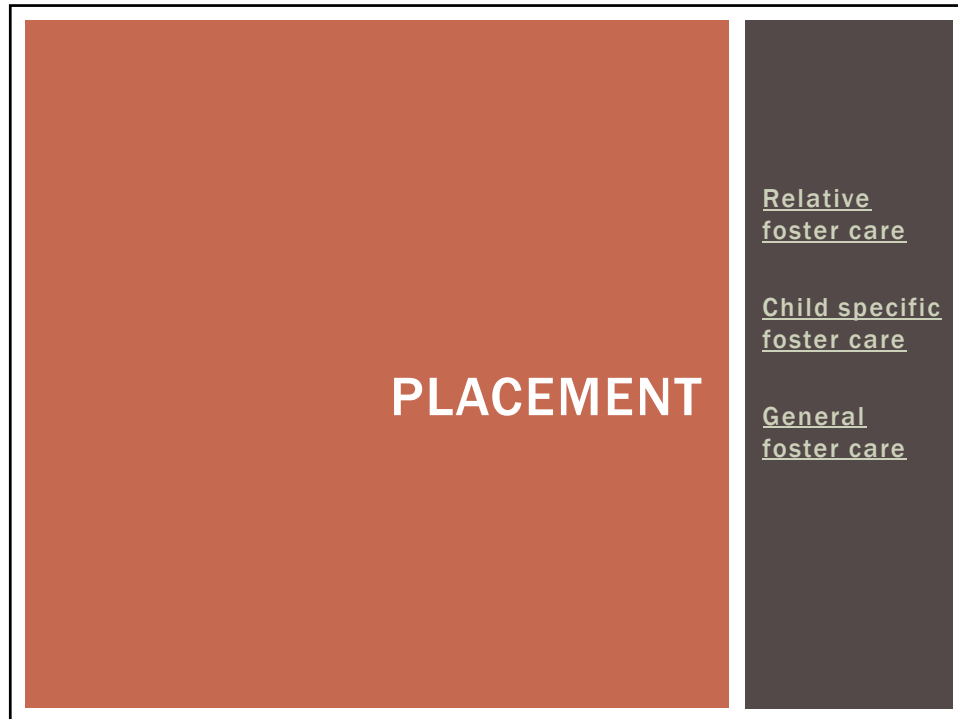
## RELATIVE PLACEMENTS

- Focused efforts on finding relative placement resources early in the case and getting them approved to care for children and youth should continue and increase. This will involve streamlining the process to remove unnecessary barriers to certification of relative care providers, but without compromising safety standards.
- A child or youth with a high level from a CASII assessment can still be maintained in a specialized foster home or relative care **with the right in-home services and supports in place.**

*Were diligent efforts made in Lindsay and Colton's case?*

## FINDING #3A


- DHS has ensured that appropriate services are in place to safeguard the child(ren)'s safety, health and well-being
  - What services are being offered to the child?
    - Placement
    - Education
    - Mental/physical health
    - Family connections
    - Face to Face Contact
  - Are additional services needed?



## PLACEMENT PREFERENCES

- The **continuum of care** begins with in-home services so children and youth can stay safely at home, to relative foster care, to non-relative foster homes, to crisis care, to specialized or professional foster care, to therapeutic foster care, residential, and psychiatric residential treatment facilities.
- Most children and youth in substitute care in Oregon are in non-relative or relative foster homes
- “Planfull foster care placements to ensure stability often does not occur, *primarily because of limited capacity and limited access to specialized training for foster parents and relative caregivers*” (Sensitive Review Committee Report, 2011, p. 5).

- A member of the Indian child’s extended family,
- A foster home licensed, approved, or specified by the Indian child’s Tribe,
- An **Indian foster home** licensed or approved by an authorized non-Indian licensing authority, or
- An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child’s needs.



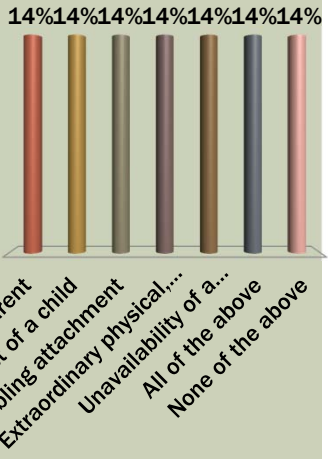
### ICWA PLACEMENT PREFERENCES

If the Tribe has established by resolution a different order of preference than specified in the ICWA, the Tribe’s placement preferences apply.

\* CW must contact tribe to see if such a resolution exists

## A PLACEMENT MAY DEPART FROM THE PREFERENCES BASED ON

- A. The request of a parent
- B. The request of a child
- C. Sibling attachment
- D. Extraordinary physical, mental, or emotional needs of the child
- E. Unavailability of a preferred placement
- F. All of the above
- G. None of the above



Category	Percentage
The request of a parent	14%
The request of a child	14%
Sibling attachment	14%
Extraordinary physical...	14%
Unavailability of a...	14%
All of the above	14%
None of the above	14%



## DEPARTURE FROM THE PREFERENCES

A placement cannot depart from the preferences based on **socioeconomic** status of one placement relative to another or on **ordinary bonding** or attachment that flowed from time spent in a non-preferred placement that was made in violation of the ICWA.

## UNAVAILABILITY OF PLACEMENT

- ▶ DHS rule states that it has the responsibility to ensure that **active efforts** have been made and the Regulations state the Court (CRB) must find that active efforts have been made to find placements that comply with the placement preferences of ICWA
- ▶ A placement **cannot be considered unavailable** if it
  - **Conforms to the prevailing social and cultural standards of the Indian community in** which the Indian child's parent or family resides
  - Or with which the child's parents or extended family members maintain social and cultural ties
  - The court should only consider whether the placement in accordance with the preferences meets the physical, mental and emotional needs of the child.

## HART CASE

- *Lindsay is in her 3<sup>rd</sup> foster placement.*
- *Would you make any recommendations to address that?*

## MENTAL HEALTH

Appropriate  
Services in  
Place

## SUPPORTS

- More than half of respondents to the Foster Parent Survey reported they received **no specialized training to care for high needs children or youth placed with them.**
- Foster parents say that when they call a caseworker for support for a child or youth with high needs, the **caseworker does not have the right training to offer solutions.**
- Focus group participants report that when foster parents don't receive the support they need to care for children and youth with high needs, **they leave**, placing increased burden and stress on those who stay.
- **Understanding and skills** in this area will help to de-escalate tensions in the homes and placements and keep more children and youth safe

## PUBLIC KNOWLEDGE REPORT - TRAUMA

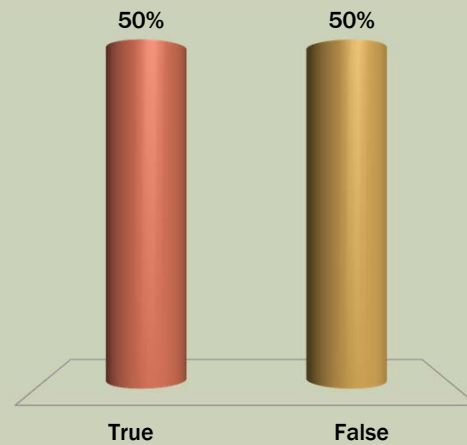
- “. . . .A Lack of psychiatric services, residential beds, and crisis placements has led to youth being held in less than ideal settings such as detention or in hospitals. These settings are ill equipped to help youth with significant needs, many of whom have suffered abuse, neglect and trauma. These settings can **exacerbate underlying trauma** and are expensive” (Juvenile Justice Mental Health Task Force Report and recommendations)

## INTERGENERATIONAL TRAUMA

- Initial phase
  - Dominant culture perpetrates mass trauma on a population in the form of colonialism, slavery war or genocide
- Second phase
  - The affected population shows physical and psychological symptoms in response to the trauma
- Final phase
  - The initial population passes these responses to trauma to subsequent generations, who in turn display similar symptoms

EXPERIENCES OF A PARENT, BEFORE EVEN CONCEIVING, CAN INFLUENCE BOTH STRUCTURE AND FUNCTION IN THE NERVOUS SYSTEM OF SUBSEQUENT GENERATIONS.

- A. True
- B. False



## HEALING FROM TRAUMA

- Native peoples have **high rates of ACEs** such as post traumatic stress, depression, suicide, substance abuse etc.
- Need to heal and grieve their historical trauma
  - If clinical mental health interventions are to be successful among Native peoples, the **therapy must be tied to its spiritual root**
  - **Indigenous means of treatment** include language, traditional foods, ceremonies, community sweats, traditional values, spiritual beliefs, history, stories, songs, traditional plants and canoe journeys
  - Knowing the history helps to realize that powerlessness and low self-esteem are not part of their identity as native people

## FACE TO FACE CONTACT

- Caseworkers are required to have contact with children and youth in substitute care that are on their caseloads once per month. According to focus group and interview participants, caseworkers often fail to meet that requirement.
- Reports say that high caseloads often prevent child welfare from spending face-to face time with families. However, **“there is no way to ensure safety of children in substitute care without seeing them in those placements.”**

## HART CASE

- *Are Lindsay Hart's mental health needs being addressed?*
- *If Lindsay were native, would you recommend anything different?*

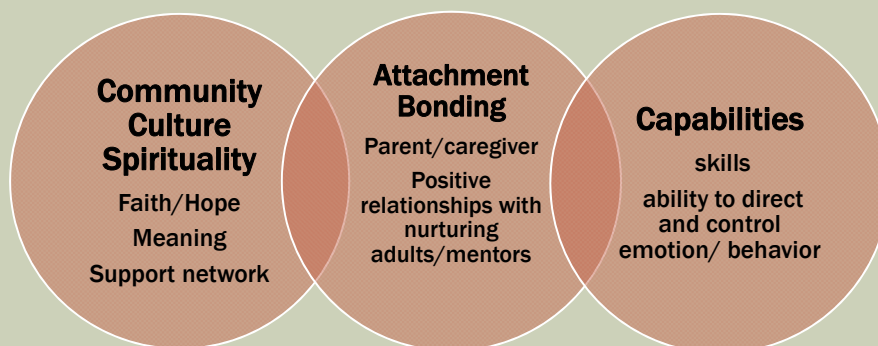
## FAMILY CONNECTIONS

Cultural competency issues within the System may have implications for safety in care

## MEETING FAMILY/CULTURAL NEEDS

- Few participants in focus groups or surveys identified issues of equity or cultural competency to be significantly connected to safety in care. However, youth, providers, and other advocates who have experienced this disconnect firsthand spoke about **cultural competency and culturally sensitive placements for children and youth as factors affecting safety in care.**
- Of those survey, **40% said the placement provider is not meeting the child's cultural needs.**
- Family Finding or other similar research services to search for relatives should be standard practice.

## BREAKING THE CYCLE



## CULTURAL HERITAGE PROTECTION

- DHS Administrative rule states that In instances where the ICWA does not apply, but the *child* is biologically an *Indian* or considered to be an *Indian* by the Indian community, the Department must **respect the child's right to participate in the culture of origin in case planning.**
- Participation in the culture includes the language, customary beliefs, social norms, and material traits including, but not limited to, the dress, food, music, and dance of a racial, religious, or social group that are transmitted from one generation to another.

*We know that the Mock Review case is not an ICWA case, but what do we know about Lindsay or Colton's cultural heritage and whether their cultural needs are being addressed in case planning?*

## FINDING #4

- The report also recommends . . . .on going training ” on “implicit bias, structural racism, family engagement and inclusion, and team decision making”

*If this were an ICWA case, would the current services to the parents be considered active?*

*If not, what would you recommend?*



## FINDING #7 – CONCURRENT PLANNING

- Adoptive Placement Preferences
  - A member of the Indian child's extended family
  - Other members of the Indian child's tribe
  - Other Indian families
- Guardianship
- Placement with a Fit and Willing Relative
- APPLA



## INTERVENE

- The tribe has a right to intervene **at any point** during the case

## GUARDIANSHIP FINALIZATION

- "When requesting court appointment of a *guardian* pursuant to **ORS 419B.366**, the Department must demonstrate, by **clear and convincing evidence**, that ***continued custody of the child with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child***. The Department's presentation of evidence must include the testimony of at least one QEW,
- When requesting court appointment of a *guardian* pursuant to **ORS 419B.365**, the Department must demonstrate, by evidence **beyond a reasonable doubt**, that ***continued custody of the child with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child***. The Department's presentation of evidence must include the testimony of at least one QEW,

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