IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LISA FLEMING, et al, Defendants.	Case No. 5:13-cv-05020-JLV BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE DSS DEFENDANTS RE: INADEQUATE TRAINING AND SUPERVISION

INTRODUCTION

First, the good news. The people who staff the Pennington County office of the Department of Social Services (DSS) are dedicated professionals genuinely concerned about the well-being of children. They work long hours under highly stressful conditions, and are underpaid for the work they perform and the responsibilities they shoulder. They deserve our appreciation and gratitude.

Now for the bad news. As discussed in this brief, these DSS employees are inadequately supervised and woefully undertrained in how and when to reunite the children in their custody with their parents. As a result, many children spend days, weeks, and sometimes months in state-imposed foster care needlessly. In one example discussed below, an Indian child remained in custody forty days longer than necessary due to inadequate DSS policies, as the Supervisor in charge of the case admitted during her deposition. *See* Deposition of S.W. ("S.W. Dep.") at 211-33.[1] In

[1] In accordance with the Court's Order Regarding Public Filings (Docket 254), the named Defendants and certain high-ranking state officials are identified by their proper names, while subordinates in the Pennington County office are identified by their initials.

another example, an Indian child remained in foster care an extra month due to improperly trained DSS staff, as Defendant Lisa Fleming admitted during her deposition. *See* Deposition of Defendant Lisa Fleming ("Fleming Dep.") at 231-47.

A core problem infecting the entire custody process—and *guaranteeing* delays in reuniting families—is the absence of written policies. In at least nine key stages of the custody process where an error by staff will cause children to spend more time in foster care than necessary, DSS has failed to issue a written policy instructing staff how they should act. The absence of written standards prevents adequate training *and* prevents adequate supervision because there are no set standards to which caseworkers can be held accountable. Bestowing such discretion on caseworkers has led to inconsistent behavior and frequent delays in reuniting children with their parents.

A second core problem guaranteeing delays in reunification is understaffing. Understaffing is so chronic and so deep that staff cannot possibly resolve cases expeditiously. There are not enough caseworkers (known as Family Services Specialists, or "Specialists") to handle the caseload effectively or efficiently, and not enough Family Services Specialist Supervisors ("Supervisors") to monitor their assigned Specialists.

Former Defendant LuAnn Van Hunnik, Regional Manager of the Rapid City office for thirteen years until her retirement in April 2015, admitted that her office was so understaffed, caseloads were "unmanageable." Deposition of LuAnn Van Hunnik ("Van Hunnik Dep.") at 328-29. Understaffing has gotten so much worse in recent years that between 2010 and 2014, although the number of custody cases per year did not increase, the average length of time that a child remained in foster care skyrocketed

from 30 days to 70 days. *See* Exhibit 160 (compare bates 025791 with 025803); *see also* Van Hunnik Dep. at 291-300; Plaintiffs' Statement of Uncontested Facts ("SUF") ¶ 180. Defendant Fleming, who replaced Ms. Van Hunnik in April 2015 as Regional Manager, testified that she "can't fix" the problem of unnecessary delays without more staff. Fleming Dep. at 135. If she had more staff, Ms. Fleming stated, "there would be a significant change" in how long children remain in foster care. *Id*. at 136. Ms. Fleming listed several changes in recent years that cause cases to be more staff intensive, *id*. at 138-39, 153-55, and agreed that "every single one of [those changes] would be cured by having more staff." *Id*. at 139.

Significantly, Ms. Fleming conceded that staff shortages in the Rapid City office "*means that [children are] spending more time in foster care than needs to happen*." *Id*. at 154 (emphasis added). Other DSS employees agreed. Supervisor M.M., who has worked in that office 13 years, testified that if the office were adequately staffed, "a majority" of their custody cases could be resolved more quickly, resulting in children returning home sooner. Deposition of M.M. ("M.M. Dep.") at 98. Supervisor S.W., who has worked in the Rapid City office for 12 years, believes that the office needs "at least five to ten" more Specialists. S.W. Dep. at 8. The office's understaffing delays the return of children to their homes because there are not enough staff to accomplish everything on time. *Id.* at 8-9, 58-59. *See also* Deposition of Supervisor D.H. ("D.H. Dep.") at 9 (agreeing that the office needs between 5 and 10 more Specialists). The Rapid City office currently has 43 Specialists. SUF ¶ 208. That number is not enough.

These unnecessary delays—whether days, weeks, or months—violate the Indian Child Welfare Act, 25 U.S.C. §§1901 *et seq*. ("ICWA"). ICWA was passed to protect

"'Indian children, Indian families, and Indian tribes [from] abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement.'" *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015) ("*Oglala* II") (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). Obviously, compelling Indian children to remain in foster care without a valid reason contravenes ICWA.

These unnecessary delays also violate the Due Process Clause, which "'protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.'" *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 3d 1017, 1036 (D.S.D. 2014) ("*Oglala I*") (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)); *see also Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005) ("The bonds between a parent and child are, in a word, sacrosanct" and protected by the Due Process Clause against unwarranted invasion by the state); *Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997) ("Both parents and children have a liberty interest in the care and companionship of each other."). Clearly, coerced separation of Indian families for no legitimate reason is an invasion of rights protected by the Due Process Clause.

Plaintiffs' complaint ("Compl.") (Docket 1) accuses the Secretary of DSS (formerly Kim Malsam-Rysdon and now Lynne Valenti) in her official capacity, and the Regional Manager of the Rapid City office of DSS (formerly LuAnn Van Hunnik and now Lisa Fleming) in her official capacity, of failing to adequately train and supervise their staff, thereby:

> exhibiting deliberate indifference to the rights of Indian parents and Indian tribes, causing them to suffer irreparable injury. *See City of Canton v. Harris*, 489 U.S. 378, 387-88 (1989); *Whisman*, 119 F.3d at 1311 (noting that plaintiffs' claims were, like the claims here, "based

> upon failure to properly train and supervise as well as creating, encouraging and following the unconstitutional custom and practice of detaining children for [longer than necessary in violation of the Due Process Clause].").

Compl. ¶ 48. The Court has already recognized that the DSS Defendants have a constitutional duty to adequately train and supervise their staff and that Plaintiffs' allegations set forth a cognizable claim. *See Oglala I*, 993 F. Supp. 3d at 1030-31. After examining certain background facts, we address these infirmities in detail.

FACTUAL BACKGROUND

Many of the facts related to the issues of inadequate training and supervision have already been noted by the Court. *See Oglala II*, 100 F. Supp. 3d at 764-67. To briefly summarize, DSS has the authority to take into immediate temporary custody a child considered to be abused or neglected, whether referred by the State's Attorney's office, by the police, or by a DSS employee. SDCL § 26-7A-14. If DSS then wants to retain continuing custody, it must file a petition seeking legal custody either through its own attorney or by having the state's attorney file the petition on behalf of DSS. SDCL §§ 26-7A-13, 26-7A-9. A temporary custody hearing must be held within 48 hours ("48-hour hearing") after a child is taken into custody by DSS. SDCL § 26-7A-15.

The South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases, issued by the South Dakota Unified Judicial System ("Guidelines") in 2007, *see Oglala II*, 100 F. Supp. 3d at 767, state that, in all temporary custody proceedings involving an Indian child, a DSS employee must fill out and sign an affidavit consistent with the requirements of the Indian Child Welfare Act ("ICWA Affidavit)" in support of the petition for custody. *See* Guidelines at 46; Compl. Ex. 3 (showing an example of an

ICWA Affidavit).[2] At each 48-hour hearing, a DSS employee is in the courtroom prepared to testify against the parents (*see* Guidelines at 37). At the conclusion of the hearing, if the court determines that the child cannot safely be returned home, the court assigns legal custody of the child to DSS. SDCL 26-7A-19(2); *see* Compl. Exs. 2, 7 (Temporary Custody Orders giving custody of Plaintiffs Pappan's and Young's children to DSS, respectively). DSS then controls whether or not the child is returned to the custody of the parents, as well as whether, when, and how the parents may visit their child. Compl. Ex. 7 (Temporary Custody Order); S.D. Codified Laws § 26-7A-19(2).

Thus, DSS employees determine prior to the 48-hour hearing which children to retain and which to return home, prepare an ICWA Affidavit for the 48-hour hearing with respect to those children they decide to retain, offer (or prepare to offer) the state's evidence at the hearing, and whenever the court grants DSS's petition for continued placement, determine when and how those children will be reunited with their parents. As shown below, Defendants (1) fail to adequately train their staff on how to properly accomplish those activities, and (2) fail to adequately supervise their staff to ensure the proper completion of those activities.

Defendant Lynne Valenti is the Secretary of DSS, the highest official in the agency, a position she has held since replacing Defendant Kim Malsam-Rysdon in February 2014. As Secretary, Ms. Valenti is a member of the Governor's cabinet. SUF ¶¶ 1, 2. There are nine divisions within DSS, one of which is the Division of Child Protection Services ("CPS"), whose duty it is to administer the agency's provision of child protection services. SUF ¶ 3. The person in charge of CPS is Virgena Wieseler,

[2] The 2007 Guidelines were amended after suit was filed. *See Oglala II*, at 767 n.29. However, the provisions of the Guidelines relevant to this lawsuit are the same in both versions.

who has been the Director of CPS since 1999. SUF ¶¶ 4, 10. Ms. Wieseler is responsible for the day-to-day administration of CPS. SUF ¶ 7.

There are seven Regions within CPS, and each Region is headed by a Regional Manager ("RM"). Pennington County is located within Region 1. At the time suit was filed, Defendant Luann Van Hunnik was the RM of Region 1. Ms. Van Hunnik retired in April 2015 and was replaced by Defendant Lisa Fleming. SUF ¶ 5.

Ms. Wieseler is responsible for supervising all seven RMs to ensure their compliance with CPS policy. SUF ¶ 9. She also supervises the person responsible for creating CPS's training program, Cara Beers. SUF ¶ 16; *see also* Deposition of Cara Beers ("Beers Dep.") at 10 ("I would be the person in charge of training.") Ms. Beers has been in charge of the CPS Training Program for the past five years. SUF ¶ 16; *see also* SUF ¶ 52.

Defendant Valenti acknowledges that both she and Ms. Wieseler must "ensure that Regional Managers are appropriately performing the duties of their position." Deposition of Lynne Valenti ("Valenti Dep.") at 36-37; SUF ¶ 9. Ms. Valenti, however, has never read the CPS policy and procedure manual; has never attended any CPS training, including training on the Indian Child Welfare Act ("ICWA"); and was unaware that under state law, the State's Attorney represents DSS in 48-hour hearings. SUF ¶ 8.

Ms. Wieseler acknowledged that it is her duty to "supervise and monitor each Regional Manger to make sure" the RM is complying with CPS policy. Deposition of Virgena Wieseler ("Wieseler Dep.") at 50. However, her system of monitoring is reactive rather than proactive. Ms. Wieseler admitted that she does not randomly monitor custody files to see how staff are handling custody cases but instead depends

on the RMs "to look at those kinds of things" and call deficiencies to her attention. *Id.* at 41. Ms. Wieseler "rel[ies] on [her] staff to do their reviews, to look at things, to bring information to me" instead of monitoring files herself. *Id*. at 42; *see* SUF ¶¶ 11, 15.

Defendant Lisa Fleming, the current RM of Region 1, has worked for DSS for 27 years. She claims to be very familiar with statewide CPS policies. SUF ¶ 20. As with the other six RMs, her direct supervisor is Virgena Wieseler. SUF ¶ 11.

After obtaining legal custody of a child at a 48-hour hearing, DSS conducts an investigation and prepares a report called the Initial Family Assessment ("IFA"). The IFA seeks to determine both "present danger" and "impending danger," as those terms are defined by CPS policy. *See* Exhibit 16, bates pages 002000-03, 002019-20. Present danger is immediate danger. Impending danger is danger that is likely to occur in the near future but might not be occurring at present. If present danger exists, the child must not reside in the home, but if there is only impending danger, a child can return home if that danger can be managed and the parent(s) agree to participate in a protective plan. *See* Beers Dep. at 126-27. Pursuant to policy, CPS has 30 days to complete an IFA if present danger exists and 45 days to complete an IFA if present danger does not exist. *See* Exhibit 16 page 001992; SUF ¶ 18.

I. DEFENDANTS HAVE FAILED TO ADEQUATELY TRAIN THEIR STAFF REGARDING HOW AND WHEN TO RETURN CHILDREN TO THEIR HOMES

A. Inadequate Training: Factual Analysis

DSS requires all new hires to complete a training program in the state office in Pierre that encompasses more than 200 hours of classroom instruction and, in addition, to complete an on-the-job orientation program in their Regional office. SUF ¶ 49. Although the length of the training program seems adequate, its content is not.

DSS has two overarching responsibilities under state and federal law with respect to child care, and implementing these responsibilities is the function of CPS. CPS must (1) keep children safe, and (2) return the children in CPS custody to their homes as soon as it is safe to do so. *See* Valenti Dep. at 148 ("Keeping children safe and reuniting them whenever it's possible and safe to do so are tenets of CPS."); *see also id*. at 146 (agreeing that "under both South Dakota and federal law, children in DSS custody must be returned as soon as it's safe to do so."); Wieseler Dep. at 45 (agreeing that DSS has these two overarching responsibilities); SUF ¶ 67.

As will now be shown, DSS adequately trains its staff to accomplish its first responsibility, but not its second. DSS, for instance, has hundreds of pages of policies that instruct DSS employees on how to assess danger, what to do when a child is in danger, how and when to take a child into custody, and how to care for the child while in custody. *See* SUF ¶ 60. But DSS does not have even one policy setting any time limits on the steps employees must undertake to determine if it is safe to return a child, or on how promptly employees must return children when safe to do so, leaving those decisions to the unmonitored discretion of (overworked and over-burdened) caseworkers. Similarly, the CPS Training Program includes nearly twenty "Exercises" and "Scenarios" explaining how to identify danger, when to take a child into custody, how to retain custody of that child, and how to create a safety plan for each child in state custody. Several of them were examined during the deposition of Cara Beers, the State Trainer. *See* Beers Dep. at 103-116; SUF ¶ 61. But as Ms. Beers admitted, her Training Program does not contain even one Exercise or Scenario explaining how and when to reunite children with their parents, or explaining how quickly such reunification

must occur. Beers Dep. at 115; *see also* SUF ¶ 62. As the DSS Defendants recently acknowledged in response to Request for Production No. 31: "As far as Exercises and Scenarios, there are none that would explain, describe, or discuss what to do when danger no longer exists and the child can go home." (A copy of this response is attached as Exhibit 195.)[3]

CPS's Training Program is lopsided. No wonder children spend longer in state foster care than necessary. When CPS hammers away at safety and all but ignores the need to promptly reunify, the inevitable result is that employees become quick to remove children and slow to return them.

Here is an example. Lisa Fleming was not involved in Seventh Judicial Circuit case A11-645, a custody case handled during Ms. Van Hunnik's tenure in 2011, but Ms. Fleming was asked prior to her deposition to examine this file so that she could be asked about it during her deposition. Ms. Fleming agreed that the case was handled consistent with how CPS staff were trained in 2011. *See* Fleming Dep. at 246 (stating that the employees who handled this case "were following policy.") When asked if staff today under her authority would likely handle the case the same way, Defendant Fleming replied: "I would hope not . . . [but] I can't guarantee anything." Fleming Dep. at 241-42. The case involved a 21 year-old unmarried Indian mother and her 7 month-old daughter. The mother asked the child's grandmother (the father's mother) if she would

[3] Plaintiffs' counsel, Stephen Pevar, has carefully examined thousands of pages of CPS policies and training materials, including Exercises and Scenarios. During his deposition of Ms. Beers, Mr. Pevar estimated that her Training Program devotes 99 percent of its time training staff on how to take and retain custody of children and 1 percent on when to return them and how promptly reunification must occur. *See* Beers Dep. at 103. Ms. Beers replied that she has "no idea of what percentage is what." *Id.* Mr. Pevar then showed Ms. Beers a number of Exercises and Scenarios, and Ms. Beers admitted that all of them help employees identify danger in the household. Ms. Beers was unable to think of a single one that trained staff how and when to return children to their homes. *Id*. at 103-16.

babysit for a few hours one evening, and the grandmother agreed. The mother knew that the grandmother was a recovering alcoholic, but also knew that the grandmother had been sober for several years, and decided to trust her. Unfortunately, the grandmother got drunk, the police were summoned, and DSS took the child into custody. A CPS caseworker ("Specialist") was assigned to the case. Her subsequent IFA (Exhibit 56, bates 020627-640) makes clear that Mother immediately explained the entire situation to the Specialist, and assured the Specialist that Mother would never allow Grandmother to babysit again. The Specialist then spoke with Grandmother, who admitted that the entire incident was her fault, and stated that Mother was a terrific parent. As noted in the IFA, there was no history that Mother was neglectful or abusive. On the contrary, the IFA reports that the child was “healthy, happy, and up to date on her vaccinations.” *Id*. at 020634. *There is no reason listed in the IFA to explain why the child was not returned to the mother at the 48-hour hearing.* Nevertheless, the Specialist and her Supervisor refused to return the child until they conducted an investigation, which took them 31 days. During that time, Mother brought her daughter's clothes and toys to the Specialist so that her daughter “‘felt secure,’” kept calling the Specialist to check on her daughter, told her that she “will do ‘everything humanly possible to get [her daughter] back,’” and was “‘going crazy’” knowing that her daughter was in foster care. *Id*. at 020632-35. The Specialist and Supervisor concluded that “the incident appears to be isolated and [Mother] was not at fault for what happened that night,” and the family was finally reunited 31 days after the incident. *Id.* at 020638.

Ms. Fleming hopes that her staff today would not treat anyone as this family was treated, and for good reason. It is impossible to know if race played a factor in what

occurred here (and Plaintiffs are not saying it did) but the handling of this case is contrary to everything ICWA is designed to accomplish. These CPS employees were so fixated, apparently, on the wholly remote chance that this child needed their protection such that they overlooked and excused all the damage and injury their compelled separation of this family was causing. The fact that it took them a month to realize that returning this child to her mother would not place the child in future danger is unconscionable. As Ms. Fleming admitted, there is nothing in the CPS file that justifies the treatment Mother received. *See* Fleming Dep. at 237-38.

Ms. Fleming made similar admissions about other custody cases, as discussed below. Also discussed below is the fact that there is a good reason why Ms. Fleming "cannot guarantee" that this case would be handled differently if it were to recur today: nothing in CPS policy has changed since 2011 regarding the need to return children promptly, and caseworkers are still not being trained to do that.

We now examine in specific detail twelve constitutional deficiencies in CPS training. Only by correcting these deficiencies will there be a sufficient reason to believe that what happened in A11-645 will not recur.

1. <u>Failure to Train Staff on the Proper Standard for Removal</u>

Section 1922 of ICWA requires that each state employ a particular standard in determining whether to remove an Indian child in an emergency custody hearing. DSS instructs staff to use a different standard, deliberately ignoring the federal standard.

As noted earlier, DSS has created an "ICWA Affidavit" that is submitted in each 48-hour hearing involving an Indian child. At the time this lawsuit was filed and continuing until April 2016, DSS trained staff throughout the state to use a "model"

ICWA Affidavit. This template was introduced during depositions as Exhibit 17. *See* SUF ¶ 34. Attached to Plaintiffs' Compl. as Exhibit 3 is the ICWA Affidavit filed in the Pappan case and it reflects this template. Paragraph 13 of the model sets forth the standard the state employed in determining whether to retain custody of an Indian child: "That returning the above-named child to his/her parents would likely result in serious emotional or physical damage to the child."[4] *See* SUF ¶ 22.

The state standard is inconsistent with the federal standard. Section 1922 of ICWA allows a state to seek emergency custody of an Indian child only "when necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. §1922. Thus, the state standard permits removal based on the possibility of emotional injury, whereas the ICWA standard limits removal to the possibility of physical injury.

There is a huge difference between the two standards, and reliance on the state standard has had catastrophic results. Ms. Van Hunnik estimated that approximately 75 percent of the Indian children in DSS custody were removed based on the prospect of their suffering emotional injury in their homes, *not* physical injury. SUF ¶ 31. Thus, had DSS employed the federal standard, three-fourths of the Indian children separated from their parents would have been returned at, or prior to, the 48-hour hearing. Defendants should be ordered to train their staff to comply with §1922.[5]

---

[4] Depending on the content of each ICWA Affidavit, "Paragraph 13" of the model may have a different number. In the Pappan Affidavit, for instance, it is paragraph 12.

[5] In April 2016, DSS switched to the ICWA standard, at least superficially, because the judge who hears ICWA cases for the Seventh Judicial Circuit ordered them to switch. *See* SUF ¶ 26. For two reasons, the switch does not render this issue moot. First, whichever Judge is appointed to hear ICWA cases in 2017 is free to return to the former standard. Second, as discussed in a motion for partial summary judgment pending before the Court, DSS misinterprets and misapplies the ICWA standard. In any event, for our purposes here, it is sufficient to note the *undisputed* fact that when this case was filed and continuing until at least April 2016, DSS trained its staff to use a standard of removal that violated ICWA, and DSS remains free to return to that standard tomorrow.

2. Failure to Train Staff to Provide a Factual Basis for Continued Custody

The central issue to be determined in each 48-hour hearing is whether sufficient grounds exist for the court to grant continued custody of the child to DSS, that is, whether the child will be in imminent danger if allowed to return home. The issue is not whether the child was in danger at the time the police or DSS removed the child two days earlier. As the Court recently reminded DSS on this point:

> The DSS Defendants miss the point of the court's findings. The issue is not what the Indian parents knew about the reasons their children were initially removed from the parents' custody, but rather the factual basis supporting continued separation of the family. This is the information mandated for disclosure to the parents and for consideration by the state court judges in determining whether continued separation of the family is necessary under ICWA. (Docket 150 at 27-28).

Oglala Sioux Tribe v. Van Hunnik, Civ. No. 13-5020-JLV, 2016 WL 697117, at *3 (Feb. 19, 2016, D.S.D. 2016) ("*Oglala III*").

During depositions, DSS staff admitted the following three things. First, Paragraph 13 of the template (Exhibit 17) is where the Specialist must set forth the factual basis supporting continued custody. SUF ¶ 35. Second, the ICWA Affidavits submitted in at least three Indian custody cases discussed during the depositions (Exhibits 26, 56, and 104) fail to contain in their respective "Paragraph 13" a sufficient factual basis to justify continued placement, and the Specialists who drafted them and the Supervisors who approved them made fundamental errors in judgment. SUF ¶ 36.

Lastly, the State Trainer for CPS, Cara Beers, admitted that these errors likely reflect "a training issue." Beers Dep. at 30; SUF ¶ 39. Ms. Beers explained that although she trained staff to describe the incident that precipitated the removal two days

earlier, “we didn’t take it to the next step” and also trained them to explain why *continued* placement was necessary. SUF ¶ 40 (quoting Beers Dep. at 174).[6]

Ms. Wieseler, Ms. Beers' supervisor, was shown the three ICWA Affidavits at issue here (Exhibits 26, 56, and 104) during her deposition. Ms. Wieseler agreed that all three failed to provide any reason to retain custody. SUF ¶ 36 (citing Wieseler Dep. at 163-66); *see also* SUF ¶ 38 (citing testimony from Defendant Fleming agreeing that, based on these ICWA Affidavits, DSS should not have sought continued placement).

Defendant Fleming attended nearly all the depositions in this case and knew that Plaintiffs were asking the Supervisors who had approved those Affidavits why they had done so. Several months after Plaintiffs first raised this issue during depositions, Ms. Fleming contacted Director Wieseler and informed her about this systemic problem. Ms. Wieseler authorized Ms. Fleming to send an email to all RMs and call attention to this deficiency. SUF ¶ 44. Ms. Fleming sent the email (Exhibit 190) on June 15, 2016.

Ms. Fleming's email, while better than nothing, is characteristic of the minimal effort that CPS undertakes to train staff on matters that go to the heart of ICWA and the Due Process Clause. Notably, Ms. Wieseler did not instruct Ms. Beers to begin training staff on how to fill out Paragraph 13 properly, and when Plaintiffs deposed Ms. Beers on July 21, 2016 (five weeks after Mr. Fleming sent her email), Ms. Beers conceded that the CPS Training Program had not changed regarding Paragraph 13. SUF ¶ 40. Ms. Wieseler knows that a simple email is unlikely to change an ingrained unless training and supervision changes. During her deposition, Ms. Wieseler was shown Exhibit 194,

[6] Defendant Fleming also admitted that due to poor training, "virtually every" member of her staff were filling out another paragraph of the ICWA Affidavit (in which staff must describe the efforts made to reunite and rehabilitate the family) incorrectly. *See* SUF ¶¶ 41-42. According to Ms. Wieseler, Ms. Van Hunnik should have noticed these failures years ago and instructed her staff to do the right thing. SUF ¶ 43.

a Policy Memorandum she issued in 2005 that was circulated to all staff on this *very* subject. Ms. Wieseler conceded that had she monitored and enforced her Memorandum, Ms. Fleming's email might not have been necessary. SUF ¶ 47.

Defendants cannot reasonably believe that Ms. Fleming's lone email will eradicate this ingrained practice when no one is training new hires how to fill out Paragraph 13 properly or retraining existing staff. Until staff are properly trained on what evidence is needed to justify continued placement, the risk remains unacceptably high that they will continue to use the wrong standard, thus resulting in some children remaining in foster care longer than necessary. Defendants should be ordered to conduct that training.

3. <u>Failure to Train Staff on Relevant Rulings Issued by this Court</u>

Director Wieseler was asked during her July 20, 2016 deposition whether DSS has made any changes as a result of this lawsuit. Her response: "Not at this time." Wieseler Dep. at 44. Indeed, when it comes to this lawsuit, DSS is like an ostrich with its head in the sand.

As discussed during the August 17, 2016 hearing on remedies, the official position taken by Secretary Valenti is that DSS is not going to change any of the policies and practices found by this Court to violate federal law until the Court issues an injunction requiring that change. *See* Valenti Dep. at 67 (explaining that the reason DSS did not switch to the ICWA standard following this Court's ruling on March 30, 2015 is because that ruling is "not a final decision"). *See* SUF ¶ 25.

This attitude permeates CPS's Training Program. Cara Beers, the person who creates the Training Program, was asked during her deposition on July 21, 2016: "Have

you developed any new training at all regarding what the federal court has ruled?" She replied: "Not at this point, no." Beers Dep. at 96. The Training Program does not even notify trainees what this Court's rulings say. *Id*.; *see* SUF ¶ 58. Ms. Valenti admitted that she has done nothing to ensure that the CPS Training Program provides staff with information about the rulings issued in this litigation. Valenti Dep. at 75; SUF ¶ 57. Plaintiffs served a Request for Production on Ms. Valenti requesting that she produce all documents in which DSS incorporated this Court's decisions into its training. No documents were produced. *See* Exhibit 201 (RFP. No. 52).

Thus, in the nearly 18 months since the Court's March 30, 2015 summary judgment ruling, scores of newly hired CPS employees have been trained to follow policies and practices that violate federal law. Ms. Valenti's decision to ignore the Court's ruling and continue to violate the rights of Indian children, their families, and their tribes until an injunction is issued is irresponsible. Fortunately (and hopefully), these persistent violations of federal law will cease when the Court's remedial order is issued, but CPS must retrain existing staff to cease and desist engaging in these ingrained practices as well as properly train new-hires.

4. <u>Failure to Enact Essential Policies and Train Staff to Implement Them</u>

CPS's policy and procedure manual is more than a thousand pages long, *see* Wieseler Dep. at 11, SUF ¶ 53, and contains hundreds of policies that instruct employees how to look for danger in the home, how and when to take a child into custody, how and when to retain custody of a child, and how and when to create a safety plan for that child. During her deposition, Director Wieseler explained why it is beneficial to have policies such as these in writing. First, a written policy creates

certainty (unlike an unwritten "best practice"). Second, a written policy creates a uniform state standard. Third, written policies facilitate training because new staff know exactly what they must do. Fourth, written policies assist supervisors monitor compliance because the activities of their subordinates can be measured against a fixed standard. Finally, placing a policy in writing demonstrates that CPS cares about the policy and considers compliance important. *See* Wieseler Dep. at 187-88; SUF ¶ 68.

The next nine failures in the CPS Training Program have one thing in common: each failure involves an essential activity that must be performed by CPS employees during the custody process, a delay in completing that activity will likely prolong foster care unnecessarily, and yet CPS has created *no written policy* setting forth how this activity must be performed or how quickly it must be completed. Instead, for each of these nine critical activities, CPS has an unwritten "best practice." Given the numerous benefits of written policies, it is inexplicable—and inexcusable—that these essential activities are not the subject of written standards. The evidence shows, as discussed below, that employees often ignore these unwritten best practices, resulting in unnecessary delays in reunifying children with their parents, and that the lack of written standards prevents both adequate training and adequate supervision.

After reviewing custody files and observing unnecessary delays in many of them, counsel for Plaintiffs fashioned written policies for each of these nine activities based on CPS's best practices in an effort to expedite the reunification process and facilitate training and supervision. Counsel discussed these written policies with CPS staff during their depositions. All nine policies were strongly endorsed by staff, including Director

Wieseler. CPS staff were virtually unanimous in their view that all nine policies had no downside, and would help ensure prompt reunification.

Plaintiffs wish to emphasize that they are not seeking "credit" for developing these nine policies. To the contrary, each written policy is based on an existing best practice of CPS. But what is clear is that, for the same reasons CPS issued written policies for *retaining* children, CPS must issue written policies for *returning* children. CPS must create enforceable standards, train staff to obey them, and supervise the implementation of them.

The failure of CPS to issue these written policies is a constitutional defect. Every state agency, as explained below, has a constitutional duty to train staff to perform its mandatory responsibilities when the failure to do so will deprive a citizen of a federal right. Here, the Indian families whose children are being placed by CPS in foster care have a federal right to be reunited as soon as it is safe to do so. *See Oglala II* at 766 ("'The legislative history [of ICWA] clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end.'") (quoting "Department of Interior Guidelines for State Courts; Indian Child Custody Proceedings," 44 Fed. Reg. 67584, 67590 (Nov. 26, 1979)); *see also* "Indian Child Welfare Act: Final Rule," 81 Fed. Reg. 38864 (Feb. 19, 2015)), at 38872 § 23.113(a) ("Any emergency removal or placement of an Indian child must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.").

CPS has a constitutional duty to return Indian children as soon as it is safe to do so. CPS therefore must enact policies that will fulfill that duty, train its staff to implement

those policies, and instruct supervisors to monitor compliance with them. The nine policies that will now be discussed are among those that must be enacted by CPS to accomplish that duty. Indeed, the absence of these policies prevents CPS from training its staff properly.

As the Court will note, Ms. Van Hunnik could have prevented all of the difficulties discussed below had she tried to train her staff on what CPS policy requires. Ms. Van Hunnik, however, believed that she had no duty to train her staff about CPS policy, other than to answer questions as they may arise. Van Hunnik Dep. at 12-13, 389 ("I am not a trainer for my staff for the IFA and stuff.") *See* SUF ¶ 66.

(a) Failure to Train Staff to Conduct Assessment Interviews Within 48 Hours

The first task the Specialist assigned to a case is expected to complete following the 48-hour hearing is conduct “Assessment Interviews” of the child and the parent(s) to determine what occurred and whether the child would be in danger if returned home. SUF ¶ 69. No written policy imposes a time limit, however, on how quickly these interviews must occur, and thus a Specialist who waits 5, 10, or even 25 days to conduct the first interview is not violating CPS policy. Wieseler Dep. at 191; Fleming Dep. at 92, 113 (stating that there is no deadline set by CPS policy on Assessment Interviews); SUF ¶ 69.

According to CPS staff, there is an expectation (“best practice”) that Assessment Interviews will be completed by the Specialist within 48 hours after the case is assigned. SUF ¶ 70. But Specialists who take longer than 48 hours are not violating CPS policy and need not document a justification, and waiting six or seven days is common. SUF

¶¶ 69-70. Recently, a Specialist waited twelve days and nowhere documented an explanation for the delay. SUF ¶ 71.

Supervisor S.W., who has worked in the Rapid City DSS office for twelve years (six of which as a Specialist), testified that a written deadline is a "great idea." S.W. Dep. at 225-26; *see also* Fleming Dep. at 114-15 (stating that creating a deadline "would assist staff in making the IFA be more timely and complete sooner."). Such a policy could list factors that would justify extending the deadline, such as inclement weather. Every DSS employee who testified on the subject agreed that the advantages of such a policy outweighed any potential disadvantages. SUF ¶ 73.

The Court recognized in *Oglala II*, citing the affidavit of Defendant Van Hunnik, that CPS returns a significant number of children to their homes within days of the 48-hour hearing. *See Oglala II*, at 757. CPS thus returns many children shortly after conducting the Assessment Interviews. These interviews can convince staff it is safe to reunify the family. In her deposition, Ms. Wieseler stated that she can "see advantages" to a written deadline, and agreed to consider enacting one, *see* Wieseler Dep. at 190-91, but no such policy has been issued. Unless Defendants offer in their brief a valid justification for not placing a mandatory deadline on completing the Assessment Interviews subject to any extensions they deem appropriate, the Court should order them to create one, to train staff to comply with it, and to supervise its implementation. Enacting this policy could result in many children returning to their homes sooner.

(b) Failure to Train Specialists to Make Periodic Assessments of Danger During the IFA Investigation and To Document Their Conclusions

The Specialist assigned the case is required to make an initial documented assessment of danger in his/her ICWA Affidavit, but is not required to document another

assessment until the IFA is completed some 30 to 45 days later. *See* Fleming Dep. at 123-24; SUF ¶ 77. CPS should enact a written policy that requires the Specialist to assess periodically—such as once every seven days—whether it is safe to return the child to the home, and to document the result of that assessment. Specialists are already expected to assess danger continuously, *see* SUF ¶ 76, but there is no way to tell if they are doing so because they have no duty to document a conclusion until the completion of the IFA. SUF ¶ 77. Enacting a policy requiring such documentation will ensure that each Specialist takes a hard look at set intervals whether the child may now safely be returned. *See* Van Hunnik Dep. at 268 (agreeing that such a policy would "reduce the likelihood that some change in the emergency situation would go unnoticed.") Circumstances can change at any time—for instance, a parent can be released from jail—and requiring periodic assessments is one way to guarantee that a child does not remain in foster care longer than necessary.

Moreover, documented assessments will assist CPS supervise this important responsibility. When Lisa Fleming examined the "bad babysitter" case, A11-645, for example, she was unable to find a single reason in the file to explain why the child was not returned after the Assessment Interviews. She would not have been in that predicament had CPS required periodic assessments to be documented. Ms. Fleming had the same difficulty when she reviewed the file in A13-49. *See* Fleming Dep. at 216 (agreeing that based on the ICWA Affidavit and the IFA in A13-49, "these children should have gone back with the parents at the 48-hour hearing."); *see* SUF ¶ 133.

Director Wieseler testified that she "could see advantages" to requiring documented periodic assessments by the Specialist. Wieseler Dep. at 190; SUF ¶ 78.

The only disadvantage she saw is that staff might be unable to reach a definitive conclusion at each interval. *Id.* at 189. But there is an easy fix for that: in that situation, the written policy can authorize the Specialist to document the competing considerations. *See* SUF ¶ 79. The fact is, such a policy could result in many children being returned sooner. *See* M.M. Dep. at 47-49 (agreeing that a written policy requiring periodic assessments would have "the benefit" of making sure that "the children who can go home, will go home."). Unless CPS presents a valid justification to the Court for not enacting this policy, the Court should order CPS to enact it, to train staff to comply with it, and to monitor its application.

(c) Failure to Train Specialists and their Supervisors to Discuss Each Custody Case at Specific Intervals and To Document Their Conclusions

Defendants expect the Specialist and Supervisor assigned to each custody case to discuss at intervals during the IFA process whether it is safe to return the child to the home. SUF ¶ 81. But CPS policy does not require those discussions. Even if the Assessment Interviews convince the Specialist that the child can go home, it would not violate CPS policy for the Specialist to wait until the end of the IFA investigation to discuss reunification with the Supervisor. SUF ¶ 81. Ms. Van Hunnik issued no oral or written instructions to her staff on this subject. *See* SUF ¶ 82.

A policy compelling the Specialist and Supervisor to discuss at specific intervals whether the child can go home and to document their conclusions can only help facilitate early reunification, and has no downside. Wieseler Dep. at 198; *see also* M.M. Dep. at 54-55 (admitting that this policy has no downside and yet "has the potential to hold staff and Supervisors more accountable with regards to important information," thus making it less likely that an improvement in circumstances would be overlooked);

D.H. Dep. at 78 (stating that although the Specialist and Supervisor are already expected to discuss this subject during the IFA process, a written requirement has the advantage of requiring documentation of the discussion).

This is another policy begging to be enacted. It has no disadvantages, and significant advantages. *See* SUF ¶ 84. It will ensure that the Specialist and Supervisor are frequently reassessing whether the child can safely return home and examining any changes that may have recently occurred, which can only enhance the chances for early reunification. Staff are already expected to have these discussions, *see* Van Hunnik Dep. at 277-78, and requiring that the outcome of those discussions be documented will emphasize the importance of having them regardless of how heavy their caseloads, as otherwise these discussions could easily be overlooked. *See* SUF ¶¶ 83, 85. As with the other proposed policies, unless CPS presents a valid justification to the Court for not enacting this policy, the Court should order CPS to enact it, to train staff to comply with it, and to monitor its application.

(d) Failure to Create a Deadline for Reviewing Drafts IFAs and Training Supervisors to Obey that Deadline

The Specialist assigned a custody case has the duty to investigate that case and prepare a draft IFA that recommends either reunification of the child with the parents or retention of the child by DSS. Each draft IFA must be submitted for review to the Specialist's Supervisor, who edits the draft and returns it to the Specialist for completion before the child can be released from placement. SUF ¶ 87.

This is another essential stage in the custody process where delays can occur that will prolong custody unnecessarily. Each extra day the Supervisor takes to return the draft is one more day a child must spend in foster care. *See* Valenti Dep. at 110.

Yet CPS has created no deadline by which a Supervisor must return a draft IFA, and Ms. Van Hunnik issued no deadlines, either. *See* SUF ¶ 93. According to Cara Beers, best practice is three days, Beers Dep. at 146, although Defendant Fleming states it is two days. Fleming Dep. at 102. *See* SUF ¶ 88.

What no one disputes is that Supervisors often take far longer than three days to return draft IFAs, and there is no written CPS policy creating a deadline. In one case, Ms. Fleming took seven days before returning a draft IFA without explaining why she was ignoring best practice, *see* Van Hunnik Dep. at 158-59, 212, and in another case, Supervisor D.H. did the same. *Id*. at 213-16; Valenti Dep. at 110; SUF ¶ 90. Given that there is no mandatory deadline, it would not violate CPS policy for a Supervisor to wait even 20 days before returning the draft IFA. SUF ¶ 89.

In fact, CPS does not require that staff log the dates when drafts are submitted and returned, and Ms. Van Hunnik did not instruct her staff to log them, nor has Ms. Fleming done so. *See* SUF ¶ 99. Plaintiffs sought those dates in a series of custody cases, and CPS was unable to provide most of them because the dates were not logged. *See* Exhibit 168a; Van Hunnik Dep. at 111; M.M. Dep. at 55; D.H. Dep. at 90; SUF ¶ 98.

It is illogical for CPS to leave this essential activity to employee discretion and not create a mandatory standard. All that is required is for CPS to codify an existing best practice and to list factors in the policy that would justify a Supervisor to take additional time. Such a policy will increase the likelihood that children will be returned as soon as it is safe to do so. *See* Van Hunnik Dep. at 280-81 (agreeing there is no downside to such a policy, whereas the policy "would be a reminder to the supervisor" of the need

"to prioritize" the return of draft IFAs); *see also* Wieseler Dep. at 200 (stating that she did not see any disadvantages); M.M. Dep. at 59 (finding no disadvantages and the advantage of "higher accountability" for Specialist and Supervisor); SUF ¶ 95-96. Unless CPS presents a valid justification for not enacting this policy, the Court should order CPS to enact it, to train staff to comply with it, and to monitor its application.

(e) Failure to Require Specialists, When Submitting the Draft IFA, to Alert Supervisors that the Child Can Return Home

As just explained, the Specialist assigned to the case prepares a draft IFA and submits it to his/her Supervisor that recommends either reunification or retention. When the child is to be reunified, every additional day the Supervisor takes to review the draft results in another day in custody for the child. It therefore seems reasonable to require the Specialist to notify the Supervisor at the time the draft is submitted that the Specialist is recommending reunification so that the Supervisor can expedite the review. Ms. Wieseler testified that she "would hope that they [the Specialist and Supervisor] would have that conversation," Wieseler Dep. at 201, but nothing requires them to do so. SUF ¶¶ 101-02. Providing that notice is "best practice," SUF ¶ 107, but Ms. Van Hunnik did not instruct her Specialists to provide this notice, and neither has Ms. Fleming. SUF ¶ 103.

Such a policy could result in earlier reunification. SUF ¶ 105. Ms. Wieseler knows of no disadvantage to requiring such notice. Wieseler Dep. at 201-02; SUF ¶ 106. Therefore, unless Defendants present a valid justification for not enacting this policy, the Court should order CPS to enact it, to train staff to comply with it, and to monitor its application.

(f) Failure to Require Specialists to Inform the RM When a Supervisor is Taking Too Long to Return a Draft IFA

The notification just discussed will expedite the process in some cases, but what if the Supervisor cannot edit the IFA promptly because he/she is on vacation or ill? When Plaintiffs asked Ms. Fleming why she had waited seven days to return the draft IFA in A14-145, she stated that she had been "out of town." Fleming Dep. at 126. But why not have another Supervisor or the RM review the draft IFA rather than force the child to remain in foster care unnecessarily? Every Supervisor goes on vacation. Does this mean that all of the children whose cases are being overseen by that Supervisor cannot go home until he/she returns, even if it is safe for them to do so?

CPS written policy does not require the Specialist to notify the RM when the Supervisor has not returned a draft IFA promptly. Wieseler Dep. at 202; SUF ¶¶ 108-110. This will result in unnecessary delays in reunification. Therefore, Defendants should adopt a written policy that requires Specialists to notify the RM when they have been waiting more than two days for the Supervisor to return a draft IFA (or immediately, if the Specialist knows the Supervisor will be out of the office beyond two days). Director Wieseler admitted that she can see no downside to such a policy. Wieseler Dep. at 202-03. Defendant Fleming recommended that notification occur if the Supervisor has not responded within 24 hours. Fleming Dep. at 143.[7]

As with the other policies under discussion, there is no reason not to have this policy and a significant reason to have it. *See* SUF ¶¶ 113, 115. Indeed, had this policy

[7] Defendant Fleming proposed an excellent option. Rather than require the Specialist to inform the RM about the delay, a system can be created, she believes, that would notify the RM electronically whenever a draft IFA has not been returned within 24 hours. Fleming Dep. at 142-43; SUF ¶ 112. In their response brief, Defendants can inform the Court which option they prefer, or offer some other option.

been in effect when Ms. Fleming left town, the child in A14-145 might have returned five days sooner, and the child in A13-49 might have been returned six days sooner. SUF ¶¶ 91, 114. Unless Defendants present a valid justification to the Court for not enacting this policy, the Court should order them to enact it, to train staff to comply with it, and to monitor its application.

(g) Failure to Promptly End the Placement After the Reason For Placement Has Ended

ICWA requires that when the reason for placement has ended, the placement must end. Defendants disagree, however. As discussed in a separate motion for partial summary judgment, Defendants train their staff that if the reason given to the parents and the court at the 48-hour hearing for placement has ended but the Specialist now has a *different* reason to retain custody, CPS is free to retain custody even though the parents had received no notice of this reason, the parents had no cause to present evidence at the 48-hour hearing on that reason, and the court did not grant custody based on that reason. *See* SUF ¶ 117.

During her deposition, State Trainer Cara Beers was shown ICWA Affidavits from two custody files, one from 2014 (A14-1044) and the other from 2015 (A15-111), in which the only reason stated for seeking continued custody was the fact that the parents were unavailable to care for their children due to hospitalization or incarceration. In both cases, the reason for placement ended within 72 hours when the mothers were released from jail and immediately asked CPS to return their children. In both instances, staff refused, and the children were not returned for more than a month. *See* SUF ¶¶ 118-120.

Ms. Beers testified that refusing to return children based on grounds not set forth in the ICWA Affidavit is permitted under CPS policy. Specialists are permitted, she said, to have alternative grounds for seeking custody and to notify parents of only one of them in the Affidavit. *See* Beers Dep. at 187 (admitting that it is "not uncommon to have alternative grounds [for seeking placement] that aren't set out in the ICWA affidavit.") Ms. Beers further testified that in cases where Specialists change their reason for retaining custody, CPS has no duty (1) to immediately provide the new reason to the parents, (2) to immediately seek approval from the court to retain custody based on the new reason, or (3) to immediately document what is the new reason. Beers Dep. at 180-83, 189-197; *see also* S.W. Dep. at 227 (admitting that there is no duty under CPS policy to document the new reason); SUF ¶ 121.

Defendants are training their staff improperly. Keeping a child in custody for a reason not presented to the court—-and without providing parents with notice of that reason at the 48-hour hearing—is just as unconstitutional as if CPS seized these children off the street and kept them without informing the parents of the reason, and without obtaining immediate judicial authorization. Defendants have only two lawful options in these situations. Either they must end the placement and return the children, or they must commence a new proceeding by filing a new petition and a new ICWA Affidavit and afford parents the right to challenge the loss of custody. Frankly, the attitude exhibited by Defendants' policy—once we have your children, we can keep them for any reason we want—is frightening. Defendants should be ordered to retrain their staff on this issue because their current policy violates both the Due Process Clause and ICWA.

(h) Failure to Promptly Return Children After the Case Has Been Closed

CPS has a duty to return a child to the home promptly after staff acknowledge it is safe to do so. Yet this does not always happen, and there is no written policy requiring it. SUF ¶ 126. Ms. Van Hunnik issued no instruction to her staff on this subject, and neither has Ms. Fleming. SUF ¶ 128. In one case discussed during depositions, the Specialist and Supervisor agreed the child could go home but the Supervisor (for reasons not explained in the file) waited four days to contact the State's Attorney's office to initiate that process and sign the final IFA. SUF ¶ 127.

CPS staff uniformly agreed that creating a written policy requiring that children be returned home within 24 hours after a case has been closed unless a valid reason is documented has no disadvantages and substantial advantages. *See* Van Hunnik Dep. at 303-04; Fleming Dep. at 144; SUF ¶¶ 130-31; *see also* Wieseler Dep. at 203 (agreeing that she could see no disadvantages). Returning children promptly is already a best practice. SUF ¶ 132; *see* Fleming Dep. at 46 (stating that CPS has a duty to return children in DSS custody "as soon as possible."). Plaintiffs therefore request that the Court order Defendants to enact such a policy, to train staff to comply with it, and to monitor its application unless CPS presents a valid justification for not enacting it.

Thus, the facts show that Defendants' inadequate training permeates virtually every aspect of the removal, retention, and reunification process involving Indian children. For reasons now discussed, Plaintiffs are entitled to a meaningful remedy.

B. <u>Inadequate Training: Legal Analysis</u>

The Court has already determined that the DSS Defendants were "policymakers" with respect to the policies challenged in this lawsuit. *See Oglala I* at 1030-31; *Oglala II*

at 762-64; *Oglala III*, 2016 WL 697117 at **6-7. We now must determine whether these policymakers failed to adequately train their staff for purposes of liability under 42 U.S.C. §1983.

The Eighth Circuit's *en banc* decision in *Szabla v. City of Brooklyn Park, MN*, 486 F.3d 385 (8th Cir. 2007), explains that there are two tests to determine whether a policymaker has engaged in inadequate training. One test applies when the policy that was promulgated is unconstitutional on its face, and the other test applies when the policy is facially lawful.

1. Defendants' Facially Unconstitutional Policies

A policymaker is necessarily responsible for any injuries caused when a subordinate implements a policy unconstitutional on its face; in that situation, the subordinate was compelled by the policy to commit unconstitutional acts for which the policymaker is liable. *See Szabla*, 486 F.3d at 389-90. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for example, a city created an unconstitutional policy that forced pregnant employees to take unpaid leaves of absence even when not medically necessary. The Court held that the city was liable each time a city employee implemented that policy. *See Szabla*, 486 F.3d at 389-90 ("*Monell* was a case where the city's policy was itself unconstitutional. The policy compelled a constitutional violation . . . [and] municipal liability in that situation is well established, because a constitutional violation flows directly" from the implementation of an unlawful policy).

When a policy is facially unconstitutional, the only evidence the plaintiff need show in order to prevail is the presence of the policy and its application to the plaintiff. *See Szabla*, 486 F.3d at 390 ("To establish a constitutional violation [in that situation],

no evidence is needed other than a statement of the municipal policy and its exercise.") (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 822-23 (1985) (plurality opinion)); *see also Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404-05 (1997) ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving [the] issues of fault and causation is straightforward.").

This Court has already determined that several of Defendants' policies were unconstitutional on their face. As to each one, Plaintiffs are entitled to a ruling that Defendants engaged in unconstitutional training of their staff. *See Szabla*, at 389-90. For instance, for many years DSS had a practice of not providing parents with a copy of the ICWA Affidavit prior to or during the 48-hour hearing. As a consequence of that training, staff repeatedly violated Plaintiffs' due process rights. *Oglala II* at 769-71.

Similarly, for many years the DSS Defendants considered ICWA's §1922 to be a statute of deferment, and refused to employ the §1922 standard in determining which Indian children to retain in foster care. *Oglala II* at 765-69. Those repeated violations of ICWA are directly attributable to Defendants' unconstitutional training.

Another facially unconstitutional policy of Defendants authorizes staff to retain children in placement even after the reason listed in the ICWA Affidavit has ended, a policy this Court is currently considering in a separate motion for summary judgment. If the Court finds that policy unconstitutional, Defendants must be found to have engaged in the unconstitutional training of that policy.

The simplest part of Plaintiffs' current motion for partial summary judgment concerns the policies already determined unconstitutional. The very existence of those policies and their application to the Plaintiffs requires the conclusion that Defendants

engaged in unconstitutional training with respect to each one. *See Szabla*, 486 F.3d at 390 ("To establish a constitutional violation [when a policy is facially unconstitutional], no evidence is needed other than a statement of the municipal policy and its exercise.") Plaintiffs are therefore entitled to partial summary judgment on their claim of inadequate training with respect to those policies.

2. Defendants' Facially Lawful Policies

A different test of liability applies when a policy is lawful on its face and a subordinate applied it improperly. *See Szabla* at 390 ("But where an official policy is lawful on its face and does not compel unconstitutional action by an employee of the municipality, the analysis is different.") This is the situation addressed in *City of Canton v. Harris*, 489 U.S. 378 (1989). As explained in *Canton*, when a policymaker has issued a lawful policy, the policymaker cannot be held liable merely because an employee applied that policy incorrectly, as otherwise that would create liability based on *respondeat superior*, which is not allowed under §1983. *Canton*, 489 U.S. at 385, citing *Monell*, 436 U.S. at 691. Instead, "[t]he standard of fault in that situation is 'deliberate indifference' to constitutional rights." *Szabla*, at 390 (citing *Canton*, 489 U.S. at 388-89). For instance, if (as in *Szabla*) a city has a policy permitting the police to deploy attack dogs to quell disturbances, a policy lawful on its face, a person bitten by one of those dogs must show that the city's training of dog handlers was deliberately indifferent to the constitutional rights of the public. *See also Brown*, 520 U.S. at 407-08 (where a city's policy on use of force by police is lawful on its face, a victim of excessive force cannot

recover damages against the city unless the city's training of police officers on how and when to use force was deliberately indifferent).[8]

Deliberate indifference can be proven in two ways. One is by showing that there were so many *prior* incidents that "the need for additional training or supervision [to avoid additional incidents] was plain" and the policymaker failed to provide it. *Szabla*, at 392, citing *Brown*, 520 U.S. at 407-08, *Canton*, 489 U.S. at 390 & no. 10. In other words, the policymaker failed to adopt adequate safeguards in response to "a history" of earlier incidents that strongly suggested the need for additional training. *Szabla*, at 392.

A second way to establish deliberate indifference is to show that an injurious situation was *likely to occur* even if it had not yet occurred, and the policymaker failed to train staff to handle it properly, resulting in plaintiffs' injuries. Even a single incident can illustrate deliberate indifference "where the violation is accompanied by a showing that the [municipality] had 'failed to train its employees to handle recurring situations presenting an obvious potential for such a violation.'" *Szabla*, at 393, quoting *Brown*, 520 U.S. at 409.

Where there is an obvious need for training to prevent future harm, a failure to supply that training is deliberate indifference. As the Court explained in *Canton*:

> It may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be liable if it actually causes injury.

[8] As the Court has noted, Plaintiffs are suing the DSS Defendants in their governmental capacities, that is, Plaintiffs are suing their offices, not the individuals. *See Oglala I* at 1029. Therefore, cases such as *Canton* and *Brown* are directly apposite because they, too, dealt with governmental liability.

City of Canton, 489 U.S. at 390. The Court in *Canton* provided an example of deliberate indifference useful for our purposes here:

> [C]ity policemakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish that task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, *see Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "so obvious" that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Id., 489 U.S. at 390 n.10. *See also Larson by Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996) (*en banc*) (recognizing that a pattern of prior injuries need not be shown where the failure to train employees "'is so likely to result in a violation of constitutional rights that the need for training is patently obvious.'") (quoting *Canton*, 489 U.S. at 389).

Deliberate indifference in this context is an objective standard, not subjective. "Deliberate indifference" is the standard the Supreme Court has selected for liability in three different contexts: Eighth Amendment, individual liability, and governmental ("municipal") liability. In the first two, deliberate indifference requires proof of subjective intent, whereas in the third—the situation presented in this litigation—it does not. The Eighth Circuit recently explained this distinction in *Walton v. Dawson*, 752 F.2d 1109 (8th Cir. 2014):

> "Deliberate indifference" is a polysemous phrase. As applied to a prison official in the Eighth Amendment context, the Supreme Court has made it clear "deliberate indifference" requires subjective knowledge: no liability attaches "unless the official *knows of* and disregards an excessive risk to inmate health and safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added). However, as applied to a municipality, . . . "deliberate indifference" is purely objective: "liability [may] be premised on obviousness or *constructive notice*. *Id*. at 841 (emphasis added); *see also City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

Walton, 752 F.3d at 1117. Under a subjective deliberate indifference standard, the plaintiff must examine what the policymaker *did* know, whereas under an objective standard, the plaintiff need only examine what the policymaker "*should have* known." *Walton*, 752 F.3d at 1118 (emphasis in original).

This distinction is critically important here. In order to prevail, Plaintiffs need not prove, for instance, that Luann Van Hunnik knew that her staff were delaying the return of Indian children to their families.[9] Plaintiffs need only prove that Ms. Van Hunnik was aware that the caseloads of her subordinates were unmanageable, that there was persistent understaffing in her office, and that children were spending more time in foster care than previously. Given those dangerous conditions and red flags, the risk of unnecessary delays in returning children was "so obvious" that Ms. Van Hunnik is presumed to have known of the need to train her staff how to properly perform those nine essential tasks and to complete those tasks promptly.

The evidence is undisputed that the DSS Defendants did not impose a deadline on those essential tasks, did not create any training materials to guide subordinates on the exercise of that discretion, and did not seek to determine why children were spending so much more time than previously in state custody. It therefore must be inferred that in the face of an obvious need for training, Defendants responded with deliberate indifference to their constitutional duty to train. *See Canton*, 489 U.S. at 390 at 10; *Walton*, 752 F.3d at 1117-18; *Russell v. Hennepin County*, 420 F.3d 841, 847

[9] Although Plaintiffs need not show that Ms. Van Hunnik knew about delays, Ms. Van Hunnik *did* know about delays. She admitted that in a number of the files she happened to review, "there were time frames that were being missed" by her staff. Van Hunnik Dep. at 227. For instance, she saw "a number of IFAs" that were submitted late. *Id*. She also knew that from 2010 to 2014, the number of days that children spent in custody more than doubled. *Id*. at 269-71.

(8th Cir. 2005) ("A policy is deliberately indifferent to a person's constitutional rights when its inadequacy is both obvious and likely to result in the alleged deprivation of constitutional rights.").

Defendants' failure to train employees how to complete those nine essential tasks constitutes nine unconstitutional policies. As this Court recently stated: "'In limited circumstances, a [policymaker's] decision not to train certain employees about their legal duty to avoid violating a citizen's rights may rise to the level of an official government policy for purposes of § 1983.'" *Engesser v. Trooper Edward Fox*, Civ. No. 15-5044-JLV, 2016 WL 5376187 at *7 (D.S.D. Sept. 26, 2016) (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)); *see also Connick*, at 61-62 (explaining that a "city's 'policy of inaction'" in the face of an obvious need to act "'is the functional equivalent of a decision by the city itself to violate the Constitution.'") (quoting *Canton*, 489 U.S. at 395) (O'Connor, J., concurring in part and dissenting in part). Here, Defendants responded to a clear need for training by creating a "policy of inaction."

Defendants know "to a moral certainty" that their subordinates will engage in nine activities on a near-daily basis and that unnecessary delays in completing one or more of those activities will result in children spending extra time in foster care. Therefore, the need for proper training on all nine activities is "'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *See Canton*, 489 U.S. at 390 n.10.

This is not a case like *Ambrose v. Young*, 474 F.3d 1070 (8th Cir. 2007), where the activity that caused the constitutional violation could not have been anticipated and, therefore, the policymaker was not at fault for not training staff how to handle it. *See*

Ambrose, 474 F.3d at 1080 ("it is unreasonable to expect training to anticipate and incorporate every possible specific dangerous scenario."). Here, the activities that Defendants Malsam-Rysdon, Valenti, Van Hunnik, and Fleming failed to address in their training programs are activities their staff conduct routinely. Nor is this a case like *Larson*, in which a failure to train claim was denied because the facts showed that the policymaker "repeatedly held meetings" with staff to discuss how to respond to the type of incident that ultimately did arise and "to develop strategies for" handling it. *Larson*, 76 F.3d at 1454. Here, in sharp contrast, there is no evidence that Ms. Van Hunnik, Ms. Fleming, Ms. Malsam-Rysdon, or Ms. Valenti held regular meetings with staff to discuss the nine activities at issue and to develop strategies for ensuring that children do not spend more time in custody than necessary. In fact, Ms. Van Hunnik admitted that even after seeing files in which the return of children had been unnecessarily delayed, she neither examined how often this was occurring nor sought to determine if the same staff were delaying other activities as well. Van Hunnik Dep. at 228.

Particularly damaging to the DSS Defendants is the undisputed fact that even after this Court announced what federal law requires, they *still* did not begin properly training their staff. In answer to Request for Production No. 37 (Exhibit 200), Defendants admitted: "No policies, procedures, protocols, instructions or notices have been issued by Ms. Fleming, Ms. Beers, Ms. Wieseler, or Ms. Valenti to any other DSS employee(s) after March 30, 2015 [when *Oglala II* was issued] regarding the 48-hour hearing, including the interpretation or application of 25 U.S.C. §1922, except for the particular materials previously provided regarding Judge Gusinsky's request that the ICWA Affidavit be changed regarding the imminent physical damage or harm language."

Defendants' refusal to modify practices the Court held are causing constitutional harm is *per se* deliberate indifference. While it may be true that the absence of a remedial order protects Defendants from an action for contempt, the failure of Defendants to conform their practices to what the Court held federal law requires reflects a conscious disregard of the rights of Indian children, Indian parents, and Indian tribes. Once this Court issued its ruling, Defendants "had notice that the [polices found unconstitutional in *Oglala II*] were inadequate and likely to result in constitutional violation," and thus the failure to train staff to follow constitutional policies is deliberate indifference. *See Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (citing *Thelma D. v. Board of Educ.*, 934 F.2d 929 934 (8th Cir. 1991)).

Plaintiffs are entitled to judgment on their claim that Defendants have failed to adequately train their staff with respect to both the policies unconstitutional on their face and unconstitutional as applied. Plaintiffs are entitled to a remedial order requiring that Defendants adequately train their staff.

II. DEFENDANTS HAVE FAILED TO ADEQUATELY SUPERVISE THEIR STAFF REGARDING HOW AND WHEN TO RETURN CHILDREN TO THEIR HOMES

A. Inadequate Supervision: Factual Analysis

Governments have two main responsibilities regarding how their employees interact with the public: the government must adequately train its employees, and then adequately supervise them. Even the best training could be for naught if employees are not properly supervised.

Defendant Secretary Valenti is the highest official within DSS. One of her responsibilities is to supervise CPS, whose Division Director is Vigena Wieseler. SUF ¶¶ 1-4. The job description for Division Director of CPS (Exhibit 107) states that the

Director "[s]upervises . . . Regional Managers" and "[o]versees the implementation of all CPS program areas." As Director Wieseler acknowledged, this means that she must "meet with, consult with, provide direction, provide guidance, evaluate performance [and oversee] everything regarding around their position and what their job duties are." Wieseler Dep. at 12. Ms. Wieseler must "ensure that her Regional Managers are appropriately performing the duties of their position." Valenti Dep. at 36-37; SUF ¶ 135.

The RM's job description (Exhibit 107) states that an RM must "[e]nsure compliance [by subordinates] with all CPS policies and procedures" and "[m]onitor program delivery for quality and uniformity of application of policies and procedures." *See* SUF ¶ 136. To do that, an RM must create a monitoring system to assess both the quality of their work and its uniformity and be sufficiently comprehensive to "identify trends" regarding noncompliance. Valenti Dep. at 48. When RMs monitor staff, they should be "looking for compliance issues and if they see issues, . . . they [should] address [them]." *Id*. at 57; SUF ¶ 137. The RM "must select a monitoring system that is effective for whatever it is they're monitoring." Wieseler Dep. at 51. This will often require RMs to "pull cases periodically" and examine them. Beers Dep. at 38; SUF ¶ 138. For instance, an RM should not merely ask Supervisors if their ICWA Affidavits comply with policy; rather, the RM must "look at some of the affidavits themselves on some periodic basis in order to ensure quality and uniformity." Wieseler Dep. at 52. The RM has the option of delegating that duty to someone else, but that person must examine the documents and report back to the RM. *Id*. at 52-53; SUF ¶ 139.

Likewise, an RM must not wait until someone calls attention to a problem but must affirmatively monitor each aspect of the child custody process, including ICWA affidavits

and IFAs, to see "how they're being handled and the timing of them." Wieseler Dep. at 53-54; *see also* Fleming Dep. at 88-89 (agreeing that a "critical duty" of each RM is to "create an effective and comprehensive monitoring system" that examines how staff are handling their duties at the 48-hour hearing and during the IFA process); SUF ¶ 140.

(a) Defendant Van Hunnik Failed to Adequately Monitor ICWA Affidavits

In at least six crucial areas, Defendant Van Hunnik failed to create an effective system to monitor staff compliance with CPS policy and procedure. By her own admission, she "pretty much allowed the Supervisors to manage the cases on their own" and she did not monitor what they were doing. Van Hunnik Dep. at 17-18. Generally, the only time Ms. Van Hunnik looked at a file was when someone asked her a question about it. *Id*. at 22-24; *see also id*. at 44 ("I don't get directly involved in the cases. I don't monitor the cases personally. The Supervisors are responsible for doing that."); SUF ¶ 142. During her nearly 13-year tenure as RM, Ms. Van Hunnik did not attend a single 48-hour hearing. Van Hunnik Dep. at 115; SUF ¶ 143.

Certain activities by Specialists and Supervisors are so important in the custody process that a mistake in conducting it, or a delay in completing it, could cause children to spend longer in foster care than necessary. It is vital that an RM develop an effective system to monitor each one of these activities to ensure it is conducted properly, and to look for trends of noncompliance. Wieseler Dep. at 54-82; SUF ¶ 144.

One of these activities is filling out the ICWA Affidavit. As Ms. Wieseler acknowledged, "each RM must monitor [this activity] in order to ensure the quality of the ICWA Affidavits and their uniformity." *Id*. at 55; *see also id*. at 59 ("we would want to have

some type of review system in place" to effectively monitor ICWA Affidavits); Beers Dep. at 22-23. SUF ¶ 145.

Yet Ms. Van Hunnik, as she conceded, "didn't have a monitoring system in place" for ICWA affidavits. Van Hunnik Dep. at 247; *see also id.* 364, 378 (admitting that she was not monitoring ICWA Affidavits). The single most important part of each ICWA Affidavit is where the Specialist lists the reasons why CPS is seeking continued placement. Ms. Van Hunnik admitted that she did not even monitor that portion. *Id*. at 378; SUF ¶ 146.

(b) Defendant Van Hunnik Failed to Adequately Monitor the IFA Process

A second activity that if handled improperly could result in children spending more time in foster care than necessary is the IFA process. *See* Wieseler Dep. at 64-65. Therefore, "each RM must create an effective system to monitor compliance by staff with the IFA process to ensure both quality and uniformity." Wieseler Dep. at 65; *see also id.* at 70-71; Beers Dep. at 23; SUF ¶ 148. Here again, Ms. Van Hunnik conceded that she did not create a system to properly and adequately monitor the IFA process. Van Hunnik Dep. at 247-48. For instance, Ms. Van Hunnik did not monitor how long Supervisors were taking to respond to draft IFAs. *Id*. at 291; SUF ¶ 149.

(c) Defendant Van Hunnik Failed to Adequately Monitor the PCA Process

At the conclusion of the IFA process, if CPS determines that continued placement is necessary, the case is transferred to a different Specialist who then conducts a further investigation and prepares a Protective Capacity Assessment ("PCA"). This is another activity that can result in delayed reunification if handled improperly. *See* Wieseler Dep. at 71-72; SUF ¶ 151. It is therefore imperative that each RM create an effective system

to monitor the PCA process. *Id*. at 72; *see also id.* at 75 (stating that such monitoring is "a part of [an RM's] job."); SUF ¶ 152. But once again, Ms. Van Hunnik conceded that she did not do that. *See* Van Hunnik Dep. at 261 (admitting that she created no system "of routinely checking on cases such as every fifth case, every tenth case, three cases a month" to see how her staff were handling the PCA process); SUF ¶ 153.

(d) Defendant Van Hunnik Failed to Adequately Monitor the Assessment Interviews

A fourth activity that if handled improperly could result in children spending more time in foster care than necessary are the Assessment Interviews. *See* Wieseler Dep. at 75-77. Therefore, each RM must create an effective way to monitor their quality and the timing of them. *Id.* Creating such a system "would be part of [an RM's] job." *Id*. at 77; *see also* Beers Dep. at 36; SUF ¶ 155. Here again, Ms. Van Hunnik conceded that she did not create a system to monitor either the quality of Assessment Interviews or how promptly her staff were completing them. Van Hunnik Dep. at 273; SUF ¶ 156.

(e) Defendant Van Hunnik Failed to Adequately Monitor the Return of Draft IFAs

A fifth activity that if handled improperly could result in children spending more time in foster care than necessary is the process by which Supervisors receive, edit, and then return draft IFAs submitted to them by Specialists. *See* Wieseler Dep. at 77 (agreeing that delays in returning draft IFAs could "result in some children spending more time in foster care than they need to."). Therefore, each RM must create a system to effectively monitor how long it takes each Supervisor to return draft IFAs. *See id.* at 77-78; *see also* Beers Dep. at 48-49; SUF ¶ 158.

Here, too, Ms. Van Hunnik conceded that she did not create a system to monitor how Supervisors were handling draft IFAs. Van Hunnik Dep. at 291. Ms. Van Hunnik

allowed Supervisors to determine for themselves whether they were responding to draft IFAs in a timely manner, and admitted not knowing how promptly those drafts were being returned. *See id*. at 218, 284-85; SUF ¶ 159-160.

In fact, Ms. Van Hunnik made it virtually impossible for anyone to monitor how promptly draft IFAs were being returned because she did not instruct her staff to log those dates. As Exhibit 168a shows, in nearly half of all custody cases, staff failed to log either the date the draft was submitted, the date it was returned, or both dates. SUF ¶ 161.

(f) Defendant Van Hunnik Failed to Adequately Monitor How Promptly Her Staff Were Returning Children When Their Files Were Closed

A sixth activity that if handled improperly could result in children spending more time in foster care than necessary is that of returning children to their homes after the IFA is signed and the case is closed. *See* Wieseler Dep. at 78-80. Therefore, each RM must create an effective way to monitor how long it takes staff to return children after the IFA is signed and the case is closed. *Id*.; SUF ¶ 163. Here again, Ms. Van Hunnik conceded that she had not created a system to "adequately monitor what was happening when cases were signed and closed, as to how long it was actually taking [her] staff to return the children." Van Hunnik Dep. at 307; SUF ¶ 164.

(g) Ms. Van Hunnik Made a Conscious, Deliberate Decision Not to Investigate

Ms. Van Hunnik was aware from the files she happened to review "that there were time frames that were being missed" by her staff. *Id*. at 227. For instance, she saw "a number of IFAs" that were submitted late. *Id*.; SUF ¶ 176. Ms. Van Hunnik, however, did not investigate those files to determine how late they were, and thus did not know if they were "seven days, ten days, fourteen days" late. *Id*. at 228. She also did not investigate other files of the employees who submitted late IFAs to see if those employees were late

in completing other tasks. Thus, despite knowing that her staff were not completing certain required activities on time, Ms. Van Hunnik "didn't commission a more detailed study to find out how huge the problem was." *Id*.; SUF ¶¶ 177-78.

Significantly, Ms. Van Hunnik acknowledged that she had reviewed data while in office (marked during her deposition as Exhibit 160) showing that it took her staff more than twice as long to resolve custody cases in 2014 as in 2010: 70.2 days versus 30.53 days. *See* Exhibit 160 bates pages 025791 and 025803. Ms. Van Hunnik agreed that this data was a "red flag" indicating serious problems. *Id*. at 296-97. Yet Ms. Van Hunnik did not commission a study to find out why her staff needed twice as long to resolve cases in 2014 than 2010. *Id*. at 297 ("I did not commission a study."); SUF ¶¶ 179-182.

When asked what may have caused the extra time, Ms. Van Hunnik replied, "It could have been turnover. It could have been a shortage of staff. It could have been a lot of new staff who weren't fully trained yet. It could have been staff who had – who we were having issues with their work product." *Id*. at 300. Significantly, every reason offered by Ms. Van Hunnik had to do with a shortage of trained staff. SUF ¶ 183.

Ms. Valenti agreed that given the large disparity between 2010 and 2014 in how long children spent in custody, an investigation should have been conducted to determine "what factors have changed or influenced the difference." Valenti Dep. at 218. No such investigation was conducted, however. SUF ¶ 184. Ms. Valenti also stated that Ms. Van Hunnik should have "been looking at data for [her] region," noticed that staff were taking twice as long in 2014 to resolve cases than in 2010, and reported that trend to the Division Director. *Id*. at 220-22. Ms. Van Hunnik, however, did not report these significant delays to the Division Director (Ms. Wieseler). SUF ¶¶ 185-86. Nor is there any evidence

indicating that Ms. Van Hunnik attempted to find out why these enormous changes had occurred and what she might do to return children sooner.

(h) Ms. Wieseler Failed to Adequately Supervise Ms. Van Hunnik

As noted earlier, Virgena Wieseler's job description requires that she, as Division Director of CPS, monitor the performance of all RMs. Therefore, Ms. Wieseler should have been aware that Ms. Van Hunnik had failed to create an effective monitoring system in each of the six areas just reviewed. Ms. Wieseler, however, was not aware of a single one of those deficiencies. SUF ¶ 166.

Ms. Wieseler testified that someone should have brought to her attention the fact that Ms. Van Hunnik was not monitoring the six areas just discussed, but that no one did. Wieseler Dep. at 83-84; *see also id*. at 86 (stating that Ms. Van Hunnik's failure to monitor "should have been brought to my attention."); SUF ¶ 168. That may be true, but Ms. Wieseler had an *independent* obligation to effectively monitor Ms. Van Hunnik in each of the six areas just discussed. SUF ¶ 169. Ms. Wieseler admitted that she could have done a better job of monitoring Ms. Van Hunnik by, for instance, instructing a Program Specialist at the state level to investigate those areas and report back to Ms. Wieseler, or by conducting that investigation herself. *Id*. at 90-92, 105. Ms. Wieseler did not even ask Ms. Van Hunnik if she was monitoring those six areas. *Id*. at 90; SUF ¶¶ 170-72. Ms. Wieseler admitted that she did not create a monitoring system that "would reasonably catch the fact that Ms. Van Hunnik was not monitoring" those essential activities. *See id*. at 93; SUF ¶ 173.

According to Ms. Valenti, Ms. Wieseler should have discovered that by 2014, Region 1 was taking more than twice as long to resolve cases than in 2010. *See* Valenti

at 223-24 (stating that she expects the Director of CPS "to have knowledge and — about caseloads and — you know, numbers about caseloads and time and investigation."). However, Ms. Wieseler was not aware of that trend or sought to discover the causes even after she became aware. SUF ¶¶ 174-75.

(i) Defendant Fleming is Not Adequately Monitoring Essential Activities of her Staff

Ms. Fleming's supervision of staff in Region 1 is not much better than Ms. Van Hunnik's. First, she has not imposed deadlines on any of the nine essential tasks her staff must complete in order to reunite children with their families. SUF ¶ 188. Nor has she instructed her staff to document the dates that those tasks are performed, such as the dates when IFAs are submitted and returned. SUF ¶ 188. As a result, she cannot accurately monitor these activities even if she wanted to. *See* SUF ¶ 161.

Second, Ms. Fleming's monitoring technique would not likely find trends or systemic problems and appears to be wholly hit-and-miss. Ms. Fleming does not examine a minimum number of files each month, she does not keep a log of the files she examines, and she does not document the results; in other words, she has not created a reliable monitoring system. Fleming Dep. at 15, 91; SUF ¶ 190.

The lack of thoroughness and reliability in Ms. Fleming's monitoring is illustrated by the fact that during her June 29, 2016 deposition, Ms. Fleming claimed she had been monitoring the length of time that elapsed between when Specialists submitted draft IFAs and Supervisors returned them. According to Ms. Fleming, both dates "normally" were logged and her examination of those dates indicated that this was "[not] a problem." Fleming Dep. at 98, 103. As Exhibit 168a shows, however, in at least half the custody cases, Ms. Fleming's staff did not log one or both of those dates, a defect Ms. Fleming

surely would have noticed had she conducted an adequate review, and the absence of those dates precluded a reliable assessment. SUF ¶¶ 190-91.

Ms. Wieseler acknowledged that in order to effectively monitor their staff, RMs likely will need help. Wieseler Dep. at 206 (stating that monitoring responsibilities "would need to be spread amongst not only the Regional Manager but perhaps the Program Specialist because she's probably not going to be able to do it by herself."). Ms. Wieseler agreed to consider providing that assistance to RMs. *Id*. However, Plaintiffs have received no information indicating that Ms. Wieseler has assigned anyone to assist RMs conduct adequate monitoring. SUF ¶ 193.

At no time since at least January 1, 2010, has DSS conducted a statewide study to determine whether Specialists are properly performing the IFA process, properly writing ICWA Affidavits, whether children are spending more time than necessary in foster care, or whether Region 1 is adequately staffed. *See* Valenti Dep. at 228, 160; SUF ¶¶ 194, 217. Therefore, Ms. Valenti cannot possibly know with any degree of certainty how well her subordinates are performing the essential duties necessary to return children as promptly as possible.

VII. DSS Has Not Investigated Racial Disproportionality

According to a review conducted by Ms. Fleming, roughly 70 percent of custody cases in Region 1 involve Indian children, even though Indians comprise less than 10 percent of the State's population. Fleming Dep. at 32; SUF ¶ 198. At the time of her deposition, Secretary Valenti was unaware that approximately 70 percent of custody cases in Region 1 involve Indian children and was also unaware of what the percentage is statewide. Valenti Dep. at 194, 200. In fact, according to Ms. Valenti, the first time the

issue of disproportionality came to her attention was when she was asked about the subject during her deposition. *Id*. at 200 ("your question is the first time that this issue [of statewide disproportionality] has come up to my attention."); SUF ¶ 199.

If any state agency should be seeking a solution to this shocking condition, it is DSS, and the failure to do so reflects inadequate supervision. Ms. Fleming agrees that DSS "should do more than it's doing to discover the causes of disproportionality and see whether [DSS] is part of the problem." Fleming Dep. at 165; SUF ¶ 206. Yet, DSS has not conducted a study to determine why Indians are disproportionally represented in CPS cases. *Id*. at 196; Wieseler Dep. at 213; Fleming Dep. at 159; SUF ¶ 200.

Nothing prevents DSS from conducting such a study. Wieseler Dep. at 213. According to Ms. Valenti, the reason why she has not commissioned a study on disproportionality is because "it hasn't risen to me for consideration." Valenti Dep. at 196; SUF ¶ 201. However, Ms. Valenti should not be waiting for someone to request this study any more than she should wait for someone to suggest that she conduct a staffing study in Region 1. This is something that cries out for attention. Ms. Fleming believes that a study of disproportionality "would be an excellent idea" and that such a study "would be very helpful." *Id*. at 159-60; SUF ¶ 202.

Ms. Van Hunnik did nothing during her tenure as RM to investigate why disproportionality is so persistent in Region 1. Van Hunnik Dep. at 334. Among other things, she did not investigate whether her staff are partly responsible for the disproportionality. *Id*. at 336-40. Ms. Van Hunnik could have tried to find out why Native families are disproportionally represented in Region 1's custody cases and whether her office was in part responsible for it. *Id*. at 342; SUF ¶¶ 204-05.

Ms. Fleming agrees that some amount of racial bias "remains with everyone" and it is important "to talk about it and to educate and deal with it." Fleming Dep. at 39. However, the state Training Program does not inform staff that unconscious racial bias is a problem today, nor does Ms. Fleming include any training in her orientation program in Region 1 about racial bias and how to overcome it. *Id*. at 39, 42; SUF ¶ 206.

VIII. Region 1 is Inadequately Staff

Region 1 is budgeted for 8 Supervisors and 43 Specialists, 11 of which are IFA Specialists. *Id*. at 49-50. However, only rarely are all positions full. During the past 18 months, Region 1 experienced nearly a 50 percent turnover rate, and staff quit so frequently that there often are six or more vacancies. *See* Wieseler Dep. at 149, 153; Fleming Dep. at 154 (stating that only "two weeks in April" were all positions filled); SUF ¶ 208.

Significantly for our purposes here, Ms. Valenti *knows* that Region 1 "has had a lot of turnover." Valenti Dep. at 157; *see also id*. at 187 ("We know we have high turnover rates."); SUF ¶ 209. In addition, she *knows* that staff in Region 1 are quitting due to the unmanageable workload. Ms. Valenti testified that when workers quit, they are asked to complete an Exit Questionnaire, and she reads them. Valenti Dep. at 169. Attached as Exhibit 199 are Exit Questionnaires from three Specialists who quit their jobs in Region 1 in 2016, all of them citing "Workload" as a main reason. One worker wrote: "the workload required by a Family Services Specialist is unmanageable and unrealistic. As much as I love my job and the work I do, the expectations are impossible. . . .I would have most certainly stayed, 100%, as I love my job with all my heart, had I not had so many cases." *See* Exhibit 199 at 032748. Another Specialist wrote: "The expectation is not for people

to succeed at this job, the expectation is for people to leave this job. I was warned on my second day at work that this position has a high turnover rate because the work load is out of control. . . .The saddest part of all of this is that I wanted this job more than anything . . . [but I] had eleven cases [and thus eleven sets of interviews to conduct, eleven investigations to complete, and eleven IFAs to draft, all within 45 days] and was expected to leave for a week at a time every month to attend training. How does that make sense?" *Id*. at 032777.

It takes a couple months to hire and train a new Specialist. *See* Van Hunnik 310 ("It takes a long time for staff to be trained."); Fleming Dep. at 156 ("it can sometimes take a couple months before [a replacement] starts, . . . [and] it takes a good two and plus — over two years, I think, to at least have some confidence in the position."). The departure of an employee means that other employees must inherit his or her cases until a replacement is hired and trained, and once someone is hired, "they're spending a lot of time that first year training" and cannot carry a full case load. *Id*; *see also* Wieseler at 148, 150 (acknowledging that turnover "does create difficulty for staff."); SUF ¶¶ 210-11.

Region 1's chronic understaffing has a *direct* bearing on the ability of that office to return children in a timely manner. As Ms. Valenti acknowledged, when there is a shortage of staff, the risk increases "that some children will spend longer in foster care than necessary." *Id*. at 159-60. Similarly, Ms. Beers acknowledged the direct correlation between having enough staff and returning children as promptly as possible; it is "common sense" that if there were more staff, each staff would have fewer cases, making it easier for staff to resolve cases sooner. Beers Dep. at 135. Ms. Beers knows of actual

cases in which returning children was delayed because of "staff that were being trained" and unavailable to work in the office. *Id*. at 58. SUF ¶ 212.

Defendant Fleming agrees that inadequate staffing is a problem in Region 1 and that she "can't fix" the problem of delays in returning children without more staff. Fleming Dep. at 135. If she had more staff, Ms. Fleming stated, "there would be a significant change" in how long children remain in foster care. *Id*. at 136.; SUF ¶ 213. Ms. Fleming listed a number of factors causing unnecessary delays in reunifying families, including increased documentation required of staff and stressful working conditions caused by heavy caseloads. These problems produce burnout, and results in people quitting. *Id*. at 138-39, 153-55. She agreed that "every single one of [those problems] would be cured by having more staff." *Id*. at 139; SUF ¶ 213. Ms. Fleming conceded that staff shortages in the Rapid City office "means that [children are] spending more time in foster care than needs to happen." *Id*. at 154; SUF ¶ 214. Ms. Fleming testified that her staff "complain their caseloads are too high," and that with more staff, "they would be able to complete their IFAs sooner." *Id*. 136. Ms. Fleming has studied the situation regarding why children are spending longer in foster care then necessary and "has come to the conclusion it's inadequate staffing." *Id*. at 139; SUF ¶ 215. Delays in returning children also occur when experienced staff are replaced by inexperienced staff. *See* Van Hunnik Dep. at 299-300 (stating that new staff cannot work as fast as experienced staff, resulting in delays); *id*. at 322 (reiterating that more experienced staff take less time to resolve cases than new staff); SUF ¶ 215.

In addition to delaying the return of children, inadequate staffing inhibits adequate monitoring. RMs are unable to have subordinates assist them gather information and

statistics because their staff are already overworked. *See* Van Hunnik Dep. at 309 ("I didn't have anybody that I could appoint" to help her obtain information on compliance); *see also id*. at 312 (stating that she "didn't have anyone" to look at files for her); Fleming Dep. at 146 (stating that it would be a good idea "[t]o have somebody assigned who specifically reviewed" custody files for compliance problems to assist the RM). SUF ¶ 216.

It is unclear whether DSS has ever conducted a staffing analysis for Region 1, but certainly not in the last six years. Valenti Dep. at 160, 179. According to Ms. Valenti, the reason she has not conducted a staffing analysis in Region 1 is "[b]ecause nobody has asked for that or requested that." *Id*. at 161; SUF ¶ 217.

Numerous employees of Region 1 agreed that Region 1 needs more staff, perhaps as many as 10 additional Specialists, although the number would depend on how trained they were when hired. *See* S.W. Dep. at 99, 112. Supervisors D.H. and M.M. agreed with Supervisor S.W. *See* D.H. Dep. at 9; M.M. Dep. at 7-8 (stating that as a result of staff shortages, "we aren't able to keep up" with responsibilities, resulting in additional "personal stress" that causes people to quit, leading to "bigger problems" with staff shortages); SUF ¶ 218.

Ms. Van Hunnik frequently requested that the state office assign more staff to Region 1 but her requests were often denied. Van Hunnik Dep. at 326 ("I didn't get [the staff] I requested most of the time.") There have been times in which CPS deliberately did not seek funding from the Legislature for more staff even though more staff was necessary. Wieseler Dep. at 24. Some years, Ms. Wieseler informed RMs not to request additional staff in their budgets because she had been informed that "there's a budget deficit and we need to tighten our belts." *Id*. at 27; SUF ¶¶ 219-20.

Ms. Van Hunnik believes that Region 1 was so short staffed during at least the last couple of years that the caseload of the existing staff was "unmanageable" and Specialists "weren't able to keep up with" their responsibilities. Van Hunnik Dep. at 328; *id*. at 330 (stating that among the consequences of inadequate staffing are: "People burn out. A lot of overtime. It leads to more turnover. Not meeting deadlines. A lot of stress."); SUF ¶ 221.

B. Inadequate Supervision: Legal Analysis

Plaintiffs allege in their complaint that the DSS Defendants violated, and are violating, Plaintiffs' constitutional rights and their rights under ICWA by failing to adequately supervise their staff. This Court recently explained the burden of proof that a plaintiff in this situation bears:

> To demonstrate a supervisor violated a plaintiff's constitutional rights by failing to supervise, a plaintiff must show that the supervisor "(1) Received notice of a pattern of unconstitutional acts committed by subordinates; (2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts; (3) Failed to take sufficient remedial action; and (4) That such failure proximately caused injury [to the plaintiff]." [Internal citations omitted.] The plaintiff must demonstrate that the supervisor was deliberately indifferent to or tacitly authorized the offending acts. . . . This requires a showing that the supervisor had notice that the training procedures and supervision were inadequate and likely to result in a constitutional violation."

Engesser, 2016 WL 5376187 at *7 (quoting *Andrews v. Fowler*, 98 F.3d at 1078)). An important point must be emphasized at the outset regarding Plaintiffs' burden of proof.

Plaintiffs must demonstrate that the four Defendants "[r]eceived notice of a pattern of unconstitutional acts committed by subordinates." In this context, "notice" includes constructive notice. *See Walton*, 752 F.3d at 1117 ("[A]s applied to a municipality, . . . "deliberate indifference" is purely objective: "liability [may] be premised

on obviousness or *constructive notice*.") (quoting *Farmer v. Brennan*, 511 U.S. at 841 (emphasis in *Walton*)). Stated differently, "a factfinder may conclude that a [supervisor] knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842; *Walton*, 752 F.3d at 1117-18.

Thus, it will do Ms. Van Hunnik no good to claim that she was unaware of the extent to which Indian children were forced to spend more time in foster care than necessary.[10] The undisputed facts are that (1) she did know delays were occurring, (2) she did know caseloads were unmanageable, (3) she did know her office was persistently understaffed, and (4) she did know that by 2014, children were spending more than twice as long in custody as they did 2010. *See* Van Hunnik Dep. at 217, 328-29, 296-97. Therefore, she "knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842; *Walton*, 752 F.3d at 1117-18.

Willful blindness is not a defense to a claim of supervisory liability. *See Ripson v. Alles*, 21 F.3d 805, 809 (8th Cir. 1994) (recognizing that supervisors may not "turn a blind eye" to dangerous conditions of which they are aware); *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994) ("Thus, even if a supervisor lacks actual knowledge of censurable conduct, he may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness, and if he had the power and authority to alleviate it."). Even under the more onerous *subjective* standard of deliberate indifference (which is not applicable here), supervisors may not "bury their heads in the sand" and fail to

[10] As discussed earlier, Ms. Van Hunnik was aware of some delays because, as she admits, some files she happened to review revealed "time frames that were being missed" by her staff. Van Hunnik Dep. at 227. For instance, she saw "a number of IFAs" that were submitted late. *Id.*; SUF ¶ 176. But Ms. Van Hunnik probably does not know the true extent of the problem because she failed to investigate it.

investigate an obvious risk of constitutional injury. *See Walton*, 752 F.3d at 1119 (finding supervisory liability in Eighth Amendment case where supervisor, after learning that some guards left cell doors unlocked at night, failed to investigate that risk, a practice that led to a prisoner's rape).

Smoke was billowing all around her and yet Ms. Van Hunnik did not look for a fire. *See* Van Hunnik Dep. at 297 ("I did not commission a study" to determine why children were spending twice as long in foster care in 2014 than 2010). Ms. Van Hunnik turned a blind eye to persistent and widespread practices that placed children and their families at risk. The need for a careful investigation was so obvious that this Court is entitled to conclude that Ms. Van Hunnik was deliberately indifferent. *See Szabla*, 486 F.3d at 393; *Walton*, 752 F.3d at 1117.

Likewise, it will do Ms. Valenti no good to claim that she was unaware that Indian children were spending more time in custody than necessary, given that her ignorance would be the product of her own failure to investigate dangerous conditions of which she *knew*: (1) high staff turnover rates in Region 1, *see* Valenti Dep. at 157 (admitting that Region 1 "has had a lot of turnover."); *id*. at 187 ("We know we have high turnover rates"), and (2) employees from Region 1 persistently quitting because of excessive caseloads. The Exit Questionnaires that Ms. Valenti was reading, *see* Valenti Dep. at 169, speak volumes, and she should have been listening to them.

Ms. Valenti admitted that she has not commissioned a staffing study for Region 1, and she says that the reason is "[b]ecause nobody has asked for that or requested that." *Id*. at 161; SUF ¶ 217. But why should someone need to ask? Ms. Valenti knows about the turnover rate, and she knows about the Exit Questionnaires. She therefore has

constructive knowledge (assuming she truly lacks actual knowledge) about the obvious risk of delays in performance.

As State Trainer Cara Beers testified, it is "common sense" that when you have fewer staff, it is going to take longer to resolve cases. Beers Dep. at 135. Indeed, Ms. Beers knows of cases in which returning children was delayed because of inadequate staffing. Ms. Beers was asked whether, during her review of case files, she "[found] any instances in which children should have gone home sooner than they did?" She replied that she did find cases like that, explaining that "some of the delays were [due to] staff that were being trained and maybe couldn't finish up and make sure that there wasn't present danger anymore. So delays in the fact that we couldn't get out there and get the assessment completed." *Id*. at 56, 58; SUF ¶ 212.[11]

It is difficult to imagine a more compelling case of supervisory liability than this one. Defendants have a duty under state and federal law to return children to their homes as soon as it is safe to do so. Defendants should know that if any essential task in the removal, retention, or reunification process is performed improperly, *or* in a dilatory manner, children could remain in placement longer than necessary. Defendants also should know that staff shortages inhibit the ability of the remaining staff to meet deadlines. Therefore, the need for adequate supervision to ensure the proper and timely performance of essential tasks is "so obvious" that Defendants' failure to provide

[11] Plaintiffs feel obliged to highlight certain testimony of Ms. Beers. Ms. Beers on several occasions claimed that she monitored 48-hour hearings, ICWA Affidavits, and the IFA process, and even claimed that at times "I will pull around 80 percent of those cases and review them." Beers Dep. at 55. To test those claims, Plaintiffs served Requests for Production ("RFPs") on Defendants soon after Ms. Beers' deposition. RFP No. 46 asked that Defendants "produce the results of [Ms. Beers'] reviews since January 1, 2015." Defendants replied: "Ms. Beers has not conducted any reviews since January 1, 2015 regarding initial contact, 48 hour hearings, ICWA Affidavits or the IFA process." *See* Exhibit 201, RFP. No. 46; *see also id.*, RFP No. 42 (confirming that Ms. Beers has no documentary proof that she conducted any monitoring).

that supervision is deliberate indifference. *See Canton*, 489 U.S. at 390 at 10; *Walton*, 752 F.3d at 1117-18.

In *Thelma D. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991), the court held that constructive knowledge can be imputed when "the underlying unconstitutional misconduct was 'so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known of [it].'" *Id*. at 934 (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987). Here, the underlying unconstitutional misconduct was widespread and flagrant. Ms. Van Hunnik knew from files she examined that delays in returning children were occurring, and she knew that caseloads were unmanageable. Likewise, Ms. Fleming conceded that staff shortages in the Rapid City office "means that [children are] spending more time in foster care than needs to happen," and believes "there would be a significant change" in how long children remain in custody if her office had sufficient staff. Fleming Dep. at 154, 136. Thus, they knew of the risk—and even knew of the consequences—but their response was to avoid a solution rather than to create one. Neither one of them imposed deadlines on essential tasks, made certain that employees were logging relevant dates, monitored cases to ensure prompt completion of them, produced training materials aimed at guiding staff in performing essential tasks, or investigated why children are spending so much more time in custody than they were just a few years ago. This is not supervision. This is abdication. *See Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir.), *cert. denied*, 534 U.S. 1066 (2001) ("This turn-a-blind-eye approach does not insulate the Department" from supervisory liability.).

When a supervisor knows of misconduct and fails to address it, a court is entitled to conclude that this misconduct "was accepted by [the supervisor] as the way things are done and have been done." *Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). The "way things are done" in Region 1 is to leave the timing of reunification up to caseworker discretion. These caseworkers receive no training focused on the duty to reunify promptly, and no training materials have been created on that subject. There are no written deadlines on the completion of essential activities in the reunification process. Caseworkers who ignore best practice are not required to document a reason, and there is no one at the state or local level compelling staff to comply with best practice. What is more, understaffing of Region 1 is persistent and profound, making it likely that some children will spend longer in custody than necessary, and no studies have even been commissioned to determine the scope of the problem. Nor have there been any studies to determine why children spend twice as long in custody today than in 2010. The Exit Questionnaires make is clear to anyone reading them that the unmanageable workload is driving good people away, but nothing is being done about it.

The policymakers in charge of DSS and Region 1 have for many years now failed to perform their supervisory responsibilities. As a direct consequence, Indian children remain in foster care longer than necessary, and Plaintiffs are being deprived of their federal rights. The facts are not in material dispute, and Plaintiffs are entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth above, Plaintiffs request that this Court conclude that the DSS Defendants have committed and are committing inadequate training and supervision of Region 1 and that, as a result, Plaintiffs have been and will in the future be deprived of their constitutional rights and rights guaranteed by the Indian Child Welfare Act, and to then issue appropriate relief to immediately halt those violations.

Respectfully submitted this 14th day of November, 2016.

/s/ Stephen L. Pevar
STEPHEN L. PEVAR
American Civil Liberties Union Foundation
765 Asylum Avenue
Hartford, Connecticut 06105
(860) 570-9830

DANA L. HANNA
Hanna Law Office, P.C.
629 Quincy
P.O. Box 3080
Rapid City, South Dakota 57709
(605) 791-1832

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel of record:

Jeffrey Hurd	jhurd@bangsmccullen.com
Robert L. Morris	bobmorris@westriverlaw.com
J. Crisman Palmer	cpalmer@gpnalaw.com

/s/ Stephen L. Pevar
Stephen L. Pevar