



IDENTIFYING AND RAISING CAPACITY AND MENTAL COMPETENCY ISSUES IN CHILDREN'S IMMIGRATION CASES

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Current Government Policies

Working with Traumatized Children

Working with Experts

Ethical Considerations

Litigating Due Process Issues



EOIR - Special Guidance for Children

Pleadings:

- 8 CFR 1240.10(c) - proceedings commenced after April 1, 1997
 - “...The Immigration Judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which respondent is an inmate or patient..”

Presence:

- 8 CFR 1240.4 - Incompetent respondents
 - “When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.”



EOIR - Special Guidance for Children

- Immigration Practice Manual 4.22
- BIA: *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2010)
 - Framework to determine if a respondent is sufficiently competent to proceed on his or her own and whether application of certain safeguards are warranted
- EOIR Operating Policies and Procedures Memorandum (OPPM) 17-03
 - <https://www.justice.gov/eoir/file/oppm17-03/download>
 - <https://cliniclegal.org/resources/eoir-revises-guidance-immigration-court-cases-involving-juveniles>



EOIR - Special Guidance for Children

❖ EOIR OPPM 17-03 (December 20, 2017)

- ❖ Applies to any case involving an unmarried individual under the age of 18, regardless of whether meets UAC definition
- ❖ Removed “best interest of the child” cannot be used as a legal standard
- ❖ Weakened some child-friendly practices present in prior OPPM, omitted guidance regarding use of age appropriate language and tone as attachment
- ❖ Seems to indicate judges should use same standards when evaluating testimony of children & adults
- ❖ De-emphasizes developmental & capacity differences between children & adults
- ❖ Emphasis on rooting out fraud in UAC cases; use of term “illegal alien”

❖ EOIR OPPM 07-01 (May 22, 2007)

- ❖ Applied only to UACs defined by Homeland Security Act 2002
- ❖ Included that “best interests of the child” standard is a factor in IJ’s discretion to take steps to ensure that a “child appropriate” hearing is established
- ❖ Encouraged child friendly practices, Focused on unique needs of children
- ❖ “Respondent” or “alien”



USCIS - Special Guidance for Children

- Signature Requirements
- Fingerprinting
- Disability Accommodations
- Waivers of Presence
- Some applications for relief
 - Affirmative asylum
 - T and U visas
 - Adjustment of Status & Ground of inadmissibility



ICE/CBP - Special Guidance for Children

- Service. 8 CFR 103.8(c)
- Confined aliens, incompetents, and minors. 8 CFR 236.2
- Notice and request for disposition. 8 CFR 236.3(h)



ORR - Special Guidance for Children

- Policies and Procedures can be found:
- <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>
- Intersection between capacity or mental competency may intersect with ORR decision-making:
 - Placement decisions
 - Family reunification and release
 - Home studies
 - Age outs with mental health issues and no placement options
 - Access to info regarding mental health and HIPPA provisions to this info



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Identifying and Raising Capacity and Mental Competency Issues in Children's Immigration Cases



CHILDREN'S IMMIGRATION
LAW ACADEMY

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LEARNING OBJECTIVES

Based on this presentation, you will be able to:

1. Define *trauma* using the biomedical model (e.g., Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition [DSM-5])⁵ and recognize its symptoms.
2. Understand how trauma impacts children differently from adults with emphasis on multiple developmental domains (i.e., physical, emotional, language, adaptive).
3. Effectively work with children seeking asylum and/or other forms of relief to maximize information gathering while reducing re-traumatization.
4. Recognize differences between *clinical* (i.e., psychological) *assessments* and *forensic evaluations*, in addition to, successfully work with mental health experts.

DEFINING TRAUMA

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Trauma is a “stressful event or situation (either short-lived or long-lasting) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost everyone (e.g., natural or man-made disaster, combat, serious accident, witnessing the violent death of others, or being the victim of torture, terrorism, rape or other crime.)”³⁰



**World Health
Organization**

DEFINING TRAUMA CONT.

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A *traumatic event* is one in which a person witnesses or is confronted with: (1) actual or threatened death, (2) serious injury, and (3) threat to the physical integrity of self or another person.³

AMERICAN
PSYCHIATRIC
ASSOCIATION



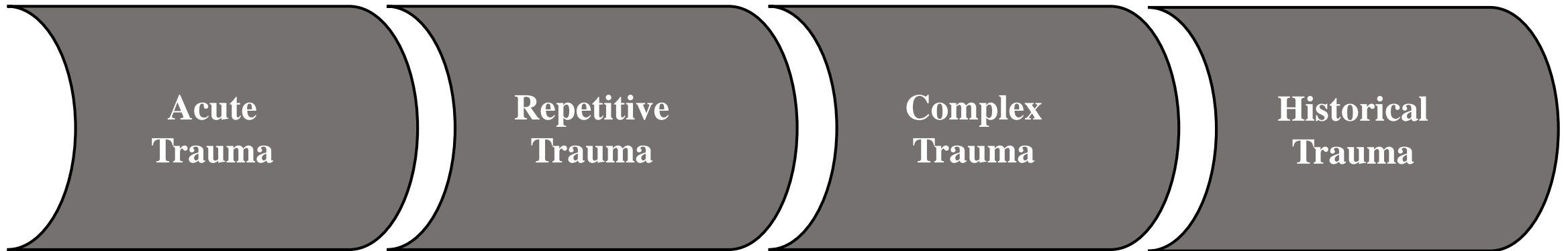
“Traumatization occurs when both internal and external resources are inadequate to cope with [an] external threat.”²⁷

Bessel van der Kolk, M.D.

The Body Keeps the Score:

Brain, Mind, and Body in the Healing of Trauma

TYPES OF TRAUMA²⁵



Fleeing from persecution and violence is unique from other stressors because the acute trauma from a single event is often followed by repetitive trauma,¹ such as those due to migration-related challenges, that lead to complex trauma transmitted across generations.^{5,15,30}

COMPLEX TRAUMA

An invasive and interpersonal; that is, relational type of trauma.

Complex trauma has both wide-ranging and long-term effects. It often occurs early in life, before adolescence, and disrupts several developmental trajectories.

Moreover, it severely impacts the formation of identity or self.⁶

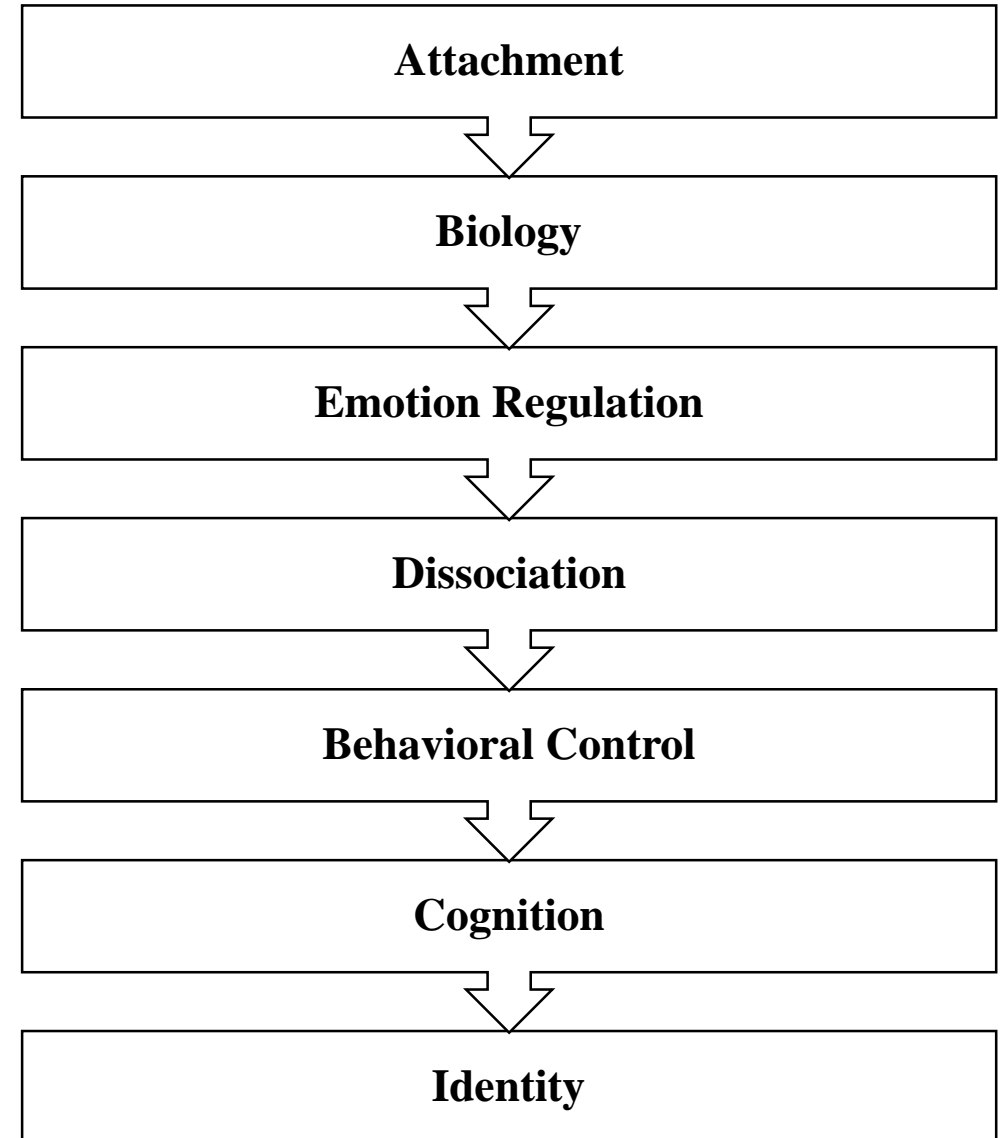


REPETITIVE TRAUMA

Developmental Impact

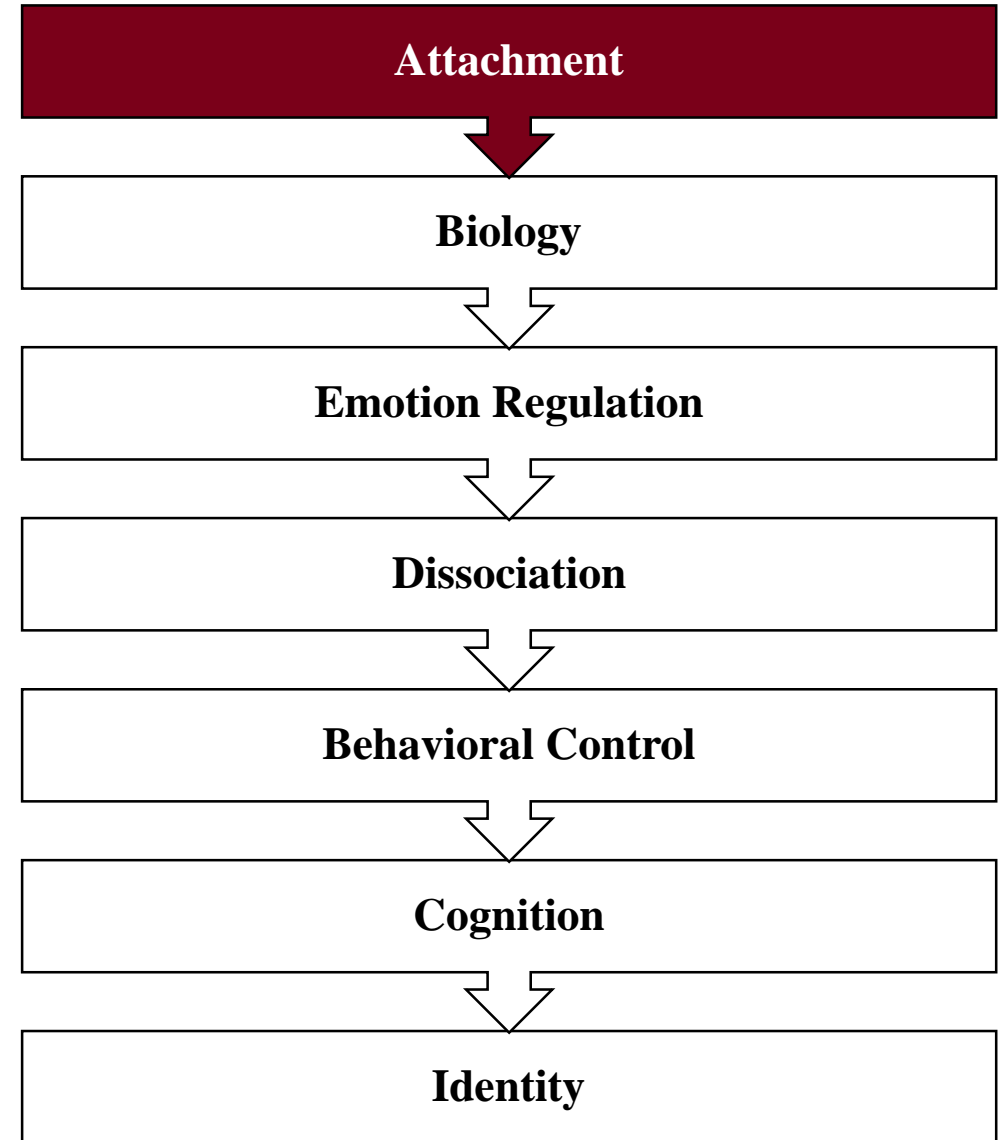
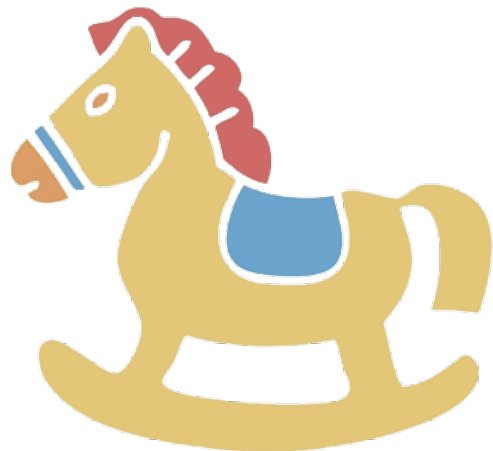
Despite recent advancements in the DSM-5³ classification of PTSD for children, it does not take into account development.

Repetitive trauma during childhood manifests in symptoms different than those of PTSD.²⁶



ATTACHMENT

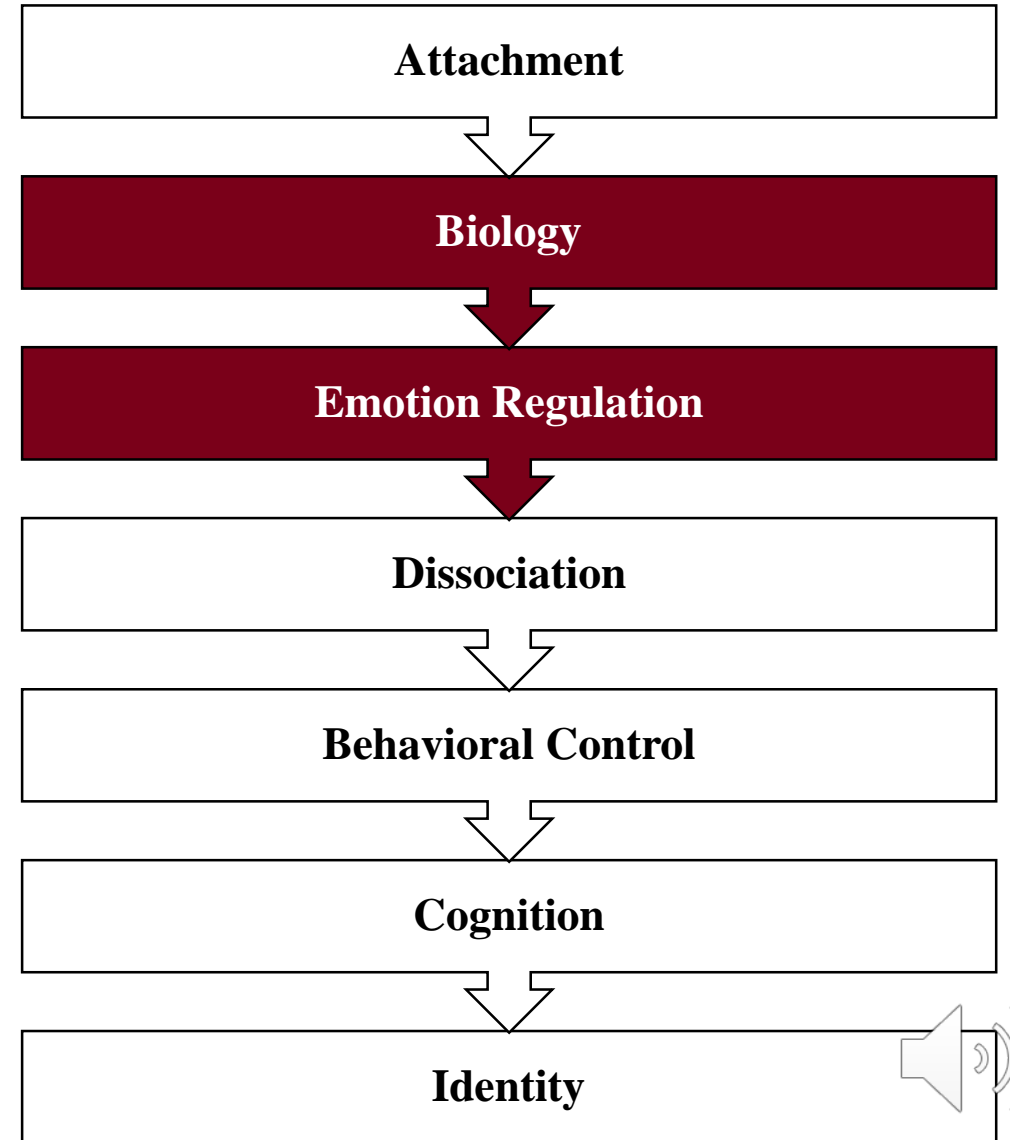
Attachment problems range from poor interpersonal (i.e., relational) boundaries²⁴ and lack of trust to social isolation and an inability to perceive the emotions of others.²⁸



BIOLOGY AND EMOTION REGULATION

Significant brain development occurs after birth and continues well into the late twenties.⁴ Early childhood experiences have a powerful impact on development.¹⁹

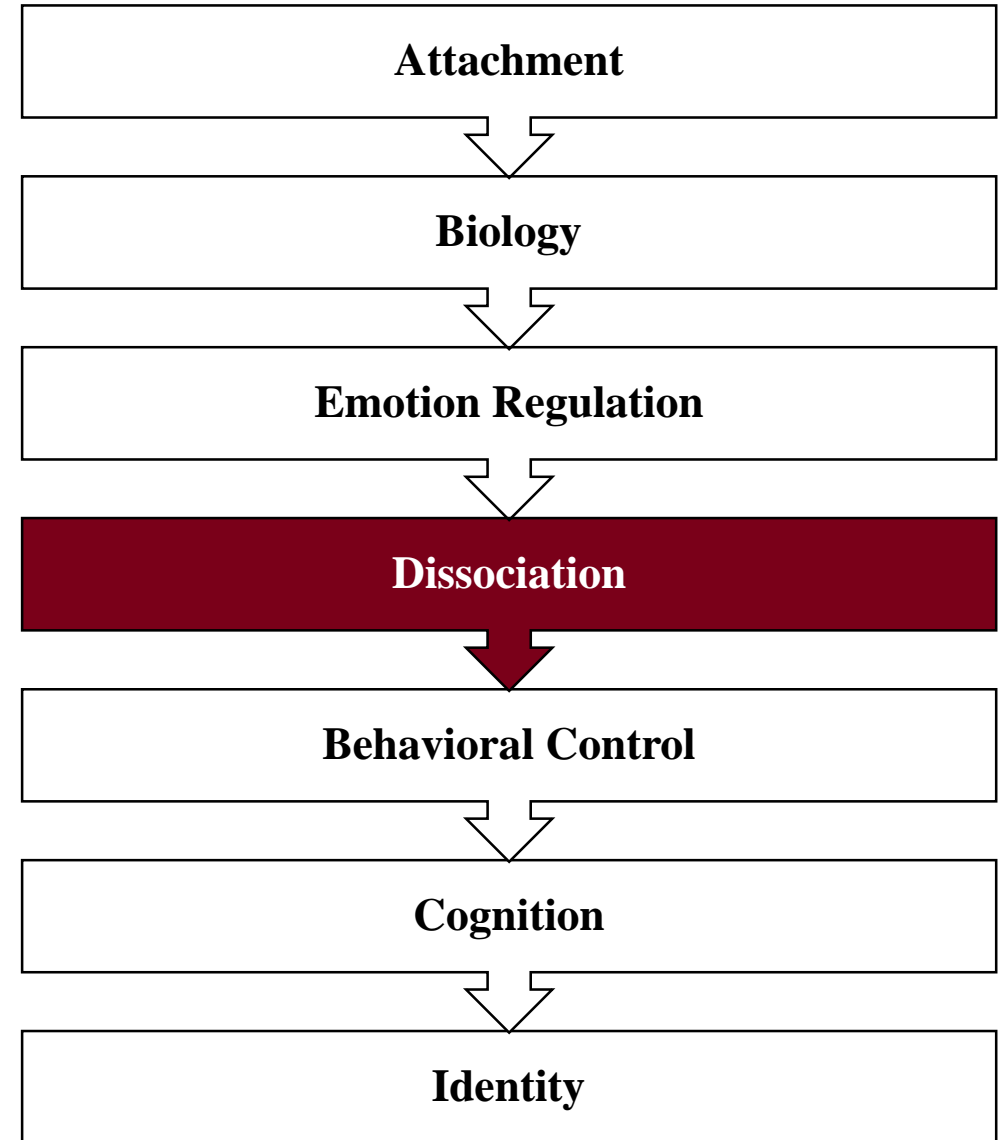
A child's ability to regulate his or her emotions, for instance, depends on early experiences that shaped brain development.⁸



DISSOCIATION

Dissociation consists of amnesia (e.g., forgetfulness), depersonalization, flat or blunt affect, and memory impairment.¹⁷

Depersonalization is characterized by feeling disconnected from mind and body. It typically develops following exposure to multiple traumatic events.

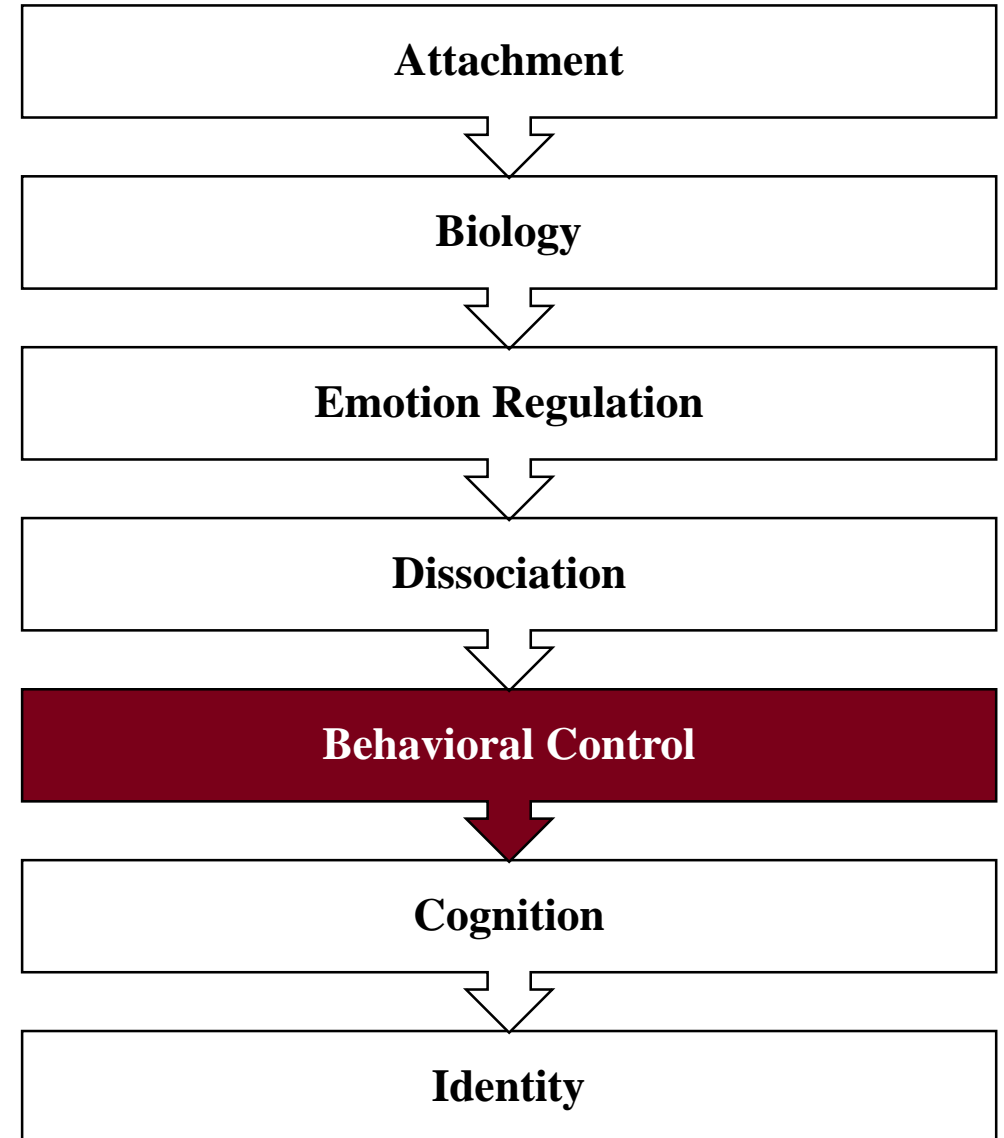


BEHAVIORAL CONTROL

Problems with behavioral control are among the most observable trauma symptoms.²⁰

Anxiety and depression, in response to repetitive trauma, constitute PTSD. But exposure to a single traumatic event may not manifest in such symptoms.

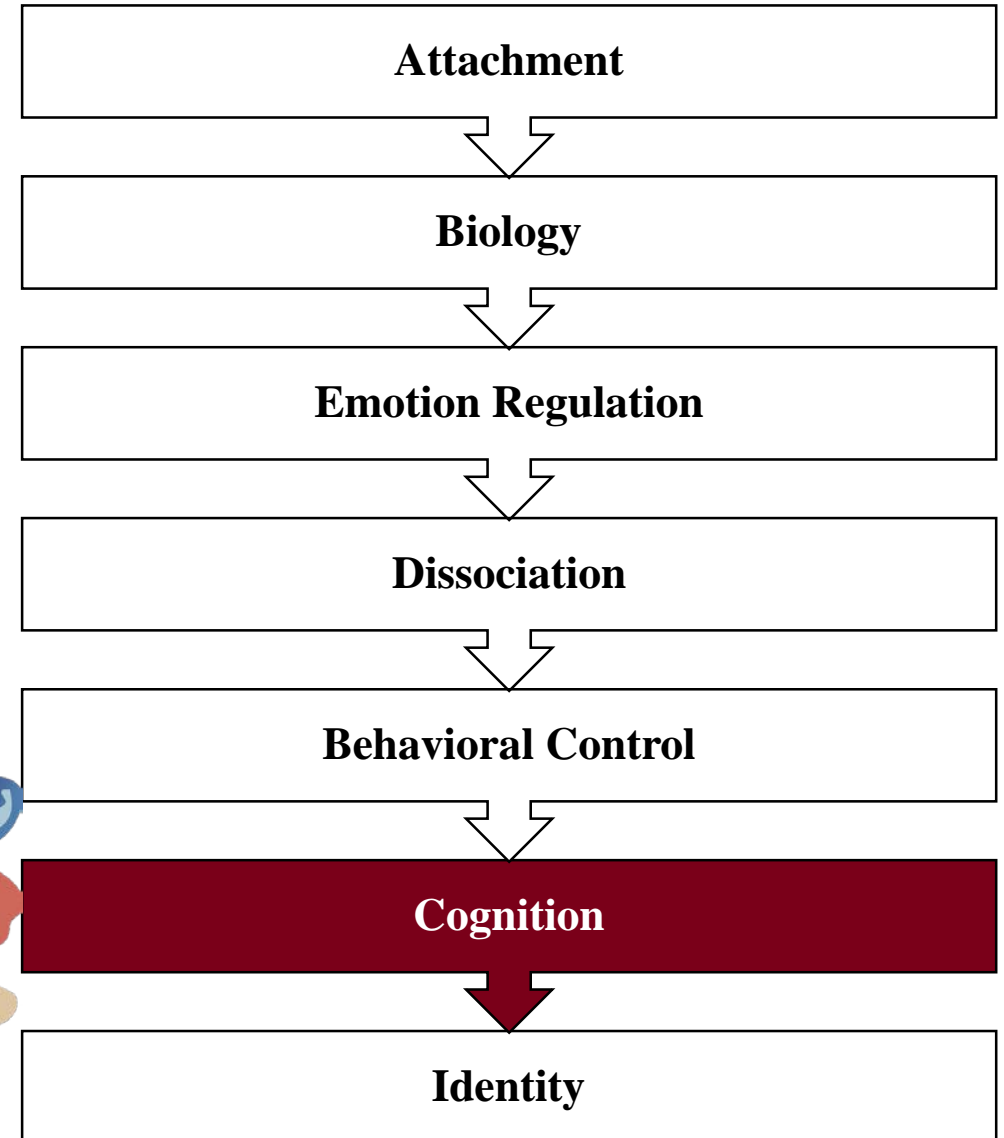
More common symptoms are internalizing problems (IPs), which manifest in poor impulse control and are frequently misdiagnosed.¹⁴



COGNITION

Difficulties processing information, limited executive functioning (e.g., cause-and-effect thinking), and a gulf between receptive and expressive communication are additional cognitive effects of traumatic stress.¹⁶

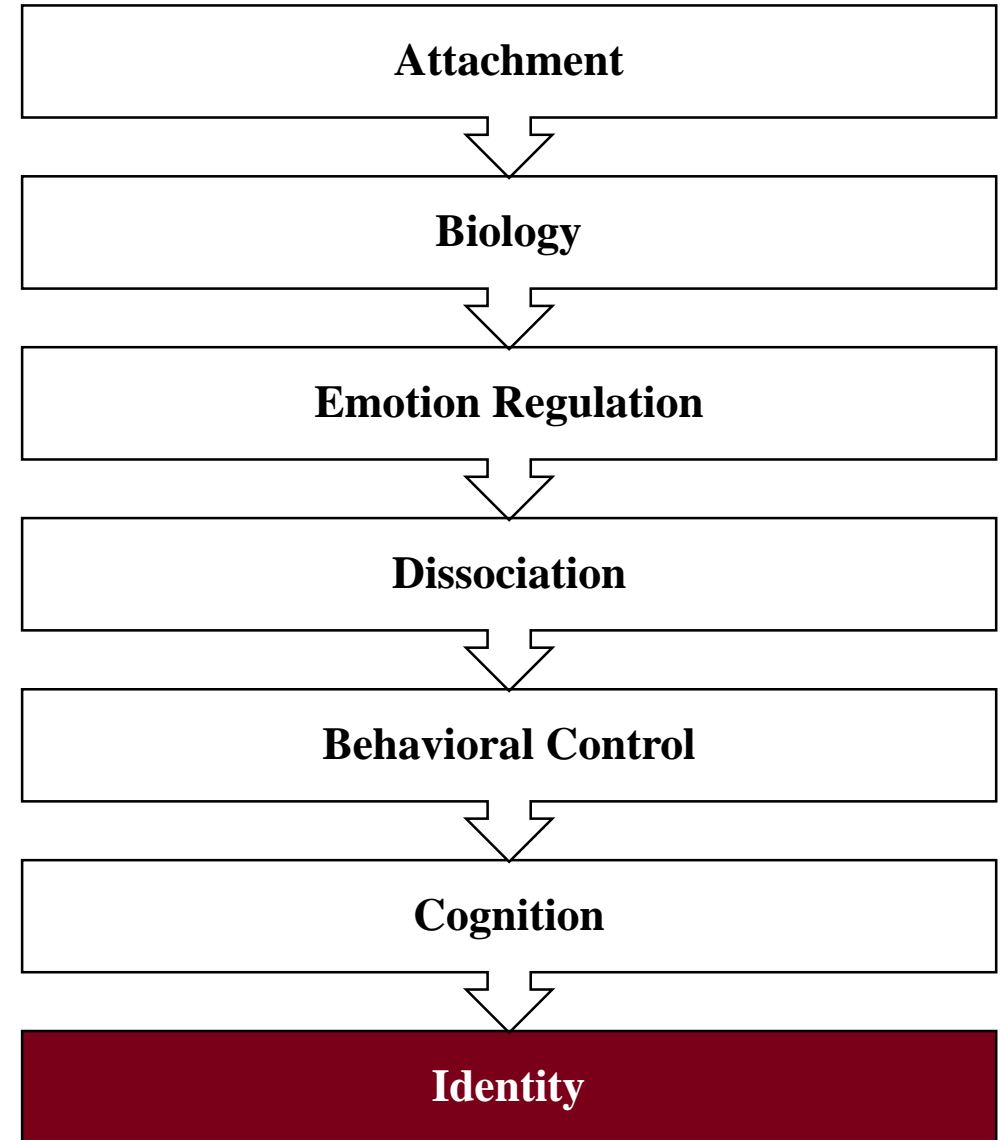
Receptive communication is the ability to understand information. *Expressive communication*, on the other hand, is the ability to form cohesive sentences.



IDENTITY

An *internal working model* is a cognitive framework for understanding the self, others, and the world.²⁸ It is related to both attachment, emotion regulation, and cognition.

Repetitive trauma fragments this model, which disconnects autobiographical narratives.



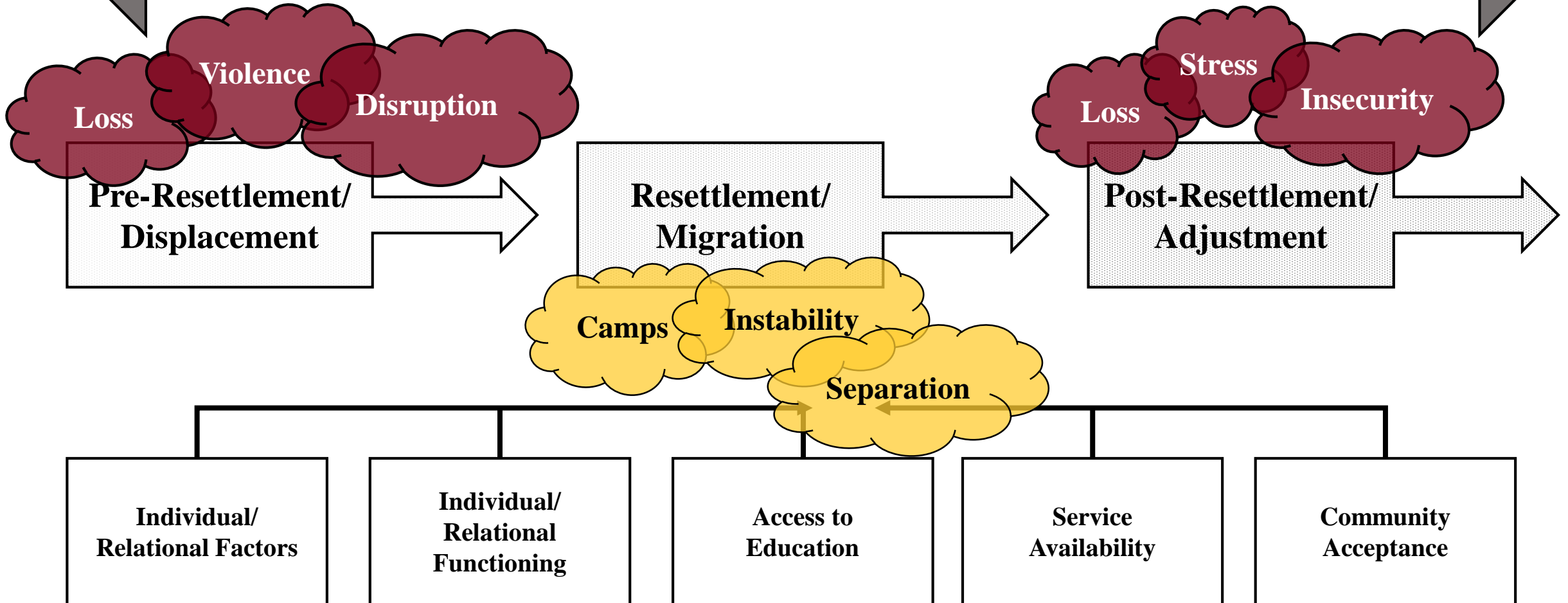
TRAUMA ACROSS DISPLACEMENT

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Trauma Exposure



DIAGNOSING TRAUMA IN CHILDREN

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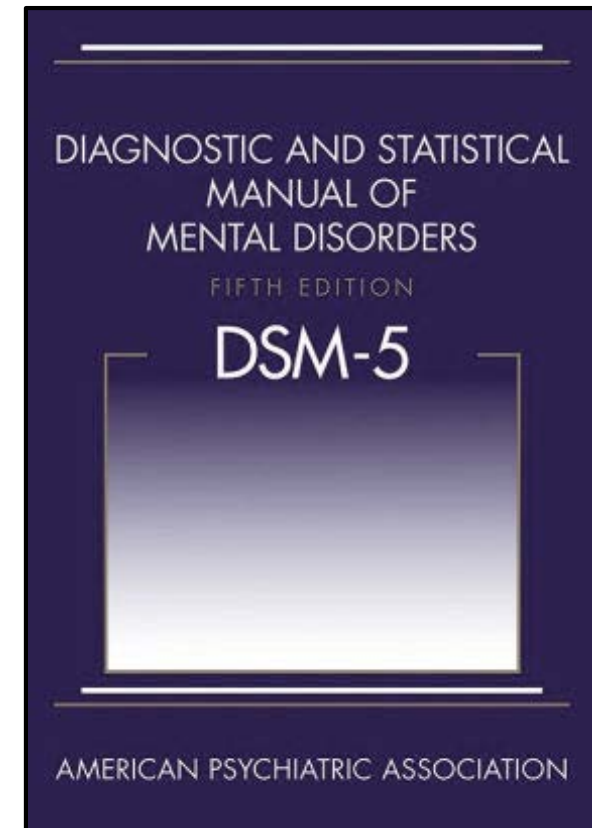
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Of children in the general (i.e., non-displaced) United States population, an estimated 16% will be diagnosed with post-traumatic stress disorder (PTSD).²¹

The current diagnostic criteria for PTSD outlined in the DSM-5³ applies to both children and adults.

The *pre-school specifier* is used for children six years of age and younger. *Specifiers* are used in the DSM-5 to clarify diagnoses and provide additional context.



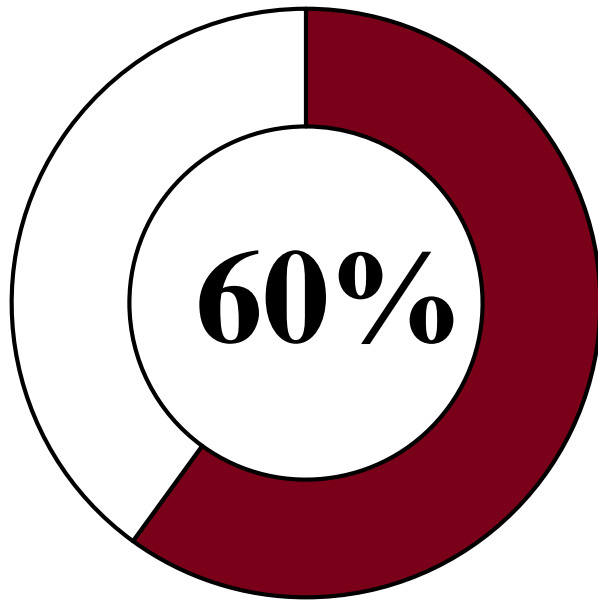
PREVALENCE RATES⁹

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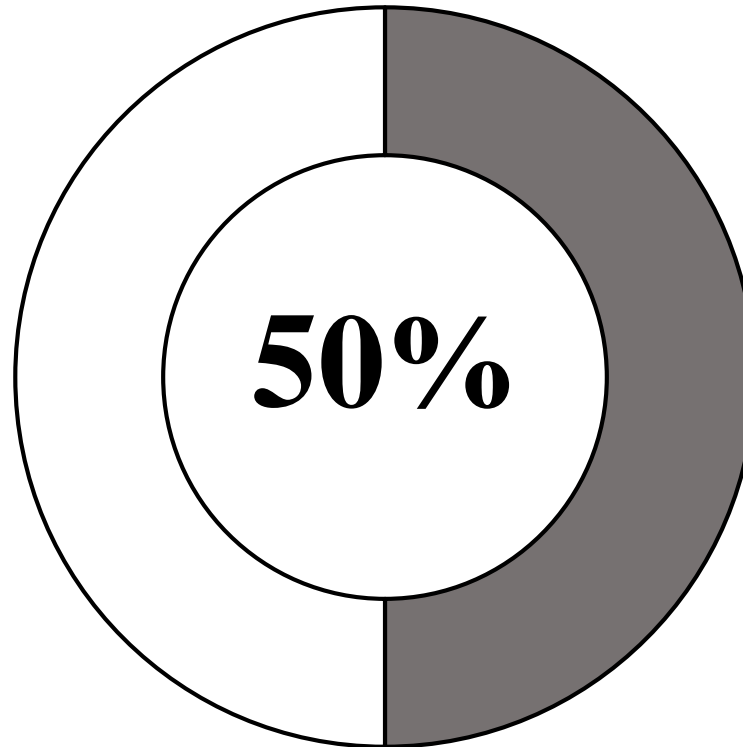
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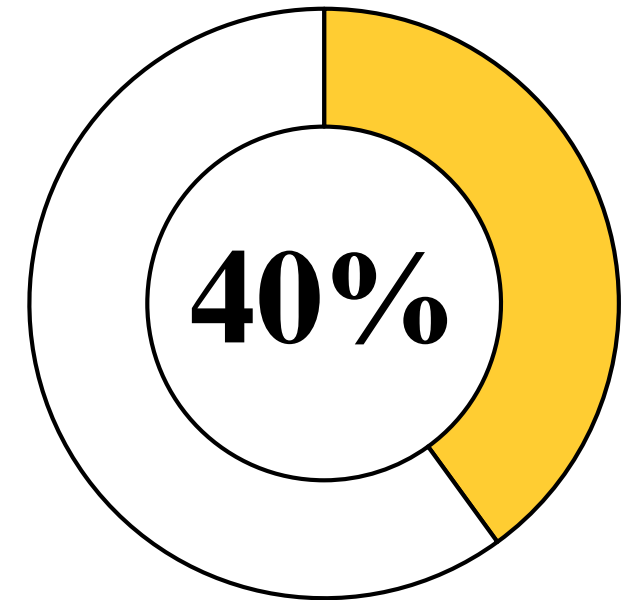
Anxiety



PTSD



Depression



DIAGNOSTIC REQUIREMENTS FOR PTSD

| Criteria | Description |
|---------------------------|--|
| Criteria A (One Required) | Exposure to Traumatic Event(s) |
| Criteria B (One Required) | Intrusive Symptoms or Re-Experiencing |
| Criteria C (One Required) | Avoidance and Numbing |
| Criteria D (Two Required) | Negative Alterations in Cognition and Mood |
| Criteria E (Two Required) | Alterations in Arousal and Reactivity |
| Criteria F (Required) | Duration of 1+ Month(s) |
| Criteria G (Required) | Significantly Impaired Functioning |
| Criteria H (Required) | Exclusion of Medication, Substance Use, or Other Illness(es) |

Note. Diagnostic requirements for PTSD from the DSM-5.⁵

Diagnostic Challenges: The Role of Culture

While the DSM-5⁵ has made great strides in broadening its diagnostic requirements for young children, several challenges remain. The most applicable of which to children is *cultural validity*.

“[...] evidence [...] suggests the need for further research [on] the relative salience of avoidance/numbing symptoms, the role of the interpretation of trauma-caused symptoms in shaping symptomatology, and the prevalence of somatic symptoms.”¹³

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MAXIMIZING INFORMATION GATHERING

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Understand

Make an effort to learn about the child and his or her background. This will nurture your relationship. Remember the role of attachment. If unsure, ask. Curiosity is positive.

Defer

Ask about the child's feelings and wishes. The interpersonal effects of trauma decimate autonomy. Giving him or her a sense of control is only going to promote cooperation. Also, prioritize the child's feelings; to the extent possible, over administrative deadlines.



MAXIMIZING INFORMATION GATHERING

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Explain

Although it may be tedious and exhausting, you should explain anything as often as necessary. This includes, but is not limited to, your role, expectations of the child, and purpose of working together.

Focus

Pay attention to both verbal and non-verbal cues. Much of what children say is non-verbal. Continuously assess their self awareness, knowledge of setting or place, knowledge of time and date; in addition to, understanding of an event.

REDUCING RE-TRAUMATIZATION

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Any external stimuli that evokes re-experiencing a previously traumatic event is referred to as a *trigger*.⁵ Anticipating or predicting triggers is difficult. However, safety and trust considerably reduce re-traumatization. Collaboration, combined with empowerment and choice, also reduce re-traumatization.²³ Additionally:

1. Do not force the child to disclose his or her traumatic events.
2. Do not respond with aggression or negativity if the child becomes withdrawn.
3. Do not make the child feel like they are alone.

NCTSN

The National Child
Traumatic Stress Network

WORKING WITH EXPERTS

| Difference | Forensic Evaluation¹⁰ | Clinical Assessment |
|---------------------|---|----------------------------|
| Purpose | Answer Legal Question | Relieve Suffering |
| Relationship | Evaluator-Client | Provider-Client/Patient |
| Client | Court, Attorney, or Agency | Client/Patient |
| Objective | Report | Heal |
| Treatment | No | Yes |
| Sources | Collateral Documents/Self-Report | Self-Report |
| Bias | Neutral and Objective | Therapeutic |
| Product | Written Report or Deposition | Therapeutic Relationship |

Note. Differences between forensic evaluations and clinical assessments.

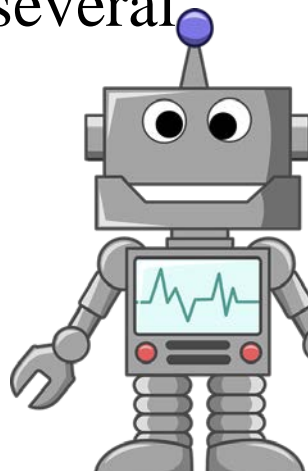
Working with experts requires strict adherence not only to the model rules of professional conduct.²

Identifying and Locating

Identifying qualified experts is difficult. Most appropriate settings include colleges and universities. Reach out to faculty, staff, and advanced doctoral (i.e., Ph.D.) students or candidate via e-mail. Also, contact local non-profit organizations such as community mental health clinics.

Screening for Qualifications

Determining whether or not an expert is qualified for immigration-related matters is different when working with children. You may therefore want to ask them several questions on the intersection of mental health, for instance, and human rights.²²



Eliminating Bias

It may be tempting to request a child's psychotherapist or physician to serve as an expert. But this should be avoided if possible given their bias in favor of the child. However, you may retain them as a consultant and to comment on treatment progress or possible outcomes if removed from United States.

Sharing Documents

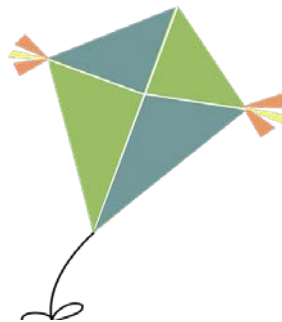
Attorneys and experts both differ on sharing collateral documents.^{11,12} However, providing experts with information to corroborate their assessment is helpful. It also reduces the amount of time spent on the clinical interview gathering basic sociodemographic information (e.g., name, birth, address).

Reviewing Reports

Depending on access to technology, experts will typically send you a draft of the report as a secured PDF. Do not attempt to make changes directly. Instead, make suggestions and ask clarifying questions. Experts make mistakes and at times neglect or altogether miss important aspects of the evaluation.

Preparing for Trial

This is more applicable to less-experienced experts, such as advanced doctoral students or candidates. Take time to meet with him or her and prepare for trial. Simulate cross-examination so they know what to expect. Also, explain any relevant legal rules and principles. This includes courtroom behavior.



THANK YOU

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“There can be no keener revelation of a society’s soul than the way it treats its children.”¹⁸

Nelson Mandela
Long Walk to Freedom

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Determining Capacity and Competency of a Child Client

The test to determine competency is whether a person:

- “[1] has a rational and factual understanding of the nature and object of the proceedings,
- [2] can consult with the attorney or representative if there is one, and
- [3] has a reasonable opportunity to examine and present evidence and cross-examine witnesses.”

Matter of M-A-M-, 25 I& N Dec. at 479

Factors to consider with child clients when determining competency:

- Age and maturity
- Education level (and/or whether enrolled in special education program)
- Past trauma and trauma-related symptoms
- Existence of any physical or mental disabilities
- Interactions with the child during intake and interview process



Ethical Considerations

ABA Model Rule 1.14 provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

- Obligation to represent client under the same standards as competent clients
 - Client directs the course of representation so you are NOT acting in client's best interest
- Problem arises when client may not have capacity to direct the course of representation or is uncooperative
- Often need information from third parties to fully understand the facts and/or gather evidence, but still bound by rules of confidentiality
- **Special Issues for Children:**
 - May have an obligation to seek a best interest recommendation
 - Guardianship
 - Young Center advocate
 - Parent/conservator



Ethical Considerations (cont.)

ABA Model Rule 1.2- Scope of Representation and Allocation of Authority Between Lawyer/Client

“...the client chooses the legal objective, or goals, while the attorney determines the legal means to pursue those goals.”

- Attorney cannot impose his/her own goals or act in what he/she believes is in the client’s best interest
- Can your child client make his/her goals known?

ABA model Rule 1.4- Communications

“...reasonably consult with the client about the means by which the client's objectives are to be accomplished...(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”

- Can you communicate with your child client so that he/she can make an informed decision about the representation?



Ethical Considerations (cont.)

ABA Model Rule 1.6- Confidentiality

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation..."

- Are you able to meet with your child client outside the presence of a responsible adult/parent and/or is he/she able to communicate confidential communications regarding the case?
- Do you need to rely on information from third parties? (May have adverse interests)



Determining When to Raise Capacity/Competency Issues

- Questions to consider:

- **Does your client understand the nature of the proceedings against him/her?**
 - Understand the concept of a judge, courtroom, country
- **Are you able to comply with your ethical obligations to the client?**
 - Allow client to direct the decision-making; maintain confidentiality
- **Will your client be able to fully participate in the proceedings?**
 - Provide testimony; assist you to prepare a declaration; understand the allegations in the NTA
- **Will your client be better served by having certain safeguards in place during the course of the proceedings?**
 - Not being required to testify; counsel being allowed to ask leading questions; ask to consider testimony in light of past trauma



Litigating Due Process Issues: Request Safeguards

Requesting Safeguards

The INA contains a very broad provision:

The IJ “shall prescribe safeguards to protect the rights and privileges” of respondents for whom it is “impracticable” to be present due to reasons of mental incompetency. INA § 240(b)(3).

- 8 CFR 103.8(c)(2) – service of the NTA; see also Matter of E-S-I-, 26 I&N Dec. 136 (BIA 2013)
- 8 CFR 1240.4 – allowing attorney, legal representative, legal guardian, near relative or friend to appear for respondent
- 8 CFR 1003.25(a) – allowing IJ to waive respondent’s presence
- 8 CFR 1240.10(c) – IJ cannot accept an admission of removability from incompetent respondent unless accompanied by a party identified in 8 CFR 1240.4



What are possible safeguards?

Mentioned in Matter of M-A-M:

- Legal representation
- Assistance from family/friends
- Special docketing
- Guardian
- Continuance
- Closed hearings
- Waiving Respondent's appearance
- Assistance developing the record
- Reserving appeal

OTHER POSSIBILITIES:

- In-person, non-simultaneous interpretation
- Not requiring oral testimony from Respondent
- Allowing leading questions
- Limiting the scope of direct & cross
- Allowing declarations/affidavits from third parties

Litigating Due Process Issues: Termination

Requesting Termination:

- 8 C.F.R § 1240.10; 8 C.F.R. § 1003.10(b): IJs have the authority to act consistent with the INA and should be flexible where there are mental health concerns
- IJ Benchbook – acknowledges that counsel’s duties are limited by the ABA Model Rules for Professional Conduct and that even with counsel, if there are insufficient safeguards, termination may be an option. Part I.D.
- Constitutional due process claims, see *Dusky v. United States*, 362 U.S. 402 (1960); *Indiana v. Edwards*, 128 S.Ct. 2379 (2008).

How to reconcile /distinguish **Matter of S-O-G- & F-D-B-**, 27 I&N Dec. 462 (A.G. 2018)

- Involved cases where respondents had conceded removability but AG recognized that IJs maintain authority to terminate proceedings where charges of removability have not been sustained
- Argue that termination is warranted by the statute or by the Constitution (here, Due Process violations)
- Argue that these decisions did not abrogate IJs authority to terminate, but made it much more difficult and still provides that termination is appropriate where authorized by statute (or the Constitution)



Requesting Termination

CASE SCENARIO: 4 y/o client, “Juan” in proceedings, no apparent mental/physical limitations

PRINCIPAL ARGUMENT: Juan is not able to participate or comprehend the removal proceedings against him and representation by counsel is an insufficient safeguard where he cannot assist counsel in his own defense

GENERAL SOURCES OF LAW:

- All citizens and noncitizens within the U.S., whether their presence is lawful, unlawful, temporary, or permanent, are entitled to due process. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).
- A respondent’s due process rights are violated if he or she does not receive a “full and fair” hearing and suffers prejudice as a result. *See Cruz Rendon v. Holder*, 603 F.3d 1104, 1009 (9th Cir. 2010).
- INA § 240(b)(4)(B) states that an individual in removal proceedings “shall have a reasonable opportunity to examine the evidence...to present evidence..., and to cross examine witnesses.”
- Pursuant to INA § 242, a noncitizen has a statutory right to effective assistance of counsel.



Requesting Termination (cont.)

- Juan does not have a rational and factual understanding of the nature of the proceedings against him
 - Specific facts/circumstances of client:
 - Does not understand what “country” means; cannot accurately relay information about experience in home country
 - Developmental stage and behavior
 - Look to state law for guidance/persuasive authority:
 - In Washington State, “[c]hildren under the age of eight years are incapable of committing crime.” RCW 9A.04.050.
 - Washington State law requires that witnesses appearing in a court proceeding be “of sound mind and discretion” and excludes “[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.” RCW 5.60.020; RCW 5.60.050.



Requesting Termination (cont.)

- Juan cannot assist his attorney in his own defense or in the preparation of evidence
 - Cannot consult with his attorney in order to provide information regarding the charges against him, present an application for relief, nor can he assist counsel to gather or prepare evidence
 - Juan can't articulate a fear to return to his country, even if he has one - in order to allow counsel to assess a potential asylum claim



Termination (cont.)

- **The Fifth Amendment Due Process Clause requires termination because Juan would be deprived a “full and fair” hearing**
 - Analogize to criminal proceedings/other federal case law:
 - A criminal trial of an incompetent defendant violates the constitutional right to due process of law. See, e.g, *Medina v. California*, 505 U.S. 437, 453 (1992); *Drope v. Mississippi*, 420 U.S. 162 171-172 (1975).
 - The U.S. Supreme Court case, *Dusky v. U.S.*, 362 U.S. 402 (1960), provides strong persuasive authority, wherein the Court held that a criminal defendant may not stand trial if he “cannot consult with his lawyer with a reasonable degree of rational understanding” or cannot “assist in preparing his defense.” The same principle should apply to removal proceedings.
 - Recent EOIR memorandum makes it clear there are no different standards of proof for children in removal proceedings
 - See MaryBeth Keller, Chief Immigration Judge, Operating Policies and Procedures Memorandum (OPPM) 17-03: *Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* (Dec. 20, 2017)



Termination (cont.)

- **Representation by counsel is an insufficient safeguard**
 - Juan has a right to have a “competent advocate acting on [his] behalf at removal proceedings.” *Hernandez-Gil v. Gonzalez*, 476 F.3d 803, 808 (9th Cir. 2007)
 - Counsel’s role is limited by the Rules of Professional conduct and cannot direct the objectives of the representation.
 - Juan can’t produce credible testimony as required to support his application or understand the nature of the questions on the I-589 (and counsel can’t testify for him)



Resources

- American Bar Association Commission on Immigration, “Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices,” July 2015
- America Immigration Council Practice Advisory “Representing Clients with Mental Competency Issues Under Matter of M-A-M-,” November 30, 2011
- Texas Appleseed, “Justice for Immigration’s Hidden Population,” 2010
- Capitol Area Immigrants’ Rights Coalition, “Practice Manual for Pro Bono Attorneys Representing Detained Clients with Mental Disability in the Immigration Detention and Removal System,” 2013





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