UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patrie*, to protect the rights of their tribal members; and MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, v. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFIEFLE; and LYNNE A. VALENTI, in their official capacities. Defendants.	)	Case No.: 13-5020

SDDSS DEFENDANTS' RESPONSE TO PLAINTIFFS' REMEDIES BRIEF

COME NOW, Lisa Fleming, Regional Manager for the South Dakota Department of Social Services Division of Child Protection Services offices in Region 1, Pennington County, Rapid City, South Dakota, and Lynne A. Valenti, Secretary of the South Dakota Department of Social Services, by and through their attorney, Robert L. Morris, of Morris Law Firm, Prof. LLC, P.O. Box 370, Belle Fourche, South Dakota 57717-0370, who submits this Response to Plaintiffs' Remedies Brief.

A. Preliminary Statement

First and foremost, although the Court has issued decisions in this matter in favor of the Plaintiffs, the matters addressed in this filing are not intended to waive or relinquish any legal or factual defenses that exist. Also, the matters addressed in this filing should not be interpreted as consent to any injunction or any particular relief sought by Plaintiffs or ultimate relief entered by the Court. Valenti and Fleming respectfully object to the entry of any prospective injunctive relief under the applicable law and the facts.

The Court has advised that it will be issuing a Declaratory Judgment in this matter and that from the Declaratory Judgment the Court will issue an injunction for prospective injunctive relief. The Plaintiffs have invoked, and the Court has agreed, that the doctrine in *Ex parte Young*, 209 U.S. 123 (1908) applies as to prospective injunctive relief sought by the Plaintiffs. It is understood that the scope and contents of the injunction will follow the requirements of Fed.R.Civ.P. 65(d) and requirements of *Ex parte Young*, 209 U.S. 123 (1908). It is further understood that the injunction cannot be too vague and must give fair and precisely drawn notice of what is prohibited or what is directed. *Calvin Klein Cosmetics Corp. v. Parfums de Coeur*, 824 F.2d 665, 669 (8th Cir. 1987).

Because the Eleventh Amendment is implicated in this case, and because Valenti and Fleming have been sued in their official capacities for prospective injunctive relief alleging violations of federal law, the alleged violations must be ongoing in order for Plaintiffs to avoid an immunity defense. Also, retroactive relief is barred by the Eleventh Amendment. See, *Green v. Mansour*, 474 U.S. 64 (1985).

Plaintiffs have submitted a "Brief in Support of Plaintiffs' Request for Appropriate Remedies." [Document 239]. Although the Brief is labeled as seeking remedies, it is assumed that Plaintiffs seek only prospective injunctive relief for alleged ongoing violations of federal law. Further, certain prospective injunctive relief can only be directed at Valenti and Fleming, in their official capacities as Secretary of the Department of Social Services and as Regional Manager for the South Dakota Department of Social Services Division of Child Protection Services offices in Region 1, Pennington County, Rapid City, South Dakota. This is because Valenti and Fleming, as state officials, must have some connection[1] to and ability to remedy the alleged ongoing violations. See, *Ex parte Young*, 209 U.S. 123, 156 - 157 (1908). See also, *Balogh v. Lombardi*, 816 F3d. 536, 545 (8th Cir. 2016); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005).

Lastly, it is apparent that even though the Plaintiffs acknowledge that State law applies at the emergency custody[2] stage of the proceedings, the Plaintiffs seek to create an adversarial environment in the proceedings. This is contrary to SDCL 26-8A-1 which provides:

> It is the purpose of [the Protection of Children From Abuse or Neglect] chapter, in conjunction with [the Juvenile Court] chapter 26-7A, to establish an effective state and local system for protection of children from abuse or neglect. Adjudication of a child as an abused or neglected child is an adjudication of the status or condition of the child who is the subject of the proceedings and is not necessarily an adjudication against or in favor of any particular parent, guardian, or custodian of the child.

[1] Throughout their Remedies Brief, the Plaintiffs make reference to "Defendants" or request the Court "direct Defendants" etc. Even though Plaintiffs wish this Court to "direct Defendants" there must be some definitive direction by the Court to each Defendant to ensure that there exists some connection and ability of a particular Defendant to remedy the alleged ongoing violation.

[2] Document 132-1, the Affidavit of LuAnn Van Hunnik is incorporated herein.

The referenced statutes evidence the State's role in protecting children and its strong interest in the care and treatment of every child within its borders. See, *In re H.O.*, 2001 SD 114, ¶9, 633 N.W.2d. 603, 604; *In re N.J.W.*, 273 N.W.2d 134, 137 (SD 1978). It is obvious that State law and ICWA focus on a child's health, safety, and welfare – whether that child is non-Indian or Indian.

B. Plaintiffs' Requested Remedy and Reply of Valenti and Fleming.

1. **Remedy No. 1: Adequate Notice [Document 239, pgs. 9-12]**.

The Plaintiffs list four matters they wish the Court to direct the Defendants to provide to Indian parents. (Document 239, pgs. 11-12.)

As to #1, Valenti and Fleming should only be directed regarding documents prepared by DSS employees in a particular case. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

As to #2, the directive request does not appear directed at Valenti and Fleming. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

As to #3, the directive request does not appear directed at Valenti and Fleming. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

As to #4, the directive request does not appear directed at Valenti and Fleming. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

2. **Remedy No. 2: The Right to Present Formal Evidence [Document 239, pgs. 12-13].**

This directive request does not appear directed at Valenti and Fleming. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

3. **Remedy No. 3: The Right to Confront and Cross-Examine [Document 239, pgs. 13-14].**

This directive request does not appear directed at Valenti and Fleming. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

DSS case workers regularly attend 48 hour hearings. Two documents are prepared by DSS case workers that are presented at the 48 Hour hearing – the Affidavit of the Department and the ICWA Affidavit. If the same case worker prepares both documents, then he/she can be available to testify. If different case workers prepare each document, then DSS needs to be informed as to whether the ICWA Affidavit affiant needs only to attend or both affiants need to attend.

4. **Remedy No. 4: The Right to Counsel [Document 239, pgs. 14-16].**

This directive request does not appear directed at Valenti and Fleming. If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

5. **Remedy No. 5: The Right to a Decision Based Upon the Evidence Present at the Hearing [Document 239, pgs. 16-17].**

In part, this directive request is aimed at directing Valenti and Fleming to "…. introduce evidence of active efforts at the 48 Hour hearing to the extent such evidence is available …." [Document 239, pg. 17]. Valenti and Fleming submit that when presented with a situation involving Present Danger, a Present Danger Plan is attempted to be implemented to manage the present danger so that law enforcement does not have to take emergency custody of a child. If a Present Danger Plan cannot be implemented, law enforcement takes custody and transfers custody to DSS. [Document 132-1, ¶¶ 12-21]. Although ICWA[3] does not define what "active efforts" are, the efforts to attempt to engage in a plan to prevent law enforcement from having to take emergency custody should be considered active efforts. At a 48 Hour hearing, this may be the extent of active efforts undertaken due to timing of events.

[3] 25 U.S.C. § 1912(d) references "active efforts" concerning foster care placement of or termination of parental rights to an Indian child. Although active efforts, as described above are undertaken concerning the emergency custody process, the ICWA active efforts are applicable for a foster care placement or prior to termination of parental rights. The South Dakota Supreme Court has ruled that in such situations, the standard of proving active efforts is beyond a reasonable doubt. *In re J.I.H.*, 2009 S.D. 52, ¶ 17, 768 N.W.2d 168, 172; *In re E.M.*, 466 N.W.2d 168, 172 (S.D.1991).

If the Court determines otherwise, it is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

6. **Remedy No. 6: The 48-Hour Hearing Must Use the §1922 Standard [Document 239, pgs. 17-20].**

The last paragraph of this directive request appears directed at Valenti and Fleming. Pursuant to SDCL 26-7A-9, the state's attorney represents the State and DSS in proceedings under Chapter 26-7A (Juvenile Court) and Chapter 26-8A (Protection of Children From Abuse or Neglect), unless DSS has selected a separate attorney and has so informed the concerned state's attorney and the court. It is unclear whether the Plaintiffs request that Valenti and Fleming be directed to have an attorney separate from the state's attorney appear at every 48-Hour hearing to carry out the directives the Plaintiffs request.

It is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

7. **Remedy No. 7: DSS Must Be Ordered to Use the §1922 Standard in Determining When to Return An Indian Child to the Home. [Document 239, pgs. 21-22].**

The second part of this directive request appears directed at Valenti and Fleming. The standard the Plaintiffs refer to in §1922 is the requirement that child be returned to the parent as soon as "removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." It has been DSS's position that all children, Indian or non-Indian, are reunified with the parents or custodial parent if DSS determines

that there is no impending danger to the child by such reunification or impending danger can be managed, through various means.

Former defendant, Ms. Van Hunnik prepared an Affidavit [Document 132-1] addressing the process undertaken by DSS when confronted with a possible emergency custody situation. [Document 132-1, ¶¶ 12-57, 59-60, 62-63, 66-76, 78-88, and 103-107]. The essence of the process is children are reunified with the parents or custodial parent if the child(ren) will be safe, in other words, impending danger is determined not to exist based upon the IFA Assessment process. If impending danger is determined to exist through the IFA Assessment process, ongoing services are provided to the parents or custodial parent and once impending danger no longer exists, or is alleviated through a Safety Plan or other mechanism that will allow the child(ren) to be safe, reunification is accomplished.

It is respectfully requested that the Court give fair and precisely drawn notice of what is prohibited or what is directed by the Court as such pertains to Valenti and Fleming.

8. Additional Remedy: The Need for a Monitor [Document 23, pgs. 22-23].

This directive request appears to be directed at all the Defendants. Fed. R. Civ. P. 53 pertains to appointment of Masters and provides in relevant part:

> (a) Appointment.
>
> > (1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:
> >
> > > (A) perform duties consented to by the parties;

> (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
>
> > (i) some exceptional condition; or
> >
> > (ii) the need to perform an accounting or resolve a difficult computation of damages; or
>
> (C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

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There has been no consent by the parties to the appointment of a Master. There exists no exceptional condition in this case that would warrant such an appointment or need for an accounting or difficult computation of damages.

Valenti and Fleming are aware of the Court's inherent powers which exist in addition to Fed. R. Civ. P. 53. In spite of such inherent powers, appointment of a Monitor is unnecessary. Such consideration of an appointed Monitor would also seem to be premature. Appointment of a Monitor would be an unnecessary expense to whoever is to bear the cost. Also, the Monitor would seem to be an intrusion of the recognized state emergency custody process with the State 7th Circuit Court, with the State's Attorney, and with the Child Protection Services in Region 1. Surely, counsel for the Plaintiffs will bring to this Court's attention any issues they deem relevant after the Court issues the Declaratory Judgment and injunction for prospective relief. Lastly, appointment of a Monitor would seem to usurp the jurisdiction of the South Dakota Supreme Court, which has jurisdiction of appeals from Circuit Court orders and rulings.

In essence, Valenti and Fleming respectfully object to the appointment of a Monitor.

Dated this 27th day of June, 2016.

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