UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Americans for Tribal Court Equality, James Nguyen, individually and on behalf of his minor child A.N., and Michelle Steinhoff, individually and on behalf of her minor child T.J.,

Plaintiffs,

vs.

Emily Piper, in her official capacity as Commissioner of the Minnesota Department of Human Services, and Scott County,

Defendants.

Civil File No. 17-cv-04597 (ADM/KMM)

MEMORANDUM OF LAW IN SUPPORT OF COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN SERVICES' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiffs sued the Commissioner of the Minnesota Department of Human Services ("Commissioner"), in her official capacity only, alleging violations of substantive due process, procedural due process, and the Indian Child Welfare Act ("ICWA").[1] Doc. 12 at pp. 1, 36, 38, 42, 47. Plaintiffs seek only declaratory and injunctive relief. Doc. 12 at p. 51, ¶¶ 1-4. Plaintiffs' claims center on their assertion that the Department of Human Services' Indian Child Welfare Manual ("Manual") contains legally incorrect guidance to county social service agencies who evaluate jurisdiction over Indian child custody proceedings.

[1] Plaintiffs also sued Scott County, but those claims are not addressed in this motion.

Pursuant to Minnesota Rule of Civil Procedure 12(b)(6), Defendant Commissioner moves to dismiss all of Plaintiffs' claims against her for failure to state a claim upon which relief can be granted. Plaintiffs failed to plausibly plead that federal law is even implicated or that the Manual contains legally incorrect guidance. Plaintiffs also failed to plead that state policy, as expressed in the Manual, was the moving forced behind any actions that violated the Constitution or other federal law. Finally, Plaintiffs failed to plead a violation of substantive or procedural due process. Accordingly, Plaintiffs' claims against the Commissioner should be dismissed.

FACTS

A. The Manual

Plaintiffs' First Amended Complaint alleges the following facts.[2] The Commissioner makes available the Manual, which Plaintiffs quote in their First Amended Complaint. *See* Doc. 12, pp. 28-29, ¶ 151. The Manual provides guidance to county social service agencies and private child-placing agencies on compliance with the requirements of ICWA. *See generally id.* at pp. 28-30.

The Manual contains guidance on referral of Indian child custody proceedings to tribal court. *Id.* at p. 28-30. This guidance differs depending on whether the Indian child subject to the proceeding resides or is domiciled within an Indian reservation. First, in the case of an Indian child residing or domiciled within an Indian reservation, the Manual

[2] As it must for the purpose of a motion to dismiss, this statement of facts accepts as true the factual allegations in Plaintiff's First Amended Complaint. *See Bhd. of Maint. of Way Employees v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir. 2001). It is not an admission that these facts are indeed true.

states that "a local social service agency shall refer any proposed child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings in tribal court." *Id*. at p. 29, ¶ 151 (emphasis omitted).

Second, in the case of an Indian child *not* residing or domiciled within an Indian reservation, the Manual states that "a local social service agency shall refer any proposed Indian child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings in tribal court." *Id*. (emphasis omitted). The Manual requires, however, that the agency "give written notice of any [such] referral" to "a child's parent(s) or Indian custodian, designated tribal representative and tribal court." *Id*. The agency shall not make the referral to the tribal social service agency in the event that: (1) it "concludes that there is good cause to the contrary"; (2) "*[e]ither parent of a child objects, in writing, to the referral*"; or (3) either a designated tribal representative or the tribal court declines to accept jurisdiction. *Id*. (emphasis added).

B. Child Custody Proceedings Involving Plaintiff James Nguyen's Minor Child, A.N.

Plaintiff James Nguyen is not a member of the Shakopee Mdewakanton Sioux Community ("SMSC"). *Id.* at pp. 5-6, ¶ 1. A.N. is the child of Mr. Nguyen and Amanda Gustafson. *Id.* at ¶¶ 1-2. Both A.N. and Ms. Gustafson are SMSC members. *Id.* at p. 6, ¶ 2. Mr. Nguyen and Ms. Gustafson were married in June 2014, and A.N. was born that September. *Id.* at p. 9, ¶¶ 19, 22.

In October 2014, Mr. Nguyen alleges that Ms. Gustafson attacked him, and he obtained an order for protection for himself and A.N. in Scott County. *Id.* at ¶¶ 24-26.

That November, Mr. Nguyen alleges that Ms. Gustafson filed a complaint against him with SMSC child protection services in retaliation for the order for protection. *Id.* at p. 11, ¶ 36-37. SMSC opened a child welfare case. *Id.* at ¶ 38. Scott County had no involvement in the matter. *Id.* at ¶ 39. When the complaint was made, A.N. did not reside and was not domiciled on the SMSC reservation. *Id.* at ¶ 40, 42.

On July 30, 2015, the SMSC Tribal Court closed the child welfare case. *Id.* at p. 12, ¶ 50. The Court, however, retained jurisdiction over A.N. as a "ward of the court" and gave Mr. Nguyen and Ms. Gustafson temporary legal and physical custody over the child. *Id.*

In June 2017, Mr. Nguyen filed for divorce in California, where he was living at the time. *Id.* at p. 15, ¶¶ 67-70. The California court granted Mr. Nguyen full custody of A.N. *Id.* at ¶ 70.

Ms. Gustafson then filed for divorce with the SMSC Tribal Court. *Id.* at p. 16, ¶ 73. After an e-mail from Ms. Gustafson's divorce attorney, the Tribal Court ordered that A.N. be returned to Minnesota. *Id.* at ¶ 74. Mr. Nguyen's California case was dismissed in favor of the Tribal Court's jurisdiction. *Id.* at ¶ 75. Since Ms. Gustafson commenced the SMSC divorce proceedings, Mr. Nguyen has been limited to visitation with A.N. on the SMSC reservation or within Scott County. *Id.* at ¶ 76.

C. Child Custody Proceedings Involving Plaintiff Michelle Steinhoff's Minor Child, T.J.

Plaintiff Michelle Steinhoff is not a member of the SMSC. *Id.* at p. 6, ¶ 3. T.J. is the child of Ms. Steinhoff and Daniel Jones. *Id.* at p. 18, ¶¶ 89-90. Both Mr. Jones and T.J. are SMSC members. *Id.* at pp. 18, 48, ¶¶ 90, 278.

Soon after T.J. was born, Mr. Jones initiated child support and custody proceedings in SMSC Tribal Court. *Id.* at p. 19, ¶ 92. The Tribal Court awarded joint legal custody and gave Ms. Steinhoff full physical custody and Mr. Jones visitation. *Id.* at ¶ 94. Mr. Jones was then incarcerated for prior criminal convictions, including felony child neglect and endangerment. *Id.* at pp. 18-19, ¶ 91-92.

After Mr. Jones was released, the Tribal Court allowed him to have unsupervised visitation with T.J. *Id.* at p. 19, ¶ 97. In August 2013, a Scott County child protection worker came to Ms. Steinhoff's home. *Id.* at ¶ 98. The worker allegedly warned Ms. Steinhoff that, given his criminal history, Mr. Jones was prohibited from having unsupervised contact with any children, including T.J. *Id.* at pp. 19-20, ¶ 98. The worker also informed Ms. Steinhoff that the findings from her visit would be reported to SMSC, and it would be up to them whether to open a child welfare case. *Id.* at p. 19, ¶ 98. Plaintiffs allege that T.J. did not reside and was not domiciled on the SMSC reservation. *Id.* at pp. 18, 40, ¶¶ 89, 212.

In late June 2014, while T.J. was visiting Mr. Jones, Ms. Steinhoff was informed by an SMSC child protection official that SMSC had opened a child welfare case and would be taking physical and legal custody of T.J. *Id.* at p. 20, ¶ 101-02. SMSC placed

T.J. with Mr. Jones. *Id.* at p. 20, ¶ 104. Ms. Steinhoff then contacted Scott County Child Protection Services and asked it to open a child welfare case in state court. *Id.* at p. 21, ¶ 107. Because there was already a case in Tribal Court, county officials denied her request. *Id.* at ¶¶ 107-08. The Tribal Court case was eventually closed, but the Tribal Court retained jurisdiction over T.J. as "a ward of the tribal court." *Id.* at ¶ 110.

In 2017, Ms. Steinhoff had a meeting with school staff about T.J.'s Independent Education Program-Plan (IEP). *Id.* at ¶ 111. Mr. Jones attended the meeting by phone. *Id.* at pp. 21-22, ¶¶ 111, 116. Ms. Steinhoff alleged that unbeknownst to her, SMSC child welfare officials were listening in on the call with Mr. Jones. *Id.* at p. 22, ¶ 116. Shortly thereafter, an SMSC child welfare official contacted Ms. Steinhoff. *Id.* at ¶ 119. The official said that she was concerned about T.J.'s school attendance and SMSC would be opening a child welfare case. *Id.* at ¶ 119. The case was opened and remained open at the time Plaintiffs' Complaint was filed. *Id.* at pp. 22-23, ¶¶ 119-21.

D. Plaintiffs' Complaint

Count I of Plaintiffs' Complaint alleges that ICWA preempts the Manual because the manual conflicts with ICWA's requirements. *Id.* at p. 36, ¶ 183-86. In Counts II and III, Plaintiffs contend that the Commissioner is liable under 42 U.S.C. § 1983 for procedural and substantive due process violations under the Fourteenth Amendment of the United States Constitution as a result of incorrectly advising Scott County on the requirements of ICWA. *Id.* pp. 39-40, 44 ¶¶ 208, 213-14, 246, 252-53. Finally, in Count IV, Plaintiffs contend that the Commissioner is liable under Section 1983 because the

Manual's erroneous guidance caused Scott County to violate their procedural due process rights under ICWA. *Id.* at p. 48, ¶ 282.

STANDARD OF REVIEW

In reviewing a complaint under a Rule 12(b)(6) motion to dismiss, the Court considers all facts alleged in the complaint as true, and construes the pleadings in a light most favorable to the non-moving party. *See Bhd. of Maint. of Way Employees v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir. 2001). Rule 12(b)(6) eliminates actions that are fatally flawed in their legal premises, "streamlin[ing] litigation by dispensing with needless discovery and fact finding." *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989). To survive a motion to dismiss, a complaint must provide more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Courts must undertake the "context-specific task" of determining whether the plaintiff's allegations "nudge[]" their claims against each defendant "across the line from conceivable to plausible." *Id.* at 679-80. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Farnham St. Fin., Inc. v. Pump Media, Inc.*, No. 09-233

(MJD/FLN), 2009 WL 4672668, at *3 (D. Minn. Dec. 8, 2009) (quoting *Iqbal*, 556 U.S. at 678).

ARGUMENT

I. ALL OF PLAINTIFFS' CLAIMS AGAINST THE COMMISSIONER SHOULD BE DISMISSED BECAUSE THE MANUAL DOES NOT CONFLICT WITH THE REQUIREMENTS OF ICWA.

All four of Plaintiffs' claims against the Commissioner are dependent on their assertion that the Manual incorrectly advised Scott County on tribal and state jurisdiction over Indian child custody matters under ICWA. Plaintiffs' claims against the Commissioner should be dismissed because ICWA is not implicated and nevertheless the Manual's instructions regarding tribal and state jurisdiction over Indian child custody proceedings are consistent with ICWA.

This case involves application of statutes affecting the authority of Minnesota's Indian tribes to hear Indian child custody cases. Accordingly, throughout its consideration of ICWA and other applicable law, the Court must be mindful that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

Jurisdiction over Indian child custody proceedings is predominantly governed by ICWA, 25 U.S.C. §§ 1901-1963 ("ICWA"). ICWA was passed due to "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of 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, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Hearings on the bill contained "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Id.* at 34. The congressional findings memorialized in ICWA include "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies" and that "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4), (5).

"At the heart of . . . ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. [25 U.S.C. § 1911] lays out a dual jurisdictional scheme" in which jurisdiction over Indian child custody proceedings depends on whether the subject child resides or is domiciled within the reservation. *Holyfield*, 490 U.S. at 36. First, Section 1911(a) grants exclusive tribal jurisdiction when a child custody proceeding involves "an Indian child who resides or is domiciled within the reservation of such tribe." Second, Section 1911(b) applies to "an Indian child not domiciled or residing within the reservation of the Indian child's tribe." Plaintiffs allege that A.N. and T.J. did not reside and were not domiciled within the SMSC reservation. Doc. 12 at pp. 11, 18, 39-40, 44, 48, ¶¶ 40, 42, 89, 211-12, 249-50, 279-80.

Plaintiffs claim that under Section 1911(b) state courts must have exclusive *original* jurisdiction over proceedings involving Indian children not residing or domiciled

within a reservation and that the Manual therefore errs in counseling initial referral to a tribal social service agency rather than first requiring a state-court proceeding where the parents can object to the referral. Doc. 12, pp. 24, 27, 31-32, 36-37, 41, 44-45, 47-49. This is incorrect: nothing in the text of Section 1911(b) requires an initial state-court proceeding. 25 U.S.C. § 1911(b). Instead, Section 1911(b) merely provides a procedure for transferring existing state-court proceedings to tribal court:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

Id. (emphasis in original). Here, Plaintiffs do not allege that a state-court proceeding existed as to A.N. or T.J. Moreover, the Manual only addresses what happens during an investigation prior to any court proceedings and therefore ICWA does not govern the cases of A.N. and T.J. or the challenged section of the Manual.

Nevertheless, the instructions in the Manual are consistent with the presumptive tribal jurisdiction created by Section 1911(b) and comply with the parental notice provisions of the statute. By requiring transfer to tribal court in the absence of "good cause," "objection by either parent," or "declination of jurisdiction by the tribal court," Section 1911(b) "creates concurrent *but presumptively tribal* jurisdiction in the case of children not domiciled on the reservation." *Holyfield*, 490 U.S. at 36 (emphasis added); *see also In re Welfare of Child of: T.T.B. & G.W.*, 724 N.W.2d 300, 305 (Minn. 2006)

(same).[3] Consistent with this presumptively tribal jurisdiction, the Manual instructs local social service agencies to refer proposed child custody proceedings involving Indian children not domiciled or residing on a reservation to tribal social service agencies for proceedings in tribal court. Doc. 12 at p. 29, ¶ 151. The Manual is also consistent with the ability of parents to object to tribal court transfer under Section 1911(b). It requires the local social service agency to notify the parents prior to any referral and prohibits the referral if either parent objects. Doc. 12 at p. 29, ¶ 151.

To the extent Plaintiffs allege that the Manual caused a violation of Section 1911(b), their claims should be dismissed.[4]

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[3] Plaintiffs make extensive arguments regarding Public Law 280. Doc. 12 at pp. 30-33, ¶¶ 156-70. Public Law 280, in relevant part, "gives certain states . . . limited jurisdiction over civil causes of action that arise in Indian country." *Doe v. Mann*, 415 F.3d 1038, 1048 (9th Cir. 2005) (citing the civil provision of Public Law 280, 28 U.S.C. § 1360(a), which applies to SMSC). Plaintiffs argue that Public Law 280 modifies Section 1911(a), Doc. 12 at pp. 30-33, ¶¶ 156-70, because Section 1911(a) gives Indian Tribes exclusive jurisdiction over "child custody proceeding[s] involving an Indian child who resides or is domiciled within the reservation . . . except where such jurisdiction is *otherwise vested in the State by existing Federal law*." 28 U.S.C. 1911(a) (emphasis added). Section 1911(b) does not contain Section 1911(a)'s language setting forth an exception "where such jurisdiction is otherwise vested in the State by existing Federal law." Section 1911(b) accordingly operates under only its own terms, and Public Law 280 does not even arguably modify Section 1911(b). *See Mann*, 415 F.3d at 1048 (discussing Public Law 280's relevance to Section 1911 only through the "exception" language contained exclusively in Section 1911(a)); *In re M.A.*, 137 Cal.App.4th 567, 576 (2006) (rejecting argument that because of Public Law 280, Section 1911(b)'s "transfer provisions are not effective" until they are "reassumed" under 25 U.S.C. § 1918).

[4] The Manual also correctly instructs social service agencies regarding children who are wards of tribal court. It provides that "any proposed child custody proceeding involving an Indian child who is a ward of tribal court, regardless of the residence or domicile of a child, must be referred to the tribal social service agency for appropriate proceedings in tribal court." Doc. 12 at p. 29, ¶ 151 (emphasis omitted). This is consistent with Section 1911(a), which provides, "Where an Indian child is a ward of a tribal court, the Indian

(Footnote Continued on Next Page.)

Finally, Plaintiffs also argue that the Manual violates Section 1911(a) because it incorrectly advises county social service agencies regarding Indian child custody proceedings involving Indian children residing or domiciled within a reservation. But Plaintiffs do not have standing to challenge that provision because they do not allege that either A.N. or T.J. were residing or domiciled within a reservation.[5] *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (standing requires, among other things, that the plaintiff "suffered an injury in fact"); *see also Golden v. Zwickler*, 394 U.S. 103, 108

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tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." 25 U.S.C. § 1911(a); *Holyfield*, 490 U.S. at 36 (stating that ICWA provides exclusive tribal court jurisdiction for wards of tribal court regardless of domicile or residence).

[5] Even if the Court determines that Plaintiffs have standing to challenge the portions of the Manual dealing with children who reside or are domiciled on a reservation, the Manual complies with Section 1911(a). The Manual provides that when the subject child "resides or is domiciled within an Indian reservation and is not a ward of tribal court," local social service agencies shall "refer any proposed child custody proceeding involving an Indian child to the tribal social service agency for appropriate proceedings in tribal court." Doc. 12, at p. 29, ¶ 151 (emphasis omitted). This is consistent with Section 1911(a), which provides that an Indian tribe has "jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). As noted above, Plaintiffs argue that Public Law 280 modifies Section 1911(a). Even if this were the case, Public Law 280 does not divest tribes of jurisdiction: it at most grants states *concurrent* jurisdiction. *See Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."); *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991) ("neither [ICWA] nor Public Law 280 prevents [tribes] from exercising concurrent jurisdiction."). Because tribes have jurisdiction even if Public Law 280 modifies Section 1911(a), the Manual's guidance directing referral to tribes would remain correct.

(1969) (stating that federal courts "do not render advisory opinions" (quotation omitted)); Doc. 12 at pp. 11, 18, 39-40, 44, 48, ¶¶ 40, 42, 89, 211-12, 249-50, 279-80.

II. PLAINTIFFS' SECTION 1983 CLAIMS SHOULD ALSO BE DISMISSED BECAUSE PLAINTIFFS DO NOT ALLEGE THAT THE MANUAL WAS A MOVING FORCE BEHIND ANY VIOLATION.

"Because the real party in interest in an official-capacity suit is the government entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law." *Hafner v. Melo*, 502 U.S. 21, 25 (1991) (quotations omitted). "[A] governmental entity is liable under section 1983 only when the entity itself is a 'moving force' behind the violation." *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987). This means that "the entity's official 'policy or custom' must have 'caused' the constitutional violation; there must be an 'affirmative link' or a 'causal connection' between the policy and the particular constitutional violation alleged." *Id.*

Even if the Manual is not consistent with ICWA, Plaintiffs' Section 1983 claims fail because they do not allege that the Department of Human Services' ("DHS") "policy or custom" as expressed in the Manual caused a violation of the federal constitution or other federal law. The portion of the Manual that Plaintiffs take issue with addresses when "county social service agencies and private child-placing agencies" should "refer" a "proposed child custody proceeding" to "the tribal social service agency for appropriate proceedings in tribal court." Doc. 12 at p. 28-29, ¶ 150-51 (emphasis omitted).

But, Plaintiffs do not allege that either A.N. or T.J. were referred to tribal social services or tribal court by Scott County. As to A.N., SMSC Tribal Court opened a child protection case regarding A.N. after Ms. Gustafson filed a complaint with SMSC child

services. *Id.* at p. 11, ¶¶ 37-38. The case originated with the tribal social service agency and Scott County was never involved. *Id.* at ¶¶ 37-39. Scott County was also not involved when SMSC Tribal Court again asserted jurisdiction over A.N. in 2017. *Id.* p. 16, at ¶¶ 73-74.

As to T.J., Plaintiffs allege that a Scott County child protection worker visited with T.J. and Ms. Steinhoff in 2013. *Id.* at p. 19, ¶ 98. But Plaintiffs do not allege that any proposed child custody proceeding was ever actually referred to SMSC by Scott County, and it was not until almost a year later that an SMSC child services official informed Ms. Steinhoff that SMSC Tribal Court would be taking custody of T.J. *Id.* at p. 20, ¶ 102. Scott County also is not alleged to have had involvement in the second child protection case that SMSC initiated after T.J.'s IEP meeting. *Id.* at p. 22, ¶¶ 116-20.

The child custody proceedings involving A.N. and T.J. were initiated by SMSC child protection officials. Because there was no referral by a county social service agency, the Manual could not have caused any violation of Plaintiffs' rights. *See Clay*, 815 F.2d at 1170. Plaintiffs' Section 1983 claims against the Commissioner should be dismissed.

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM THAT THE MANUAL VIOLATED SUBSTANTIVE OR PROCEDURAL DUE PROCESS.

Plaintiffs allege that the Manual violated Fourteenth Amendment substantive (Count II) and procedural (Count III) due process. As stated above, these claims should be dismissed because they are dependent on the erroneous allegation that the Manual conflicts with ICWA and because Plaintiffs fail to allege that Scott County referred A.N.

or T.J. to SMSC pursuant to the policies in the Manual. Furthermore, to the extent that the Court determines that Scott County referred A.N. and T.J. to SMSC pursuant to the Manual and that Plaintiffs' constitutional claims are not solely based on violation of ICWA, Plaintiffs' claims fail for the reasons stated below.

In addition to violations of ICWA, Plaintiffs allege a violation of their constitutional right to parent. Doc. 12 at pp. 2, 38, 43, ¶¶ 200, 238; *see Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). But Plaintiffs do not allege that the guidance in the Manual caused a violation of this fundamental right. Instead, Plaintiffs allege that the SMSC Tribal Court interfered with their ability to parent their children. Doc. 12 at pp. 4-5, 12-13, 16, 20-21, 40, 42, 45-46 ¶¶ 50, 53-54, 74-79, 102, 110, 215-217, 228, 254-56, 266. As discussed above, a government agency may be liable under § 1983 only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ." *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694, (1978); *see also Clay*, 815 F.2d at 1170 ("[A] governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the violation.").

The only DHS "policy or custom" challenged here is the referral instructions contained in the Manual. Even if Plaintiffs are claiming that the manual caused A.N. and T.J. to be referred to SMSC, Plaintiffs do not claim that the referral *per se* violates their right to parent; instead, the violation they allege was done by the tribal court's application

of tribal law. Plaintiffs plead no facts, however, suggesting that a tribal court is an entity "whose edicts or acts may fairly be said to represent [the] official policy" of the Commissioner, as required for the Commissioner's liability. *Monell*, 436 U.S. at 694. Plaintiffs also plead no facts suggesting that a tribal court, in applying tribal law, is executing a policy or custom of the Commissioner, as also required. *Id*. Indeed, far from being executors of DHS policy, tribes are "quasi-sovereigns [that] enjoy rights and privileges of self-government and local culture," over whose courts the Commissioner exercises no authority or control.[6] *United States v. Wadena*, 152 F.3d 831, 843 (8th Cir. 1998).

[6] The Commissioner does not concede this would constitute a violation of Plaintiffs' statutory or Constitutional rights.

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that the Court dismiss Plaintiffs' First Amended Complaint with prejudice.

Dated: November 1, 2017

Respectfully submitted,

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