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 ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, v. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their official capacities. Defendants.	)	Case No.: 13-5020

MALSAM-RYSDON'S AND VAN HUNNIK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

COMES NOW, Robert L. Morris, Day Morris Law Firm, LLP as attorney for Luann Van Hunnik, 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 Kim Malsam-Rysdon, Secretary of the South Dakota Department of Social Services, who provides this Memorandum of Law in Support of Motion to Dismiss.

A. Background

1. Defendants Malsam-Rysdon and Van Hunnik.

Malsam-Rysdon is the Cabinet Secretary for the South Dakota Department of Social Services (SDDSS). In her capacity as Secretary, she is responsible for the administration and functioning of the SDDSS which includes responsibility for program and fiscal administration of

the nine (9) divisions which comprise the SDDSS. She reports directly to the Governor's Senior Advisor and the Governor.

Ms. Van Hunnik is a Regional Manager for Region 1[1] which is comprised of Pennington County. As the Regional Manager, she oversees the Rapid City office for the Division of Child Protection Services. As Regional Manager, she reports directly to the Division Director of Child Protection Services and supervises Child Protection Supervisors within the region.

2. Claims Against The Secretary and Van Hunnik in Their "Official Capacity."

The Defendants in this case are an elected Judge, an elected States Attorney, a Governor appointed State Cabinet Secretary, and a SDDSS Regional Manager employee. The Plaintiffs initiated this action for Declaratory Injunction and Relief by filing a 39-page Complaint containing 129 separate paragraphs. A fair reading of the Complaint shows a great amount of legal argument, conclusory statements, and conclusory allegations against "Defendants" in some places and allegations against specific Defendants by name in other places. The Complaint fails to state a claim against Malsam-Rysdon and Van Hunnik. See, *Bell Atlantic Corp. vs. Twonbly*, 550 US 544, 555 (2007). (The plaintiff's complaint does not need detailed factual allegations but requires more than labels and conclusions and a formulaic recitation of the elements of the cause of action will be insufficient.); and *Bevers vs. Lockhart*, 755 F2d 657, 663 (8th Cir. 1985). (A dismissal is appropriate if a complaint does not contain the bare essentials.)

Paragraph ¶12 of the Complaint [Doc. 1] sets forth that the alleged acts set out in the Complaint were undertaken by Malsam-Rysdon and Van Hunnik et. al., acting under color of state law; that they are sued in their "official capacities" only; and that each of them is a "policy maker" with respect to the policies challenged in the lawsuit. As such, the Plaintiffs invoke 42

[1] The undersigned has previously referenced Ms. Van Hunnik as Regional Manager for Region 6. This was in error.

U.S.C §1983; recognize that only prospective injunctive relief is available pursuant to *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989); and invoke the *Monell* standards for public entity liability under 42 U.S.C. §1983 pursuant to *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978), as the basis for their claims.

The following claims are being made against Malsam-Rysdon and Van Hunnik in their official capacities: (1) SDDSS has a policy, practice, and custom of refusing and failing to provide Indian families and Indian tribes with adequate notice of a meaningful hearing at a meaningful time following the removal of Indian children from their homes by state officials thereby violating the Due Process Clause [Doc. 1, ¶¶ 62-73]; (2) SDDSS has a policy, practice, and custom of refusing and failing to provide Indian families and Indian tribes with adequate notice and a meaningful hearing at a meaningful time following the removal of Indian children from their homes by state officials thereby violating the Indian Child Welfare Act [Doc. 1, ¶¶ 74-112]; and (3) SDDSS has a policy, practice, and custom of coercing Indian parents into waiving their rights to adequate notice and a meaningful hearing at a meaningful time thereby violating the Due Process Clause and the Indian Child Welfare Act [Doc. 1, ¶¶ 113-129].

3. Plaintiffs' Requested Remedies For Alleged Claims.

The Plaintiffs request the Court to issue Declaratory Judgment that declares as a matter of law that the SDDSS alleged policies, practices and customs violate (1) the Due Process Clause and (2) the Indian Child Welfare Act. The Plaintiffs also request the Court to enter prospective injunctive relief against SDDSS requiring it to provide adequate notice and a meaningful hearing at a meaningful time consistent with Due Process and the Indian Child Welfare Act. Lastly, the Plaintiffs seek prospective injunctive relief preventing SDDSS from coercing Indian parents into waiving their rights to adequate notice and a meaningful hearing at a meaningful time.

It is evident why Malsam-Rysdon and Van Hunnik are sued. The Plaintiffs recognize that 42 U.S.C. § 1983 prohibits the issuance of injunctive relief against Judge Davis. [Doc. 1, fn. 1, page 38). Thus, the Plaintiffs seek injunctive relief against Malsam-Rysdon and Van Hunnik (SDDSS) by alleging policies, practices, and customs that allegedly violate the law but do not specify what those policies, practices, and customs are.

The Court should take judicial notice that the process beginning at the 48 hour hearing juncture is fully within the control of the presiding judicial official. SDDSS employees or officials clearly have no control over a judicial official's interpretation or application of the applicable law. There is no allegation or facts which support any allegation that the SDDSS is a "moving force" behind any alleged violation. See, *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

B. Applicable Law

1. Failure to State a Claim Standard.

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Facial plausibility, in turn, requires that the claim plead facts from which a court may "draw the reasonable inference that the defendant is liable for the misconduct alleged." *L.L. Nelson Enterprises, Inc. v. County of St. Louis, Missouri*, 673 F.3d 799, 804-05 (8th Cir. 2012). The plaintiff's complaint does not need detailed factual allegations but requires more than labels and conclusions and a formulaic recitation of the elements of the cause of action will be insufficient. *Bell Atlantic Corp. vs. Twonbly*, 550 US 544, 555 (2007). A dismissal is appropriate if a complaint does not contain the bare essentials. *Bevers vs. Lockhart*, 755 F2d 657, 663 (8th Cir. 1985). The Plaintiffs' Complaint fails to meet the requirements to state a valid claim against Malsam-Rysdon and Van Hunnik.

2. 42 U.S.C. §1983

42 U.S.C §1983 provides that:

> Every person, who under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the Jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws shall be liable to the party injured.

To state a claim under §1983 the Plaintiffs must show a set of facts whereby they have been deprived of a federal statutory right or a constitutional right under color of state law. 42 U.S.C §1983, *Maine v. Thiboutot*, 448 US 1, 4 (1980).

3. Claims Against Government Officials in Their "Official Capacity."

42 U.S.C §1983 provides the federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against the state for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the state has waived its immunity or unless Congress has exercised its undoubted power under §5 of the Fourteenth Amendment to override that immunity[2]. *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989). A suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself. *Will*, 491 U.S. at 71. Nonetheless, a state official, when sued for prospective injunctive relief, in his or her official capacity, is not treated as an action against the state. *Id*. at fn. 10 (citing, *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985)); *ExParte Young*, 209 U.S. 123, 159-160 (1908). An official-capacity suit against a government officer is equivalent to suit against the employing governmental entity. *Crawford v. Van Buren County*, 678 F.3d 666, 669 (8th Cir. 2012).

[2] The State of South Dakota has not waived 11th Amendment immunity and nothing in ICWA shows that Congress has exercised its power to override that immunity.

4. Governmental Liability Standards for 42 U.S.C. §1983 Liability.

Official-capacity suits typically involve either allegedly unconstitutional state policies or unconstitutional actions taken by state agents possessing final authority over a particular decision. *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989). To establish liability in an official-capacity suit under 42 U.S.C. §1983, the plaintiff must show that either the official named in the suit took an action pursuant to an unconstitutional governmental policy or custom, or that he or she possessed final authority over the subject matter at issue and used that authority in an unconstitutional manner. *Nix*, 879 F.2d at 433. In an official-capacity suit, the plaintiff must prove more than that a constitutional right was violated by the named individual defendant, for a governmental entity is liable under §1983, only when the entity itself is a "moving force" behind the violation. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987). The Plaintiffs do not allege that an unconstitutional "policy or custom" of the State or South Dakota Department of Social Services was the "moving force" behind the injuries. For this reason alone, the Complaint fails to state a claim and should be dismissed.

The "policy or custom" requirement applies in §1983 cases when prospective relief is sought by the Plaintiff. *Los Angeles County v. Humphries*, __ U.S. __, 131 S. Ct. 447, 454-55 (2010). Congress intended potential §1983 liability where a [governmental entity's] *own* violations were at issue but not where only the violations of *others* were at issue. The "policy or custom" requirement rests upon that distinction and embodies it in law. *Los Angeles County*, 131 S. Ct. at 453. [Emphasis in original]. A [governmental entity] cannot be held liable *solely* because it employs a tortfeasor – or in other words, a [governmental entity] cannot be held liable under 42 U.S.C. §1983 on a respondeat superior theory. *Monell v. Dept. of Soc. Serv.*, 436 U.S.

658, 691(1978); *Los Angeles County v. Humphries*, __ U.S. __, 131 S. Ct. 447, 454-55 (2010). [Emphasis in original].

There can only be liability for a 42 U.S.C. §1983 claim if a public entity "policy or custom" caused a plaintiff to be deprived of a federal right. *L.A. County v. Humphries*, 131 S. Ct. 447, 450 (2010); *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978). An "official policy" involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy. *Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 645 (8th Cir. 1990). See also, *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

To establish the existence of a governmental custom, a plaintiff must prove: 1) the existence of a continuing, widespread, persistent pattern of constitutional misconduct by the governmental entity's employees; 2) deliberate indifference to or tacit authorization of such conduct by the governmental entities policy-making officials after notice to the officials of that misconduct; and 3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation. *Jane Doe A by and through Jane Doe*, 901 F.2d at 646.

Under a failure to train or supervise theory, the inadequacy of training may serve as the basis for 42 U.S.C. §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the governmental employee comes in contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Robinette v. Jones*, 476 F.3d 585, 591 (8th Cir. 2007). As framed by the U.S. Supreme Court:

> [T]he focus must be on the adequacy of the training program in relation to the tasks the particular [governmental employee] must perform. That a particular [governmental employee] may be unsatisfactorily trained will not alone suffice to fasten liability on

> the [governmental entity], for the [governmental employee's] shortcomings may have resulted from factors other than a faulty training program.

City of Canton v. Harris, 489 U.S. 378, 390-91(1989).

Liability arises for deficient training when 1) the training practices are inadequate; 2) the failure to train reflects a deliberate or conscious choice by the governmental entity; and 3) an alleged deficiency in the training procedures actually caused the Plaintiffs' injury. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *Larson by Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996). Plaintiffs' Complaint fails to properly allege a valid claim for deficient training.

C. Legal Argument[3]

1. Count I -- The Plaintiffs' Complaint is Devoid of a Policy, Practice, or Custom Which Caused an Alleged Constitutional Violation Regarding Due Process.

The crux of the Plaintiffs' Due Process claim is that there should be "more" due process at the 48 hour hearing and prior to filing a petition for adjudication, than what is being afforded by the Circuit Court in Pennington County. The Plaintiffs point to no statute, administrative regulation or policy/practice/custom of the SDDSS which restricts the level of due process afforded at the 48 hour hearing. The Complaint is devoid of any specific facts that SDDSS took any action pursuant to an alleged unconstitutional policy or custom.

The Complaint sets forth no supporting factual allegations that Malsam-Rysdon and Van Hunnik made deliberate choices, among various alternatives, to follow a course of action which caused a constitutional violation. Further, there exists no supporting factual allegation that Malsom-Rysdon and Van Hunnik were or are deliberately indifferent regarding any alleged

[3] Defendants Malsam-Rysdon and Van Hunnik incorporate the Memorandum In Support of Defendants' Motion to Dismiss filed by counsel for Judge Davis. The arguments contained therein, in support of the Motion to Dismiss, are adopted. Malsam-Rysdon and Van Hunnik file this Memorandum to address particularly that an alleged policy, procedure, or custom caused the Plaintiffs to be deprived of a constitutional or federal right.

governmental custom which caused a constitutional deprivation. *Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 645 (8th Cir. 1990); *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

The Complaint also lacks specific factual allegations that Malsam-Rysdon and Van Hunnik/SDDSS have final authority of the level of due process afforded at the 48 hour hearing or that authority was used in an unconstitutional manner to restrict the level of due process at the 48 hearing. *Nix v. Norman*, 879 F.2d 429, 431-33 (8th Cir. 1989). Also, the Plaintiffs have not asserted, nor can they assert, that the SDDSS is a "moving force" behind any alleged violation. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

The process at the 48 hour hearing is solely under the control of the presiding judicial official. The presiding judicial official directs SDDSS employees as to the process to undertake pursuant to the orders of the judicial official. The SDDSS employees then do their job as required by the applicable statutory law. Therefore, even assuming, for sake of argument, that there has been a constitutional violation, there exists no "affirmative link" or "causal connection" related to SDDSS policy or the alleged lack of sufficient due process. There simply exists no policy or custom that is the "moving force" behind the alleged deprivation. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

2. Count II -- The Plaintiffs Presume Certain Sections of ICWA Apply at the 48 Hour Hearing Stage and the Complaint Only Argues That a Policy, Practice, or Custom Exists to Violate ICWA.

Judge Davis's legal analysis in his Memorandum appropriately covers the ICWA claims made by the Plaintiffs. (Judge Davis's Memorandum pgs. 5 – 11). Malsam-Rysdon and Van Hunnik find no need to provide additional legal analysis or argument, except in response to

allegations of a policy, practice, or custom that allegedly caused a deprivation of a federal or constitutional right.

As they did in the Due Process claim, the Plaintiffs lump the Defendants together alleging that some unknown policy, practice or custom in applying and interpreting ICWA caused a constitutional deprivation. If someone other than SDDSS did so, that does not create liability with SDDSS. Congress intended potential §1983 liability where a [governmental entity's] *own* violations were at issue but not where only the violations of *others* were at issue. *Los Angeles County v. Humphries*, __ U.S. __, 131 S. Ct. 447, 453 (2010). Most of the allegations relate to a judicial official's interpretation or application of ICWA.

There exists no specific factual allegations that anyone in the SDDSS took action pursuant to an unconstitutional policy or custom to violate ICWA or that anyone in the SDDSS possessed final authority of the interpretation or application of ICWA and used such authority in an unconstitutional manner. Moreover, there exists no allegation or specific facts that the SDDSS was the moving force behind any alleged violation of ICWA. *Nix v. Norman*, 879 F.2d 429, 431-33 (8th Cir. 1989); *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

3. Count III -- The Coercion Allegation is Unsupported by Facts and Fails to Point to a Policy, Practice, or Custom Which Caused a Constitutional Deprivation.

Most of the argumentative allegations in Count III – Coercion, are directed at judicial officials in Pennington County. Plaintiffs boldly label the judicial officials' efforts to have SDDSS employees work with the parents as "a cruel[4] hoax." They go on to allege that SDDSS

[4] This allegation is hyperbole. Parents appear at the 48 hour hearing because their child has been taken into temporary custody by law enforcement because the child is abandoned or seriously endangered (SDCL 26-7A-12(2)) or is in imminent danger (SDCL 26-7A-12(4)). The Plaintiffs ignore the triggering event that causes judicial and SDDSS involvement. Further, like many other conclusory allegations, the availability of reunification efforts using an informal process, is allowed under state law and is ignored by the Plaintiffs. See, SDCL 26-7A-19(2). This process has been recognized as valid by the South Dakota Supreme Court in *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62.

makes matters worse,[5] alleging that SDDSS has: inadequately trained SDDSS employees to work with Indian parents in a meaningful way and failed to commit staff and resources to reunification at the earliest reasonable opportunity. It is further alleged SDDSS employees "keep Indian parents in the dark" regarding various matters.

Plaintiffs continue to make conclusory allegations in this Count which do not state a claim for relief. The alleged "coercive" conduct is merely judicial officials using one of the statutory alternatives available, i.e. a voluntary informal reunification process. SDCL 26-7A-19(2). If it is in the best interests of the child, and if the Indian parent agrees to the voluntary process, the SDDSS employees work with the parents to achieve the goal of reunification. SDDSS employees follow the judicial official's directives and orders in this regard. The Plaintiffs point to no official "policy or custom" that caused, or was the moving force behind any alleged constitutional violation. *Clay v. Conlee*, 815 F2d 1164, 1170 (8th Cir. 1987); *Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 646 (8th Cir. 1990).

Lastly, the Plaintiffs allege that SDDSS employees have been inadequately trained to work with Indian parents in a meaningful manner. The allegation does not state a constitutional violation. The Complaint is devoid of how existing training is inadequate; that such alleged inadequate training reflects a conscious choice by SDDSS; or that any alleged inadequate training actually caused the Plaintiffs' alleged injury. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *Larson by Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996).

---

[5] Coercion is defined as compulsion or depriving someone of their free choice. *Black's Law Dictionary*, pg. 258, 6th Edition. Malsam-Rysdon and Van Hunnik, like Judge Davis, encourage the Court to read the Young and Walking Eagle transcript upon the same being provided by Plaintiffs' counsel. Coercion simply does not exist in the 48 hour hearing setting and is a blatant misrepresentation of the facts and the process.

Wherefore, Defendants Malsam-Rysdon and Van Hunnik respectfully request that Court dismiss all claims against them and enter judgment accordingly.

Dated: May 20th, 2013.

DAY MORRIS LAW FIRM, LLP
Attorneys for LuAnn Van Hunnik and Kim Malsam-Rysdon – Official Capacity

By : */s/ Robert L. Morris*
Robert L. Morris
117 5th Avenue, PO Box 370
Belle Fourche, SD 57717-0370
(605) 723-7777
bobmorris@westriverlaw.com

Special Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document, **MALSAM-RYSDON'S AND VAN HUNNIK'S POSSESSIVE MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**, upon the persons herein next designated, on the date below shown, as follows:

Stephen L. Pevar ACLU 330 Main Street, First Floor Hartford, Connecticut 06106 *Attorney for Plaintiffs*	___ U.S. Mail ____ Federal Express ____ Hand Delivery ____ Facsimile Transmission ____ E-mail _X_ Federal US District Court ECF System
Dana L. Hanna Hanna Law Office, P.C. 816 Sixth St. P.O. Box 3080 Rapid City, South Dakota 57709 *Attorney for Plaintiffs*	___ U.S. Mail ____ Federal Express ____ Hand Delivery ____ Facsimile Transmission ____ E-mail _X_ Federal US District Court ECF System
Robert Doody ACLU of South Dakota P.O. Box 1170 Sioux Falls, SD 57101 *Attorney for Plaintiffs*	___ U.S. Mail ____ Federal Express ____ Hand Delivery ____ Facsimile Transmission ____ E-mail _X_ Federal US District Court ECF System