UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA W., by her next friend,
Elizabeth Barricelli, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

15 Civ. 5273 (LTS) (HBP)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT POOLE'S PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT POOLE'S PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Sheila J. Poole, Acting Commissioner of the New York State Office of Children and Family Services ("Defendant Poole"), sued in her official capacity, respectfully submits this memorandum of law in support of her partial motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure: (1) all claims brought by Plaintiff Letitia James ("Plaintiff James") as against Defendant Poole, and (2) the Third Cause of Action asserting claims under the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") as asserted against Defendant Poole in the Amended Class Action Complaint for Injunctive and Declaratory Relief dated December 28, 2015 ("Amended Complaint" or "Am. Compl."), on the grounds that (a) the Public Advocate for the City of New York lacks capacity to sue Defendant Poole, and (b) Plaintiffs have failed to state a cognizable claim under the AACWA because the provisions of the AACWA relied upon by the Plaintiffs do not provide for a private right of action.

PRELIMINARY STATEMENT

Plaintiffs are nineteen minor children allegedly in New York City's foster care system ("Named Plaintiff Children") suing on behalf of a putative class ("Plaintiff Children"), and Plaintiff James, the Public Advocate for the City of New York ("the Public Advocate"). See ECF Docket No. 91, Am. Compl. ¶ 2. On July 8, 2015, Plaintiffs filed a Complaint in the Southern District of New York seeking injunctive and declaratory relief to remedy alleged deficiencies in the New York City foster care system. See ECF Docket No. 1, Compl. dated July 8, 2015. Plaintiffs filed an Amended Complaint on December 28, 2015, naming as defendants the City of New York, the New York City Administration for Children's Services ("ACS"), and Gladys Carrión, the Commissioner of ACS (collectively "City Defendants"), as well as the State of New

York, the New York State Office of Children and Family Services ("OCFS"), and Defendant Poole (collectively "State Defendants").[1] See ECF Docket Nos. 86, 91, Am. Compl., ¶ 3.

The Amended Complaint alleges five causes of action. Am. Compl. ¶¶ 341-58. As is relevant here, the Third Cause of Action posits claims under 42 U.S.C. § 1983 allegedly arising under the AACWA, 42 U.S.C. § 670 et seq. Am. Compl. ¶¶ 347-49. Specifically, Plaintiffs claim numerous purported rights under the AACWA's §§ 671(a)(10), (a)(16), (a)(22) and 675(1), (5). See Am. Compl. ¶ 348. Plaintiff James brings the AACWA claims only against State Defendants, while Named Plaintiff Children and Plaintiff Children assert the same claims against both City and State Defendants.[2] Am. Compl. p. 114; ¶¶ 347-49. Plaintiff James contends that as a result of the Defendants' alleged failure to comply with the AACWA, the Public Advocate's office has been forced to expend resources investigating and responding to complaints, and will have to expend similar resources in the future. Am. Compl. ¶ 349.

However, Plaintiff James is an official of the City of New York who has no capacity or standing to sue New York State, its agencies or officials. Indeed, she makes no allegations of her capacity to bring this suit; the Amended Complaint only states that the Public Advocate "ensures that the city government serves its citizens by exercising oversight of city agencies, investigating citizen complaints regarding city services, and making proposals or seeking relief to address perceived shortcomings or failures." Am. Compl. ¶ 172.

For the reasons stated below, the Amended Complaint should be partially dismissed on the grounds that (1) the Public Advocate of New York City lacks capacity to sue Defendant

[1] Plaintiffs voluntarily dismissed the State of New York and OCFS by Notice of Partial Voluntary Dismissal executed on January 25, 2017.

[2] By contrast, the corresponding cause of action in the original Complaint was asserted by Plaintiff James against only City Defendants. See Compl. p. 95; ¶¶ 289-91. All of Plaintiff James's claims against City Defendants were voluntarily dismissed on January 27, 2016. ECF Docket No. 101, Notice Voluntary Dismissal dated Jan. 27, 2016.

Poole; and (2) all Plaintiffs have failed to state a cognizable claim under the AACWA because the AACWA does not provide for a private right of action. Defendant Poole hereby seeks to preserve her defense for failure to state a claim as to Plaintiffs' remaining AACWA claims.[3]

STATUTORY AND REGULATORY FRAMEWORK

A. The Public Advocate's Role Pursuant to the New York City Charter

Section 24 of the New York City Charter establishes the role of the City's Public Advocate and the scope of her authority as a municipal official of New York City. N.Y. City Charter § 24. The Charter states that the Public Advocate, who is elected by New York City electors, id. § 24(e), has the responsibility to: (1) "monitor the operation of the public information and service complaint programs of city agencies and make proposals to improve such programs"; (2) "review complaints of a recurring and multiborough or city-wide nature relating to services and programs, and make proposals to improve the city's response to such complaints"; (3) "receive individual complaints concerning city services and other administrative actions of city agencies"; and (4) under certain circumstances, "investigate and otherwise attempt to resolve such individual complaints," id. § 24(f). The Public Advocate's authority to investigate complaints requires her to refer valid complaints to the appropriate city agency. Id. § 24(g). If the city agency does not resolve the complaint within a reasonable time, the Public

[3] Relevant here, City Defendants already sought partial dismissal on February 19, 2016. See ECF Docket No. 114, Notice Mot. dated Feb. 19, 2016. In part, City Defendants' motion to dismiss asserted that Plaintiffs had no enforceable right under the AACWA. See ECF Docket No. 115, Mem. Law Supp. Mot. Dismiss dated Feb. 19, 2016, Point IV at pp. 19-21. On September 12, 2016, this Court issued an Opinion and Order partially granting City Defendants' motion to dismiss. Elisa W. v. City of N.Y., No. 15 CV 5273, 2016 WL 4750178, at *9 (S.D.N.Y. Sept. 12, 2016); accord ECF Docket No. 278, Op. & Order dated Sept. 12, 2016. The Court concluded that Plaintiffs had no enforceable rights under §§ 671(a)(10), 671(a)(16) and 675(1)(B), 671(a)(16) and 675(1)(B), (E), (G), and 671(a)(22). See Elisa W., No. 15 CV 5273, 2016 WL 4750178, at *4-7. The Court therefore dismissed the claims set forth in paragraphs 348(a), (c)-(f), and (j) of the Amended Complaint. Id. at *9.

Advocate may first "conduct an investigation and make specific recommendations to the agency for resolution of the complaint." Id. If the city agency still does not respond, the Public Advocate then "may issue a report to the council and the mayor" of New York City. Id. The Charter mandates that the Public Advocate "shall have timely access to those records and documents of city agencies which the public advocate deems necessary to complete the investigations, inquiries, and reviews required by this section." Id. at § 24(j). The New York City Charter grants no other authority to the Public Advocate. See generally N.Y. City Charter.

B. Federal Aid for Foster Care through the AACWA

In 1980, Congress passed the AACWA pursuant to its spending power, in part to supply federal funds to states for child welfare services including foster care and adoption. N.Y. State Citizens' Coalition for Children v. Carrion, 31 F. Supp. 3d 512, 514 (E.D.N.Y. 2014); Charlie H. v. Whitman, 83 F. Supp. 2d 476, 482 (D.N.J. 2000). The AACWA established Title IV-E of the Social Security Act, which provides for "reimbursement to the states" for portions of the "foster care maintenance and adoption assistance payments made by the states on behalf of eligible children." New York ex rel. Office of Children & Family Servs. v. United States HHS Admin. for Children & Families, 56 F.3d 90, 92-93 (2d Cir. 2009) (quoting Vermont Dep't of Soc. & Rehab. Servs. v. U.S. Dep't of Health & Human Servs., 798 F.2d 57, 59 (2d Cir. 1986)); see 45 C.F.R. § 1355.31. The purpose of the AACWA is to provide "such sums as may be necessary" to "enabl[e] each State to provide, in appropriate cases, foster care and transitional independent living programs for children . . . and adoption assistance for children with special needs[.]" 42 U.S.C. § 670; see also Citizens' Coalition, 31 F. Supp. 3d at 514 ("The [AA]CWA set guidelines for a cooperative state-federal program to provide federal funding for foster care and adoption assistance.").

To receive AACWA federal funding, participating states must submit a state plan that meets the requirements of § 671(a) to the Department of Health & Human Services ("DHHS") for approval. § 671; Office of Children & Family Servs., 56 F.3d at 93. The AACWA does not dictate the exact content of a State Title IV-E plan; rather, it provides only that a state must establish a plan with certain requisite provisions "to be eligible for [federal] payments." § 671(a). Federal funding eligibility is determined by whether states are "in substantial conformity with . . . [s]tate plan requirements under [§ 671(a)], . . . the implementing regulations, and . . . the relevant approved state plans." 42 U.S.C. § 1320a-2a(a).

The AACWA contains a comprehensive review and enforcement infrastructure to determine substantial compliance, including administrative and judicial review. See id. § 1320a-2a(c). The DHHS's Administration for Children and Families conducts reviews to determine whether a state is in substantial conformity with the state's approved plan, the AACWA, and its implementing regulations. See, e.g., 45 C.F.R. §§ 1355.31-37, 1356. DHHS may withhold federal funds if the state is not in substantial conformity with the AACWA. § 1320a-2a(c). If a state is found not in substantial conformity, the state may appeal the decision to an appeals board, and thereafter obtain judicial review of an adverse appeals board decision by appealing to the appropriate United States District Court. Id.

In 1996, Congress amended the AACWA through the Removal of Barriers Amendment, 42 U.S.C. § 674(d)(3)(A). This amendment explicitly created a private right of action for one specific provision of the AACWA, namely § 671(a)(18). § 674(d)(3)(A). The Removal of Barriers Amendment provides that not only does a State's failure to comply with AACWA § 671(a)(18) result in the withholding of federal funds, but also that any individual aggrieved by such a violation may bring a private action. See Small Business Job Protection Act of 1996, Pub.

L. No. 104-188, 110 Stat. 1755 at § 1808; see also 142 CONG. REC. H9661 (Aug. 1, 1996) ("Any individual who is harmed by a violation of this provision may seek redress in any United States district court."). The Amendment did not provide AACWA beneficiaries with a private right of action under any other AACWA provision. See § 674(d)(3)(A).

STANDARDS OF REVIEW

A. Rule 12(b)(1)

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a complaint must be dismissed for lack of subject matter jurisdiction when "the court 'lacks the statutory or constitutional power to adjudicate it.'" Cortlandt St. Recovery Corp. v. Hellas Telecomms., 790 F.3d 411, 416-17 (2d Cir. 2015) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)); accord Fed. R. Civ. P. 12(b)(1). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." Makarova, 201 F.3d at 113. While the Court "must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of [the] plaintiff," NRDC v. Johnson, 461 F.3d 164, 171 (2d Cir. 2006) (citation and internal quotation marks omitted), "[j]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it," APWU v. Potter, 343 F.3d 619, 623 (2d Cir. 2003) (citation and internal quotation marks omitted). When evaluating a motion to dismiss based on subject matter jurisdiction, the Court may also properly consider matters outside the pleadings. Cortlandt St. Recovery Corp., 790 F.3d at 417 (citing Makarova, 201 F.3d at 113).

B. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must state a "plausible claim for relief." Ashcroft v. Iqbal, 556 U.S. 662,

679 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)); accord Fed. R. Civ. P. 12(b)(6). When considering the legal sufficiency of a complaint, the requirement that the Court accept the well-pleaded factual allegations as true does not extend to the complaint's legal conclusions. Twombly, 550 U.S. at 555 (stating that the Court is "not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 579 (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).

ARGUMENT

POINT I:

PLAINTIFF JAMES LACKS LEGAL CAPACITY AND STANDING TO SUE DEFENDANT POOLE

Plaintiff James must be dismissed from this action because she does not have the legal capacity or standing to sue Defendant Poole.[4] Rule 12(b)(1) requires dismissal when the Court lacks subject matter jurisdiction, such as when the plaintiff lacks capacity or standing. See Fed. R. Civ. P. 12(b)(1); Cortlandt St. Recovery Corp., 790 F.3d at 416-17 (citing W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100, 104, 106 (2d Cir. 2008); Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 88 n. 6 (2d Cir. 2006)). In the context of a Rule 12(b)(1) motion, the plaintiff bears the burden of establishing that she has legal

[4] Notably, Plaintiff James did not assert any claims against State Defendants in the original Complaint. Compare Compl. ¶ 2 ("Plaintiff Letitia James, as the Public Advocate for the City of New York . . . brings this lawsuit seeking injunctive and declaratory relief against the City Defendants . . . .") with Am. Compl. ¶ 2 (replacing "City Defendants" with "State Defendants"); and Compl. p. 95 (stating that the Third Cause of Action was "[a]sserted . . . by the Public Advocate against the City Defendants") with Am. Compl. p. 114 (replacing "City Defendants" with "State Defendants"). Plaintiff James's only remaining claims are those against Defendant Poole. See generally Am. Compl.

capacity or standing to sue. See id. (quoting Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011)); Cherry v. Hillside Manor Rehab. & Extended Care, No. 06-CV-3296, 2008 WL 2559378, at *3, 17 (E.D.N.Y. June 23, 2008) (quoting Aurecchione v. Schoolman Transp. Sys., 436 F.3d 635, 638 (2d Cir. 2005)).

It is plain that the Public Advocate of the City of New York has no authority here to sue Defendant Poole. Rule 17(b) of the Federal Rules of Civil Procedure requires that New York State law apply to determine the capacity of a plaintiff to sue. Fed. R. Civ. P. 17(b)(3); Yonkers Comm'n on Human Rights v. City of Yonkers, 654 F. Supp. 544, 551 (S.D.N.Y. 1987). Under New York law, a governmental entity such as the Public Advocate has "neither an inherent nor a common-law right to sue." Cmty. Bd. 7 v. Schaffer, 84 N.Y.2d 148, 156 (1994). Rather, it is well-known that "their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." Id. (citing Matter of Pooler v. Pub. Serv. Comm'n, 58 A.D.2d 940 (N.Y. App. Div. 3d Dep't 1977); Matter of Flacke v. Freshwater Wetlands Appeals Bd., 53 N.Y.2d 537 (1981); Matter of B.T. Prods. v. Barr, 44 N.Y.2d 226, 236 (1978); Dep't Pers. of City of N.Y. v. N.Y. City Civil Serv. Comm'n, 79 N.Y.2d 806 (1991)). The right to sue must be explicit or "inferred from the [entity]'s stated powers and responsibilities." Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth., 801 N.Y.S.2d 236, at *13 (N.Y. Sup. Ct.), aff'd, 19 A.D.3d 284 (N.Y. App. Div. 1st Dep't 2005) (citing Cmty. Bd. 7, 84 N.Y.2d at 155-56); see also Yonkers Comm'n on Human Rights, 654 F. Supp. at 551 ("As creatures of statute, arms or departments of the municipal government have only those powers which are expressly granted by statute and those powers which are necessary to implement the expressed powers."); Matter of City of N.Y. v. City. Civ. Serv. Comm'n, 60 N.Y.2d 436, 444

(1983) (providing that, when not explicit, the capacity to sue must arise from the "necessary implication from its power and responsibility").

The Public Advocate's authority is "expressly limited to that set forth in the New York City Charter." Matter of James v. Donovan, 130 A.D.3d 1032, 1034 (N.Y. App. Div. 2d Dep't 2015). That enabling legislation provides no power for the Public Advocate to commence litigation against a State defendant. See generally N.Y. City Charter § 24. The Charter gives the Public Advocate the authority to "oversee city agencies, perform related investigations, and attempt to resolve individual complaints concerning city services." James, 130 A.D.3d at 1034; see also Am. Compl. ¶ 172 ("[T]he Public Advocate ensures that the city government serves its citizens by exercising oversight of city agencies, investigating citizen complaints regarding city services, and making proposals or seeking relief to address perceived shortcomings or failures."). No further authority is granted to the Public Advocate by the Charter. See generally N.Y. City Charter.

The Charter does not grant the Public Advocate any capacity or standing to sue. See James, 130 A.D.3d at 1034. Nor do the responsibilities it does grant provide any basis for inferring that the Public Advocate has the authority to sue Defendant Poole in this matter. See Madison Square Garden, 801 N.Y.S.2d at *13. First, the Public Advocate was created to be "a 'watchdog' over City government"; Defendant Poole is not part of the city government. Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth., 19 A.D.3d 284, 285 (N.Y. App. Div. 1st Dep't 2005), lv. denied, 5 N.Y.3d 878 (N.Y. 2005) (citations omitted) (emphasis added); see also James, 130 A.D.3d at 1034-35 (rejecting the Public Advocate's assertion of legal capacity to sue non-city agencies).

Second, the claims that Plaintiff James raises here have no relation to her authority. The Public Advocate's authority to commence litigation has been limited to "the context of efforts to gain access to information, consistent with that office's investigatory and public reporting function" as detailed in the Charter. Madison Square Garden, 801 N.Y.S.2d at *13 (citations omitted). Thus, the Public Advocate may only commence litigation when a City agency refuses to provide the Public Advocate with records relating to individual complaints. See James, 130 A.D.3d at 1034-35; Matter of Green v. Safir, 255 A.D.2d 107 (N.Y. App. Div. 1st Dep't 1998). By no stretch can such authority extend to the State actions targeted by this lawsuit. See James, 130 A.D.3d at 1035 ("The Public Advocate's capacity to bring the instant proceeding cannot be derived by 'necessary implication' from her oversight and investigatory responsibilities as set forth in the City Charter.").[5]

Plaintiff James does not carry her burden of establishing that she has the capacity to sue Defendant Poole in this action; indeed, her own description of her duties does not include such a capacity. See Am. Compl. ¶ 172 ("[T]he Public Advocate ensures that the city government serves its citizens by exercising oversight of city agencies, investigating citizen complaints regarding city services, and making proposals or seeking relief to address perceived shortcomings or failures."). The Public Advocate's claims against Defendant Poole must be dismissed.

[5] Nor has Defendant Poole waived any objection to the lack of capacity of the Public Advocate. On the contrary, subject matter jurisdiction is not waivable, Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481, 493 (S.D.N.Y. 2003), vacated on other grounds, 388 F.3d 39 (2d Cir. 2004), and the defense is moreover being raised here, in Defendant Poole's initial responsive pleading, Pressman v. Estate of Steinvorth, 860 F. Supp. 171, 176 (S.D.N.Y. 1994).

POINT II:

THERE IS NO PRIVATE RIGHT OF ACTION UNDER THE AACWA

The AACWA does not give rise to a private right of action on behalf of Plaintiffs. Indeed, this Court has already ruled that §§ 671(a)(10), 671(a)(22), and elements of § 671(a)(16) of the AACWA do not provide individually-enforceable rights. Elisa W., No. 15 CV 5273, 2016 WL 4750178, at *4-7, 9. The entirety of Plaintiffs' Third Cause of Action as against Defendant Poole fails for that same reason.[6]

Rule 12(b)(6) mandates that a cause of action be dismissed for failure to state a claim when the cited federal statute does not provide a private right of action. See Fed. R. Civ. P. 12(b)(6); Lopez v. Jet Blue Airways, 662 F.3d 593, 597 (2d Cir. 2011). The AACWA provisions relied upon by Plaintiffs do not support their purported rights because the AACWA does not meet the test that demonstrates whether a private right of action exists under § 1983. The relevant provisions are absent of any rights-creating language; they have an aggregate focus on the subject states; and the AACWA provides for a federal review mechanism. In addition, the subject sections are vague and amorphous. Moreover, Congress has unambiguously provided for only one private right of action for violation of an AACWA provision not at issue here, demonstrating its intent to exclude any other private rights. Accordingly, Plaintiffs' Third Cause of Action states no plausible claim for relief.

[6] Although Defendant Poole recognizes that the Court has already ruled on the arguments raised in City Defendants' partial motion to dismiss relating to the AACWA claims against City Defendants, Defendant Poole hereby raises additional arguments that no private right of action exists under the AACWA, and furthermore seeks to preserve its objection to the AACWA claims.

A. The AACWA Fails the Blessing Test for a Private Right of Action Under § 1983.

As this Court has recognized, none of the AACWA sections on which Plaintiffs rely explicitly provide for a private right of action. Elisa W., No. 15 CV 5273, 2016 WL 4750178, at *2; accord §§ 671; 675. In addition, no implied right of action exists. See Alger v. Albany, 489 F. Supp. 2d 155, 158 (N.D.N.Y. 2006); Daniel H. v. City of New York, 115 F. Supp. 2d 423, 427 (S.D.N.Y. 2000); Charlie H., 83 F. Supp. 2d at 489; Ingrao v. County of Albany, No. 1:01-cv-730, 2006 WL 2827856, at *6 (N.D.N.Y. Sept. 29, 2006).

The test for determining whether an implied private right of action lies under § 1983 comes from the seminal case Blessing v. Freestone, 520 U.S. 329, 340 (1997). The Blessing test requires three factors for a private right of action to exist:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Blessing, 520 U.S. at 340-41 (internal citations omitted); accord Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 321-22 (2d Cir. 2005); Citizens' Coalition, 31 F. Supp. 3d at 517.

The Second Circuit has cautioned that "courts should not find a federal right based on a rigid or superficial application of the Blessing factors where other considerations show that Congress did not intend to create federal rights actionable under § 1983." Torraco v. Port Auth. of N.Y. & N.J., 615 F.3d 129, 136 (2d Cir. 2010); Wachovia Bank, 414 F.3d at 322. "[T]he ultimate issue is whether Congress intended to create a private cause of action." California v. Sierra Club, 451 U.S. 287, 293 (1981); see also Elisa W., No. 15 CV 5273, 2016 WL 4750178, at *3 (quoting Gupta v. Headstrong, Inc., No. 12-cv-6652, 2013 U.S. Dist. LEXIS 124710, at *4 (S.D.N.Y. Aug. 30, 2013) (quoting Sierra Club)).

1. Congress Did Not Intend to Create Federal Rights Actionable under § 1983 by Enacting the AACWA.

The AACWA provisions on which Plaintiffs rely fail the first factor of the Blessing test and therefore do not provide a cause of action. In Gonzaga Univ. v. Doe, 536 U.S. 273 (2002), the Supreme Court set forth the analysis necessary under the first Blessing factor. Id. at 285-90. In particular, the Court evaluated: a) whether Congress included "rights-creating language" in the statute; b) whether the statutory language manifested an "aggregate" focus as opposed to an individual one; and c) the availability of a congressionally-mandated "federal review mechanism." Id.; see also Citizens' Coalition, 31 F. Supp. 3d at 519 (discussing Gonzaga).

The Gonzaga Court further "reject[ed] the notion that [earlier Supreme Court] cases permit anything short of an unambiguously conferred right" to meet the first Blessing prong and imply a cause of action under § 1983. Gonzaga, 536 U.S. at 283. The Court explicated that "it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Id. Specifically relevant here, the Gonzaga court made clear that "unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." Gonzaga, 536 U.S. at 280 (citation and internal quotation marks omitted). Each element of the Gonzaga analysis is now addressed in turn.

First, the provisions relied upon by Plaintiffs in their claims against Defendant Poole plainly "lack any indicia of 'rights-creating language' and suggest that Congress did not intend for an individual cause of action to arise from the statute." Citizens' Coalition, 31 F. Supp. 3d at 520. Instead, the AACWA provides a federal funding mechanism for state reimbursement of payments relating to foster care and adoption. See § 670; 45 C.F.R. § 1355.31; Office of Children & Family Servs., 56 F.3d at 92-93. It is clear that the AACWA is intended to regulate

the states, not create a right on behalf of Plaintiffs in this action. See Citizens' Coalition, 31 F. Supp. 3d at 522. Section 671(a)(16), for example, conditions a state's receipt of federal funds on the existence of a case plan and a case review system that meets the definitions of § 675. Indeed, the entirety of § 671 addresses what a state must do under the AACWA to receive funding; § 671 "does not go beyond that and explicitly require a plan to meet the requirements described in" § 675. 31 Foster Children v. Bush, 329 F.3d 1255, 1271 (11th Cir. 2003). Nor does § 671 contain any language creating a right on behalf of any benefited foster children; it looks to regulate the state. Citizens' Coalition, 31 F. Supp. 3d at 522.

Similarly, the definitional section of the AACWA contains no rights-creating language. On the contrary, "[t]o infer a private right of action from a definitional section is antithetical to the mandate that a private right in a federal statute does not exist 'unless Congress speaks with a clear voice and mandates an unambiguous intent to confer individual rights.'" Citizens' Coalition, 31 F. Supp. 3d at 520 (Midwest Foster Care & Adoption Ass'n v. Kincade, 712 F.3d 1190, 1197 (8th Cir. 2013)); accord Midwest Foster Care, 712 F.3d at 1197 ("Finding an enforceable right solely within a purely definitional section is antithetical to requiring ambiguous congressional intent."); 31 Foster Children, 329 F.3d at 1271. The definitions set forth in §§ 675(1) and (5), the basis of claims against Defendant Poole, merely provide the definitions of "case plan" and "case review system." They plainly do not communicate an intent to confer rights on Plaintiffs, instead only describing what a state's case plan must include and a procedural case review system that the state must put in place to receive federal funds.

Second, not only is the absence of the requisite "rights-creating language" by itself fatal to Plaintiffs' § 1983 claim, but Plaintiffs' claim also fails because the subject AACWA provisions have an aggregate focus, rather than an individual one. "Statutes that focus on the

person regulated rather than the individuals protected do not tend to create enforceable rights." Citizens' Coalition, 31 F. Supp. 3d at 520 (quoting Midwest Foster Care, 712 F.3d at 1197); accord Gonzaga, 536 U.S. at 287; Alexander v. Sandoval, 532 U.S. 275, 289 (2001). The AACWA and its §§ 671 and 675 center on regulating the states' actions. They do not emphasize "whether the needs of any particular [child] ha[s] been satisfied," and therefore lack the individual focus required by the first Blessing prong. Gonzaga, U.S. at 288 (quoting Blessing, 520 U.S. at 343).

The aggregate focus of the AACWA is evidenced by the requirement that the state only be in "substantial conformity" with the AACWA to receive federal funding. 42 U.S.C. § 1320a-2a(a). Courts considering § 1983 claims have routinely recognized that "[s]uch '[a] substantial compliance regime cuts against an individually enforceable right because, even where a state substantially complies with its federal responsibilities, a sizeable minority of its beneficiaries may nonetheless fail to receive the full panoply of offered benefits.'" Citizens' Coalition, 31 F. Supp. 3d at 523 (quoting Midwest Foster Care, 712 F.3d at 1200-01); see also id. at 523-24 (collecting cases and noting that the substantial conformity/compliance regime of the AACWA supports a finding of aggregate focus); Gonzaga, 536 U.S. at 288 (finding that a federal funding statute with a substantial compliance standard has an aggregate focus); Blessing, 520 U.S. at 335 (concluding that a statute that required "substantial compliance" with federal regulations did not give rise to a private right of action); Midwest Foster Care, 713 F.3d at 1200-01 (finding that a § 1983 claim did not exist in part because of the AACWA's substantial conformity standard); Olivia Y. ex rel Johnson v. Barbour, 351 F. Supp. 2d 543, 561 (S.D. Miss. 2004) (same); D.O. v. Beshear, No. 5:15-048, 2016 WL 1171532, at *5 (E.D. Ky. March 23, 2016) (same). The AACWA's substantial conformity standard is "tantamount to focusing on the aggregate practices

of a state funding recipient." Citizens' Coalition, 31 F. Supp. 3d at 523 (quoting Midwest Foster Care, 712 F.3d at 1200-01).

The AACWA's own stated purpose further reveals the statute's aggregate focus. Section 670 explicitly states that the AACWA was enacted to make federal funds available "[f]or the purpose of enabling each State to provide, in appropriate cases," foster care and adoption programs. § 670. This is a classic statement of spending power legislation with an inherent aggregate focus. See Citizens' Coalition, 31 F. Supp. 3d at 524. Congress's concern was the states' abilities to receive funding, not individual children's rights. "[A] spending statute turning on state compliance does not create a private right of action under § 1983." Id.

In addition, the provisions at issue themselves demonstrate their aggregate focus. Section 671(a) focuses on what a state must do to receive federal funds under the statute. § 671(a) ("In order for a State to be eligible for payments under this part, it shall . . ."). It requires the state to develop case plans and a case review system for the aggregate foster care and adoption system; it does not require the state to perform any action for any individual within that system. Similarly, § 675's definitions of "case plan" and "case review system" have an aggregate focus on the state's system, rather than "the kind of focused-on-the-individual, rights-creating language required by Gonzaga." 31 Foster Children, 329 F.3d at 1272 (finding that subsections of § 675 have an aggregate focus). "The references to individual children and their placements are made in the context of describing what the procedure is supposed to ensure, and such provisions cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983." 31 Foster Children, 329 F.3d at 1272.

Third and last, like the statute at issue in Gonzaga the AACWA is principally a federal funding statute that contains its own scheme for federal administrative and judicial review. See

§ 670; Office of Children & Family Servs., 56 F.3d at 92-93; Loyal Tire & Auto. Ctr. v. Woodbury, 445 F.3d 136, 149 (2d Cir. 2006) (noting that important to the Gonzaga outcome was that the statute at issue "was spending legislation that focused primarily on the government's allocation of resources"). "In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." Citizens' Coalition, 31 F. Supp. 3d at 519 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981)). The AACWA provides for such a remedy through DHHS should a state fail to meet its requirements. See 42 U.S.C. §§ 1320a-2a(c), 1355.31-37, 1356. Further, the AACWA contains its own scheme for federal administrative and judicial review. § 1320a-2a(c) (providing for administrative review by an appeals board and judicial review by a United States District Court). The presence of "the extensive statutory scheme for helping wayward states return to 'substantial conformity' and the ability for DHHS to use its audit power to terminate federal funding" evidences that Congress did not intend to create a § 1983 private right of action for those that might incidentally benefit from the AACWA. See Citizens' Coalition, 31 F. Supp. 3d at 526.

That Plaintiffs receive some sort of "benefit" or have any "interest" in the AACWA does not alter Plaintiffs' failure to fulfill the first Blessing factor. See Gonzaga, 536 U.S. at 283. The "mere status as a beneficiary of a federal law is insufficient to stake a claim to the congressional grant of the right to privately enforce the statute under §1983." Citizens' Coalition, 31 F. Supp. 3d at 522 (citing Gonzaga, 536 U.S. at 283); see also Sierra Club, 451 U.S. at 294 ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries."). "For a statute to create private rights, its text must be phrased

in terms of the persons benefitted." Gonzaga, 536 U.S. at 274. Sections 671 and 675 are not so phrased. Rather, "it is the states . . . that are the textual focus of" those provisions. Citizens' Coalition, 31 F. Supp. 3d at 522.

It is clear that Congress did not intend to benefit Plaintiffs when it enacted the AACWA's §§ 671 and 675. As "the ultimate issue is whether Congress intended to create a private cause of action," Sierra Club, 451 U.S. at 293, the failure to meet the first Blessing factor of intent dooms Plaintiffs' AACWA claims as asserted against Defendant Poole.

2. The Relevant Provisions are Vague and Amorphous.

Turning to the second factor in the Blessing test, it is obvious that provisions of the AACWA relied upon by Plaintiffs also fail this element of the analysis. These provisions not only lack rights-creating language, but also are so vague and amorphous that they "are beyond the competence of the judiciary to enforce." Rodriguez v. DeBuono, 162 F.3d 56, 60 (2d Cir. 1998) (quoting Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990)). Accordingly, they cannot stand as bases for Plaintiffs' purported rights.

The AACWA's general "substantial conformity" standard is itself too vague and amorphous to provide guidance for whether a state has met that standard outside of the DHHS approval system. See 42 U.S.C. § 1320a-2a(a). While that standard may suit review for receipt of federal funding, it cannot be applied to §§ 671 and 675 to conjure any meaningful review of the state's plan as applied to individual children.

Further, those sections themselves are "expressed in language too imprecise to be judicially enforced." Daniel H., 115 F. Supp. 2d at 427 (citing Blessing, 520 U.S. 329; other citations omitted). Neither § 671 nor § 675 include any language evincing a standard by which a court could judge whether a state's provision for the development of a case plan or its provision

for a case review system is sufficient. Accordingly, these subsections fail to satisfy the second Blessing factor and do not give rise to a § 1983 claim. See Daniel H., 115 F. Supp. 2d at 427.

For the multitude of reasons discussed above, §§ 671 and 675 of the AACWA do not meet the first or second Blessing factors required for a § 1983 right to exist. Like those claims previously dismissed by this Court, Plaintiffs' remaining AACWA claims do not state a private cause of action.

B. Congress Precluded Any Additional Private Causes of Action When it Passed the 1996 Removal of Barriers Amendment.

When Congress amended the AACWA in 1996, it added one subsection that explicitly provided for a private right of action for an individual aggrieved by § 671(a)(18). See § 674(d)(3)(A) (the Removal of Barriers Amendment). Congress did not provide for any additional causes of action under other AACWA provisions. By demonstrating its "unambiguous intent to confer individual rights" under § 671(a)(18), Gonzaga, 536 U.S. at 280, Congress contemporaneously communicated its intent to exclude private rights under any other AACWA provision. See 2A Norman J. Singer & J.D. Shambie Singer, STATUTES & STATUTORY CONSTRUCTION § 47.23 ("[T]here is an inference that all omissions should be understood as exclusions," and "[t]he force of [that inference] is strengthened where a thing is provided in one part of a statute but excluded in another."); Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, the Second Circuit has found that this principle, unis exclusion alterius, is particularly persuasive when considering whether an implied cause of action exists. Olmsted v. Pruco Life Ins. Co., 283 F.3d 429, 433 (2d Cir. 2002). The Circuit Court expounded that

"Congress's explicit provision of a single right of action to enforce one section of a statute suggests that omission of an explicit private right to enforce other sections was intentional." Id.

Courts of this and other jurisdictions have applied this statutory construction principle to the AACWA and concluded:

> [t]hat Congress chose to amend [the AACWA] to include a private right of action under § 1983 for a state or other entity's failure to comply with 671(a)(18), but did not include the other various elements enumerated in § 671(a) . . . is strong evidence that Congress did not intend these other various State plan elements in § 671(a) to confer rights enforceable pursuant to § 1983.

Alger, 489 F. Supp. 2d at 158 (quoting Charlie H., 83 F. Supp. 2d at 489); accord Charlie H., 83 F. Supp. 2d at 489; Daniel H., 115 F. Supp. 2d at 428. These courts have thus found that with the exception of § 671(a)(18), the "AACWA does not create a private cause of action." Alger, 489 F. Supp. 2d at 158; see also Charlie H., 83 F. Supp. 2d at 489 ("Therefore, for this and the other reasons set forth herein, Plaintiffs § 1983 claim to 'an enforceable written case plan and a case review system' under [§§ 671(a)(16), 675(1) and (5), among other sections] and an 'enforceable right to implementation of case plan services' is dismissed."); Daniel H., 115 F. Supp. 2d at 428 ("Accordingly, the [Southern District] holds that plaintiffs do not have an implied right of action under 42 U.S.C. § 1983 for violations of the [AACWA].").

Plaintiffs have not stated a plausible claim for relief for their § 1983 claim under the AACWA. Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). Therefore, Defendant Poole asserts that the Third Cause of Action should be subject to dismissal in its entirety.

CONCLUSION

For the reasons set forth above, the Court should grant Defendant Poole's partial motion to dismiss, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
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