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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CLARK K., by his next friend Sherry)
Anderson; JALEN, SIA, ROSHAUN,)
CALEB, and KING A., by their next friend)
Tarrah Logan; TONI, SUMMER, and)
FRANK B., by their next friend Marilyn)
Paikai; and DONNA C., by her next friend)
Jacquelyn Romero,)

2:06-cv-01068-RCJ-RJJ

Plaintiffs,

ORDER

vs.

MICHAEL WILLDEN, Director of the)
Nevada DHHS; FERNANDO SERRANO,)
Administrator of the Nevada Division of)
Child and Family Services; JOHN DOE,)
Bureau Chief of the Bureau of Services for)
Child Care of the Division of Child and)
Family Services; VIRGINIA VALENTINE,)
Clark County Manager; CLARK COUNTY)
DEPARTMENT OF FAMILY SERVICES;)
TOM MORTON, Director of Clark County)
Department of Family Services; LOUIS)
PALMA, Manager of Shelter Care for the)
Clark County Department of Family)
Services; BRUCE L. WOODBURY, TOM)
COLLINS, CHIP MAXFIELD, YVONEE)
ATKINSON GATES, MYRNA WILLIAMS)
LYNNETTE BOGGS MCDONALD and)
RORY REID, Clark County Commissioners;)
and CLARK COUNTY,)

Defendants.

This matter was referred to the undersigned Magistrate Judge on Plaintiffs' Motion for
Entry of Protective Order (#119) and Defendants' Renewed Motion for Protection from
Disclosure of Confidential Information (#120). The Court, has considered the Motions (#119)

1 and (#120), Declaration of Leecia Welch in Support of Plaintiffs' Motion for Entry of Protective
2 Order (#116), Plaintiffs' Response (#126), Defendants' Opposition (#125), Defendants' Reply
3 (#131), and Plaintiffs' Reply (#129).

4
5 **BACKGROUND**

6 This case arises from a civil action filed on August 30, 2006, by the plaintiffs, on behalf
7 of themselves and "all abused and neglected children who are in, or at risk of entering, the Clark
8 County foster care system," alleging a violation of 42 U.S.C. § 1983. Plaintiffs' seek declaratory
9 and injunctive relief relating to the operation of Nevada and Clark County's foster care system.

10 The defendants have filed a Renewed Motion for Protection from Disclosure of
11 Confidential Information (#120).¹ The parties have met and conferred regarding the applicability
12 of the Nevada Revised Statute, but were unable to resolve the issue without Court intervention.
13 Plaintiffs filed a Motion for Protective Order (#119) on March 5, 2007. The dispute in both
14 motions involves the agreement on an appropriate protective order to safeguard the privacy rights
15 of foster care children and their families. Essentially the defendants want the Court to grant
16 protection from disclosure of the information while the plaintiffs request that this Court mandate
17 that the parties enter into the protective order and require disclosure. The defendants seek to
18 include the following language in the protective order, which the plaintiffs' contend is overbroad
19 and defeats the purpose of the proposed protective order,

20 Clark County views the statutory language in NRS 432B.280 and 432B.290 broadly
21 and believes that agreeing to stamp documents 'confidential' and then disclose them
22 to opposing counsel does not meet the stated confidentiality requirements of the
23 statutes. The County also believes that Judge Herndon's order regarding disclosures
24 under NRS 432B.280 reflects a correct interpretation of that statute for purposes of
25 this litigation. Therefore, the County intends to proceed very carefully with regard
26 to disclosure of documents and reserves the right to object to disclosures of
27 confidential documents at any time.

28 The defendants' contend that under 42 U.S.C. § 671(a)(8), individual state statutes may
adopt more restrictive regulations regarding the disclosure of confidential information about

¹The previous motion was denied as prematurely filed without any attempt to meet and confer between and among counsel to resolve the discovery issue in compliance with Federal Rule of Civil Procedure 26(c).

1 foster care programs than that suggested under the federal statute. The defendants' request that
2 the Court take judicial notice of NRS 432B.280, NRS 432B.290, and NRS 432B.407(4).
3 Specifically, the defendants' contend that NRS 432B.290(1)(e) requires them to request *in*
4 *camera* review of confidential documents before they may be disclosed to the plaintiffs in the
5 discovery process. NRS 432B.290 states that "Except as otherwise provided in subsections 2, 5
6 and 6 and NRS 432B.513, data or information concerning reports and investigations thereof
7 made pursuant to this chapter may be made available only to: . . . (e) A court, for in camera
8 inspection only, unless the court determines that public disclosure of the information is necessary
9 for the determination of an issue before it; . . . (g) The attorney and the guardian ad litem of the
10 child." Further, NRS 432B.290(2) states that

11 Except as otherwise provided in subsection 3, data or information concerning reports
12 or investigations thereof made pursuant to this chapter may be made available to any
13 member of the general public if the child who is the subject of a report dies or is
critically injured as a result of alleged abuse or neglect, except that the data or
information which may be disclosed is limited to:

- 14 (a) The fact that a report of abuse or neglect has been made and, if appropriate, a
factual description of the contents of the report;
15 (b) Whether an investigation has been initiated pursuant to NRS 432B.260, and the
result of a completed investigation; and
16 (c) Such other information as is authorized for disclosure by a court pursuant to
subsection 4.

17 Subsection 4 states that "Upon petition, a court of competent jurisdiction may authorize the
18 disclosure of additional information to the public pursuant to subsection 2 if good cause is shown
19 by the petitioner for the disclosure of the additional information."

20 The County Defendants take the position that they are not obligated to disclose the
21 records for an *in camera* review by this Court, but that they are willing to disclose the records if
22 it will advance the public interest in improving the County foster care system. The defendants
23 also assert that since the A children's natural mother has signed a Confidentiality Agreement,
24 containing language identical to that which they are requesting be inserted into the current
25 protective order, in the wrongful death lawsuit, this acknowledges that disclosure of information
26 about her children is subject to the limitations of NRS 432A.290.

27 The County Defendants also argue that the proposed protective order has additional
28 language which is problematic.

1 **DISCUSSION**

2 **A. APPLICABILITY OF NEVADA REVISED STATUTE**

3 In this case, the Court must decide two issues related to the applicability of the Nevada
4 Revised Statute. First, whether the Nevada Revised Statute prohibits the disclosure of the
5 plaintiffs' case files in this case for the purpose of litigation, assuming that an appropriate
6 protective order has been entered. Second, if the Nevada Revised Statute does in fact prohibit
7 disclosure, whether that prohibition is binding on this Court mandating a federal privilege. The
8 defendants rely on 26 U.S.C. § 6103 for the proposition that federal statutes may create a
9 privilege in federal court beyond federal common law. However, the issue in this case is not
10 whether a federal statute may create a privilege in federal court, but whether a state statute may
11 create a privilege in federal court, and if so, to what extent.

12 NRS 432B.290 specifically states that reports and investigations may be made available
13 to the attorney and guardian ad litem of the child. Therefore, contrary to the defendants'
14 assertion, this Court may order disclosure of the reports and investigations involving the plaintiff
15 children to the children's attorneys without requiring the defendants to violate state law. Further,
16 NRS 432B.290(2) specifically addresses when information "may be made available to any
17 member of the general public if the child who is the subject of a report dies or is critically injured
18 as a result of alleged abuse or neglect." Here, the plaintiffs are not requesting the information in
19 an attempt to disclose it to the general public. To the contrary, the plaintiffs are willing to enter
20 into a protective order for the purpose of preserving the confidentiality of the information in
21 order to protect the privacy rights of the children involved. Therefore, NRS 432B.290(2) does
22 not apply to the circumstances of this case.

23 NRS 432B.280 specifies the penalties for willfully releasing data or information
24 concerning reports and investigations of abuse or neglect. However, this section makes
25 exceptions for information and data released as authorized or required pursuant to NRS
26 432B.290. Therefore, as previously stated, since NRS 432B.290 specifically authorizes the
27 release of the information to the children's attorneys, the defendants will not be subjected to
28 criminal penalties for releasing the information in this case. NRS 432B.407 is likewise

1 inapplicable to this case. This statute only applies to multidisciplinary teams reviewing the death
2 of a child.

3 The defendants also contend that 42 U.S.C. § 671(a)(8) permits them to limit disclosure
4 of confidential information. The Court disagrees. 42 U.S.C. § 671(a)(8) allows the states to
5 adopt stricter standards regarding disclosure than specified within the federal statute. However,
6 the state of Nevada has not adopted a standard prohibiting disclosure in the present
7 circumstances. Therefore, County Defendants are not entitled to limit disclosure. Since the state
8 statute does not prohibit disclosure in the circumstances of this case, it is unnecessary for the
9 Court to determine whether the statute creates a federal privilege which is binding on the Court
10 and the parties. Lastly, Defendants proposition that the federal statute requires *in camera* review
11 by the court, or the alternative of disclosure to the public, is incorrect. The statute provides
12 exceptions to the non-disclosure requirements.

13 **B. PROPOSED PROTECTIVE ORDER**

14 The Clark County Defendants have additional concerns regarding the proposed protective
15 order. Specifically, the defendants contend that all references to class members should be
16 removed since there is no certified class at this time. The Court agrees. Since there is not a
17 certified class at this time that language is premature and shall be removed. However, this does
18 not preclude Plaintiffs from conducting discovery relating to the proposed class. On May 14,
19 2007, Judge Robert C. Jones ruled that Plaintiffs may “conduct discovery relating to the
20 proposed class.” Order (#134) at 43-47. Accordingly, if Judge Jones grants class certification,
21 then the protective order will also apply to the class.

22 The defendants also state that they cannot stipulate that Plaintiffs’ DFS case records are
23 discoverable in this action due to the expansive list of documents defined as “DFS case records.”
24 Specifically, County Defendants state that they cannot stipulate that records belonging to third
25 parties are DFS case records, nor that these documents are discoverable. The Court agrees with
26 Plaintiffs that using the language “which are in the custody of County Defendants” amply
27 resolves this problem. The defendants are not required to provide documents which are not in
28 their custody.

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CONCLUSION

The Court refuses to adopt a broad policy requiring *in camera* review of all documents in this type of case. This task would be unduly burdensome on the Court and is unnecessary. The Nevada Revised Statute permits disclosure to the attorneys of the children who are named in the investigations and reports. Therefore, the parties shall enter into a protective order consistent with this Order. The proposed protective order shall be entered into by the parties; however, all references to class members shall be deleted since a class has not been certified.

ORDER

Based on the foregoing, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Entry of Protective Order (#119) is **GRANTED**, consistent with this Order.

IT IS FURTHER ORDERED that Defendants' Renewed Motion for Protection from Disclosure of Confidential Information (#120) is **DENIED**.

DATED this 12th day of March, 2008



ROBERT J. JOHNSTON
United States Magistrate Judge