APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-1066

JANE DOE; I.B.,
Plaintiffs – Appellants,

v.

APRIL WOODARD, in her individual capacity; CHRISTINA NEWBILL, in her individual capacity; SHIRLEY RHODUS, in her individual capacity; RICHARD BENGTSSON, in his individual capacity; EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS,
Defendants – Appellees,

and

REGGIE BICHA, in his official capacity as Executive Director of the Colorado Department of Human Services; JULIE KROW, in her official capacity as Executive Director of the El Paso County Department of Human Services,
Defendants.

PARENTAL RIGHTS FOUNDATION; NATIONAL CENTER FOR HOUSING AND CHILD WELFARE; NATIONAL COALITION FOR CHILD PROTECTION REFORM; PARENT GUIDANCE CENTER; MARK FREEMAN; PACIFIC JUSTICE INSTITUTE,
Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-01165-KLM)

Submitted: September 24, 2018
Filed: January 3, 2019

Theresa Lynn Sidebotham, (Jessica Ross with her on the brief), of Telios Law PLLC, Monument, Colorado, for Plaintiffs – Appellants.
Kenneth R. Hodges, Senior Assistant County Attorney (Diana K. May, First Assistant County Attorney, with him on the brief), Colorado Springs, Colorado, for Defendants – Appellees.
Kevin T. Snider, Pacific Justice Institute, Sacramento, California, filed an Amicus Curiae brief for Pacific Justice, in support of Appellants.
Darren A. Jones and James R. Mason, III, Purcellville, Virginia, Martin Guggenheim and Carolyn Kubitschek, Alexandria, Virginia, Diane Redleaf, College Park, Maryland, and Mark Freeman, Media, Pennsylvania, filed an Amici Curiae brief for Parental Rights Foundation, National Center for Housing and Child Welfare, National Coalition for Child Protection Reform, Parent Guidance Center, and Mark Freeman, Esq., in support of Appellants.

Before **BRISCOE**, **LUCERO**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

I.B., a minor child, and her mother, Jane Doe (collectively, "Does"), claim that April Woodard, a caseworker from the El Paso County Department of Human Services ("DHS"), a state agency, wrongfully searched I.B. at the Head Start preschool program in Colorado Springs. Without consent or a warrant, Ms. Woodard partially undressed I.B., performed a visual examination for signs of abuse, then photographed I.B.'s private areas and partially unclothed body.

In their lawsuit, the Does alleged that Ms. Woodard and other DHS officials violated the Fourth Amendment's prohibition on unreasonable searches and the Fourteenth Amendment's protection against undue interference with parental rights and with familial association. The Defendants moved to dismiss.[1] The district court granted the motion, holding that qualified immunity precludes the Fourth Amendment unlawful search claim and that the complaint failed to state a Fourteenth Amendment claim.

The Does appeal these rulings and the district court's denial of leave to amend their complaint. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. Factual Background

In reviewing the grant of a motion to dismiss, we accept the allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party—

[1]The Does sued six defendants, who are identified in the procedural history section below.

here, the Does. *Mayfield v. Bethards*, 826 F.3d 1252, 1255, 1258 (10th Cir. 2016).

In December 2014, I.B. was attending preschool at the Head Start Program in Colorado Springs.[2] An anonymous source reported to DHS possible signs of abuse on I.B.'s body, including bumps on her face, a nickel-sized bruise on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees. DHS caseworker April Woodard responded to the report, arriving to take I.B. to the nurse's office.[3] Allegedly acting on instructions from DHS supervisor Christina Newbill, Ms. Woodard removed I.B.'s clothing and visually inspected and photographed I.B.'s buttocks, stomach, and back using a county-issued cell phone.[4]

The Does alleged that the undressing and photographing were "executed under an unwritten, but well-established county-wide policy or custom encouraging the practice, often without first obtaining

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[2]Pacific Justice's amicus brief explains that Head Start is "a federally funded preschool in which children engage in a course of age-appropriate studies conducted by a teacher. Although not a K-12 public school, Head Start primarily functions as an educational institution for very young children." Pacific Justice Amicus Br. at 2 (footnote omitted). The "program meets on public school campuses." *Id.*

[3]This was the not DHS's first investigation regarding I.B. The Does alleged that, between 2012 and 2014, DHS investigated their home "around half a dozen times, based on false reports that I.B. was being abused." Am. Compl. ¶ 15. One investigation was based on a report that I.B. had marks resembling a hand print on her bottom and lower-back bruising. DHS visually examined I.B. with her clothing removed. DHS closed the investigation, finding in January 2014 the report was unfounded. *Id.* ¶¶ 24-32.

[4]According to Defendants, "the school's health paraprofessional" assisted Ms. Woodard. Aplee. Br. at 7.

parental consent or a court order." Aplt. Br. at 5 (citing Aplt. App., Vol. I at 21-28). They further alleged that Richard Bengtsson, then Executive Director of the El Paso County DHS, issued the policy, and the director of Ms. Woodard's department, Shirley Rhodus, implemented it.

The following day, Ms. Woodard visited Ms. Doe at home. DHS did not suspect her of abuse, and she cooperated with the investigation. Ms. Woodard did not inform Ms. Doe that she had inspected and photographed I.B. in a state of partial undress. The case was closed as unfounded.

After DHS closed the case, I.B. told her mother about the incident, saying she hoped she would not see Ms. Woodard again because "I don't like it when she takes all my clothes off." Aplt. App., Vol. I at 17. I.B. later said to Ms. Doe that Ms. Woodard had taken photos of her against her will. Aplt. App., Vol. I at 18. When Ms. Doe approached Ms. Woodard about her daughter's accusations, Ms. Woodard at first denied them. Two months later, she reversed course and admitted that she did the inspection and took photographs. Ms. Woodard told Ms. Doe that a child abuse accusation and investigation takes priority over the mother's parental rights.

B. Procedural History

The Does sued under 42 U.S.C. § 1983, alleging violation of I.B.'s Fourth Amendment rights and violations of I.B.'s and Ms. Doe's Fourteenth Amendment rights.[5]

[5]Because I.B. is a minor, Ms. Doe brought her claims for her. Although we refer to "the Does" when discussing the Fourth and

The Fourth Amendment claims were based on both the visual inspection and the photographs; the Fourteenth Amendment claims only on the inspection. In addition to Ms. Woodard, the Does named as defendants Ms. Woodard's supervisors, Ms. Newbill and Ms. Rhodus; Mr. Bengtsson, Executive Director of El Paso County DHS; Reggie Bicha, Executive Director of Colorado DHS; and the El Paso Board of County Commissioners ("BOCC"). The Does sought damages and prospective relief against a "statewide and local policy and custom" encouraging "strip searching children whenever injuries are alleged." Aplt. App., Vol. I at 40. The Defendants moved to dismiss based on qualified immunity and failure to state a claim.

1. Dismissal of Fourth Amendment Claims

A magistrate judge[6] concluded Ms. Woodard and her supervisors were entitled to qualified immunity on the Fourth Amendment claim[7] and dismissed the claim without prejudice. When the Does sought to file an amended complaint, the court rejected the request on futility grounds and dismissed the claim with prejudice.

a. Ms. Woodard and Ms. Newbill

The district court dismissed the Fourth Amendment claim against Ms. Woodard and Ms. Newbill because the law was not so "clearly established" as to "give Defendants fair

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Fourteenth Amendment claims, the Fourth Amendment claims are solely on behalf of I.B.

[6]The parties agreed to have all proceedings in the case decided by a magistrate judge. *See* 28 U.S.C. § 636(c). We will refer to the magistrate judge's court as the "district court."

[7]*Doe et al. v. Woodard et al.*, No. 1:15-CV-01165-KLM (D. Colo. Sept. 30, 2016).

warning that the taking photographs of portions of I.B.'s unclothed body required a warrant." Dist. Court Op. at 16.

To the extent the Fourth Amendment claim was based on the Defendants' failure to show that the "special needs" doctrine justified the search, the district court recognized that a special needs search comports with the Fourth Amendment only if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified interference in the first place." *Id.* at 19 (quotations omitted). But, the district court concluded, the Does' complaint "lack[ed] allegations" the search was unjustified at its inception or was improper in scope. *Id.*[8]

The district court dismissed the Does' Fourth Amendment claim without prejudice.

b. Ms. Rhodus and Mr. Bengtsson

The district court dismissed the Fourth Amendment § 1983 supervisory liability claim against Ms. Rhodus and Mr. Bengtsson. Because qualified immunity shielded their supervisees, Ms. Woodard and Ms. Newbill, it also shielded them. *Id.* at 22. The court also dismissed the claim for prospective relief against Ms. Rhodus and Mr. Bengtsson, which demanded safeguards on storing photographs obtained in future searches, because it was based only on a "mere potential violation." *Id.* at 23-24.

2. Dismissal of Fourteenth Amendment Claims

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[8]The district court also said Defendants' conduct was objectively reasonable because they complied with a Colorado statute authorizing photography in cases of suspected child abuse. Id. (citing Colo. Rev. Stat. § 19-3-306).

a. Ms. Woodard and Ms. Newbill

The district court dismissed, for failure to state a claim, the Does' substantive due process claims under the Fourteenth Amendment for violation of the parental right to direct medical care and of the right to familial association.

(i) Right to direct medical care

The district court dismissed the parental rights claim, stating that (1) the visual exam of a child was not "essentially a medical procedure"; (2) the complaint did not allege that the exam "affected [I.B's mother's] right to direct [I.B.'s] medical care"; and (3) the complaint did not allege that the exam caused any "interference with [I.B.'s] medical treatment." *Id.* at 31 (quotations omitted).

(ii) Right to familial association

The district court dismissed the familial association claims, concluding the Does did not sufficiently plead that (1) the Defendants intended to separate I.B. from her mother or that (2) the Defendants knew their conduct would adversely affect the familial relationship. *Id.*

b. Ms. Rhodus, Mr. Bengtsson, and Mr. Bicha

The district court also dismissed the Fourteenth Amendment supervisory claims against Ms. Rhodus and Mr. Bengtsson and the official capacity claims against Mr. Bengtsson and Mr. Bicha because the complaint failed

to allege an underlying violation of the Fourteenth Amendment.[9]

3. Denial of Leave to Amend and Dismissal with Prejudice

When the Does attempted to amend their complaint, the district court denied the request, stating that the Does "have not addressed the Court's determination that Defendants were entitled to qualified immunity because the law was not clearly established with respect to whether Defendants needed a warrant in order to search the minor Plaintiff. In the absence of any case clearly establishing Plaintiffs' rights as asserted, the Court cannot find that Defendants knowingly violated the law, even assuming that they committed a constitutional violation." Aplt. App., Vol. II at 72-73 (citations and quotations omitted).[10]

The district court also dismissed the Fourth and Fourteenth amendment claims with prejudice.[11]

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[9]The Does do not appeal the dismissal of the Fourteenth Amendment official-capacity claims.

[10]The Does sued the BOCC for its role in the same alleged violations under the Fourth and Fourteenth Amendments. The district court dismissed these claims because the BOCC is a county rather than state entity and lacked final policymaking control. This ruling is not on appeal.

[11]The claim for prospective relief against Mr. Bengtsson and Mr. Bicha in their official capacities survived the motion to dismiss. Limited discovery was granted regarding standing on the claim, but it was later dismissed by stipulation of the parties. No prospective claim against Ms. Rhodus and Mr. Bengtsson in their official capacity is part of this appeal.

II. DISCUSSION

Our discussion reviews (A) the district court's qualified immunity dismissal of the Does' Fourth Amendment claims and (B) its dismissal of their Fourteenth Amendment claims for failure to state a claim. We affirm in both instances.

A. Fourth Amendment Claims

This section provides background on the standard of review; qualified immunity law; Fourth Amendment search requirements, with emphasis on the special needs doctrine; and analysis of whether the Does have shown there was clearly established law at the time of the search to support their claim. We conclude they have not shown clearly established law that the special needs doctrine could not support the search in this case. They therefore have not shown that a warrant clearly was required.[12]

1. Standard of Review

[12]This approach is similar to the one we followed in *McInerney v. King*, 791 F.3d 1224 (10th Cir. 2015). In that case, the plaintiff brought a § 1983 action alleging a Fourth Amendment violation based on the defendant police officer's warrantless search of her home. We reversed the district court's grant of qualified immunity. As in our case, the search was conducted without a warrant, and the defendant relied on an exception to the warrant requirement to contest the Fourth Amendment claim. After reviewing the existing case law, we concluded it was clearly established that the exigent circumstances exception did not apply and therefore the defendant was not entitled to qualified immunity. *Id.* at 1228. Here, after reviewing existing case law, the opinion concludes that the law was not clearly established that the special needs exception did not apply, and therefore the defendants were entitled to qualified immunity.

We review de novo the grant of a motion to dismiss under Rule 12(b)(6) due to qualified immunity. *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1106 (10th Cir. 2016).“At [the motion to dismiss] stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for 'objective legal reasonableness.'" *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

2. Legal Background

a. Qualified immunity

Under 42 U.S.C. § 1983, a person acting under color of state law who "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." "Individual defendants named in a § 1983 action may raise a defense of qualified immunity, which shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (citation, ellipsis, and quotations omitted).

"[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). A motion to dismiss based on qualified immunity imposes the burden on the plaintiff to show "both that [1] a constitutional violation occurred and [2] that the constitutional right was clearly established at the time of the alleged violation." *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) (quotations omitted). A court evaluating qualified immunity is free to "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity

analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A constitutional right is clearly established if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). The plaintiff must show there is a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Klen v. City of Loveland*, 661 F.3d 498, 511 (10th Cir. 2011) (quotations omitted). Generally, "existing precedent must have placed the statutory or constitutional question beyond debate" for a right to be clearly established. *The Estate of Lockett*, 841 F.3d at 1107 (quoting *Mullenix*, 136 S. Ct. at 308).

There "need not be a case precisely on point." *Redmond v. Crowther*, 882 F.3d 927, 935 (10th Cir. 2018). But "it is a 'longstanding principle that clearly established law should not be defined at a high level of generality.'" *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)); see also *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("The clearly established standard . . . requires a high degree of specificity." (quotations omitted)). "[T]he salient question . . . is whether the state of the law . . . gave [the defendants] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

"[G]eneral statements of the law are not inherently incapable of giving fair and clear warning to officers, but in the light of pre-existing law the unlawfulness must be apparent." *White*, 137 S. Ct. at 552 (citations and

quotations omitted). "[T]here can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590 (quotations omitted).

For supervisory liability, "[p]ersonal participation is an essential allegation in a 1983 claim." *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976). A supervisor cannot be held vicariously liable for the constitutional violations of subordinates. *See Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2003) ("Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person's constitutional rights.") "[D]irect participation," however, "is not necessary." *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990) (quotations omitted). "The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Id.* (quotations omitted). "[T]he establishment or utilization of an unconstitutional policy or custom can serve as the supervisor's affirmative link to the constitutional violation .... Where an official with policymaking authority creates, actively endorses, or implements a policy which is constitutionally infirm, that official may face personal liability for the violations which result from the policy's application." *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010) (quotations and brackets omitted). Supervisors cannot be liable under § 1983 where there is no underlying violation of a constitutional right by a supervisee. *See Martinez v. Beggs*, 563 F.3d 1082, 1092 (10th Cir. 2009).

b. Fourth Amendment search requirements

(i) The warrant requirement

The Fourth Amendment protects people from unreasonable government searches of their "persons, houses, papers, and effects." U.S. Const. Amend. IV. It "protects the right of the people to be 'secure in their persons' from government intrusion whether the threat to privacy arises from a policeman or a Head Start administrator." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003). "There is no 'social worker' exception to the Fourth Amendment." *Id.*

As a general rule, a search requires a warrant based on probable cause. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). "Searches conducted without a warrant are per se unreasonable under the Fourth Amendment—subject only to a few 'specifically established and well-delineated exceptions.'" *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). These exceptions include (1) consent;[13] (2) exigent circumstances;[14] and (3) a "special

[13]"It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

[14]"The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant. It permits, for instance, the warrantless entry of private property when there is a need to provide urgent aid to those inside, when police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (citation omitted). "Warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quotations omitted) (brackets omitted).

need." In this case, there was no warrant, consent, or exigent circumstance. The qualified immunity question concerns, therefore, (1) whether a warrant was required for the search because the special needs exception did not apply, and (2) if it did, whether the search nonetheless violated the special needs doctrine.

(ii) Special needs doctrine

"'Special needs' is the label attached to certain cases where 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Dubbs*, 336 F.3d at 1212 (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 830 (2002)).

There is no definitive list of "special needs." The Supreme Court has found a special need in a principal's in-school search of a student's purse for drugs; a public employer's search of an employee's desk; a probation officer's search of a probationer's home; a Federal Railroad Administration policy requiring employees to take blood and urine tests following a major rail accident; drug testing of United States Customs employees applying for drug interdiction jobs; schools' random drug testing of athletes; and drug testing of public school students partaking in extracurricular activities. *See Dubbs*, 336 F.3d at 1213 (collecting cases). In *Dubbs*, we synthesized the special needs doctrine as follows:

> (1) an exercise of governmental authority distinct from that of mere law enforcement—such as the authority as employer, the in loco parentis authority of school officials, or the post-incarceration authority of probation officers; (2) lack of individualized suspicion of wrongdoing,

> and concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing.

Id. at 1213-14.

State actors can invoke the special needs doctrine only when the purpose of the search is sufficiently "divorced from the State's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (drug tests used in a state obstetrics ward not justified under special needs because they were coordinated with the police).

When it applies, the special needs doctrine employs a more relaxed test than the one traditionally used under the Fourth Amendment to assess the reasonableness of a search. To evaluate special needs reasonableness, we have (1) required that (a) the search be "justified at its inception" and (b) reasonable in its "scope" given the "circumstances";[15] or we have (2) balanced government and private interests.[16]

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[15]*See, e.g., Edwards For and in Behalf of Edwards v. R*ees, 883 F.2d 882, 884 (10th Cir. 1989) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)). *T.L.O.*, in turn, cites this test from *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

[16]*See, e.g., Dubbs*: "[I]n special needs cases, the Court replaces the warrant and probable cause requirement with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest." 336 F.3d at 1213.

1) Child abuse context: Supreme Court and Tenth Circuit

The Supreme Court has not addressed the special needs doctrine in the context of social workers' inspection of children upon suspicion of child abuse. It has rejected the special needs doctrine to justify a search, but in a different child abuse context. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court held that a hospital's testing of pregnant mothers in its maternity ward for cocaine and reporting results to authorities under a theory that a positive result constituted "child abuse" did not qualify for the special needs exception to the Fourth Amendment warrant requirement because of the program's "pervasive involvement of law enforcement." *Id.* at 70, 85.

The Tenth Circuit has not previously addressed whether the special needs doctrine applies to a social worker's search of a student at school to detect evidence of suspected abuse. We applied it in a child abuse context when a student at a public school needed to be interviewed. *Doe v. Bagan*, 41 F.3d 571, 574 n.3 (10th Cir. 1994). That case concerned a seizure, however, not a search, because it involved the questioning of a minor suspected of abusing another child, not an inspection of the allegedly abused child. *See id.* In another case, we held that special needs did not permit a social worker, who suspected abuse, to enter a home and remove a child. *Roska*, 328 F.3d at 1242. In *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993), we held that even if a police officer is performing the functions of a social worker in examining a young child's private areas upon suspicion of abuse, the police officer nevertheless

must abide by the Fourth Amendment's warrant requirement.[17]

In *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003), a school invoked the special needs doctrine when it subjected an entire class of children to intrusive physical examinations (including genital examinations and blood tests) without parental notice or consent, stating this was "done in order to comply with federal regulations [and] is an effective means of identifying physical and developmental impediments in children prior to them starting school, a goal of Head Start." *Id.* at 1214. We did not decide whether the doctrine applied, holding instead that even if it did, the searches were unconstitutional under the balancing test. The extreme privacy deprivations involved in the invasive testing outweighed the ostensible special need of doing a health assessment. *Id.* at 1214-15.

We therefore have not established whether the special needs doctrine permits a social worker to search a child, such as by removing clothing and/or taking photographs, to investigate a report of suspected abuse.

2) Child abuse context: other circuits and special needs

Other circuits have split on whether a social worker's examination of a child upon suspicion of abuse requires a warrant or qualifies for the special needs doctrine.

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[17]We decided *Franz* before the Supreme Court held in *Ferguson* that social workers are not categorically exempt from the warrant requirement when performing a search. *Ferguson*, 532 U.S. at 76 & n.9.

The Seventh Circuit held that a social worker's visual inspection of a child upon suspicion of child abuse falls under the special needs doctrine and thus can proceed without a warrant, as long as the search passes the special needs balancing test and is fundamentally reasonable. *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).[18] In *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993), the Fourth Circuit held social workers' warrantless examinations of potentially abused children in their foster homes should be evaluated under a special needs balancing and general "reasonableness" analysis, as opposed to probable cause.

Four other circuits, however, have held that social worker examinations of children based on abuse suspicions are not candidates for special needs analysis. The Third Circuit, in *Good v. Dauphin Cty. Soc. Servs. for Children & Youth*, 891 F.2d 1087 (3d Cir. 1989), held that social workers' search of a child in his home required either a search warrant, consent, or exigent circumstances. The Ninth Circuit, in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), held that a social worker performing a search on a child to investigate possible abuse must have a warrant, consent, or exigent circumstances, and may not rely on the special needs doctrine (especially in this case where a police officer was also present with the social worker). The Second Circuit, in *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), held that judicial authorization was required for social workers to examine a student upon suspicion of abuse. Finally, the Fifth Circuit, in *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395 (5th Cir.

[18]The Seventh Circuit later limited this holding to searches on public as opposed to private property. *Michael C. v. Gresbach*, 526 F.3d 1008, 1016 (7th Cir. 2008).

2002), held that social workers performing a visual body cavity search for suspected abuse needed a court order based on probable cause or exigent circumstances, and that they could not rely on the special needs doctrine. *Roe* emphasized, under *Ferguson*, the overlap of social workers with law enforcement investigating abuse militates against the applicability of the special needs doctrine. *Id.* at 406.

3. Analysis

We limit our qualified immunity analysis, as the district court did, to whether the Does can satisfy the second prong of qualified immunity—that is, whether they can show that any Fourth Amendment violation was based on clearly established law.

Defendants do not contest that Ms. Woodard conducted a search for Fourth Amendment purposes.[19] For the search to have been valid under the Fourth Amendment, Ms. Woodard needed a warrant or one of the exceptions to the warrant requirement to apply—consent, exigent circumstances, or the special needs doctrine. Because (1) Ms. Woodard did not obtain a warrant, (2) Ms. Doe did not consent to the search, and (3) the circumstances were not exigent, the search would have been valid without a warrant only if the special needs doctrine applied.

[19]Although the Defendants do not expressly and directly concede that I.B. was subject to a search, they devote their brief to evaluating a "search" of this type. See, e.g., Aplee Br. at 14 ("This Court should consider a social worker's visual inspection and photographing of a child, under the circumstances alleged, as an administrative search subject to the reasonableness balancing test . . . .").

The Does have not cited a Supreme Court or Tenth Circuit decision specifically holding that a social worker must obtain a warrant to search a child at school for evidence of reported abuse. Instead, they argue that (a) only a warrant could have justified the search of I.B. because the special needs doctrine did not apply, or (b) even if the special needs doctrine did apply, Defendants' conduct violated the Fourth Amendment reasonableness standards for a special needs search. The Does have not met their burden of showing clearly established law on either ground.

a. No showing of clearly established Fourth Amendment law on whether social worker searches examining for abuse qualified for the special needs exception

In this section, we examine the Does' attempts to show that Ms. Woodard's search violated clearly established Fourth Amendment law in December 2014 because she lacked a warrant and the special needs exception did not apply. They have failed to do so. Based on our previous review of the case law and discussion below, we conclude that neither the Supreme Court nor this court had previously decided that the special needs exception does not apply to warrantless social worker searches for suspected child abuse. Nor was the weight of authority from other circuits clearly established. We therefore hold that, when the search occurred in this case, there was no clearly established law that a warrant was required.

(i) Supreme Court and Tenth Circuit law

The Does argue that Supreme Court and Tenth Circuit precedent on special needs existing when Ms. Woodard searched I.B. may be read to find a Fourth Amendment

violation under clearly-established law. They cite (1) *Franz*, which held that a police officer could not search a young child without a warrant or consent upon suspicion of abuse; (2) *Dubbs*, which held that examinations of children at school needed a warrant, consent, or exigent circumstances, and that there is no general social worker exception to the Fourth Amendment; (3) *Roska*, for the proposition that the special needs doctrine can be used only when obtaining a warrant is impracticable; and (4) *Ferguson*, for the principle that "[e]xcessive entanglement with law enforcement renders the special need exception inapplicable," Aplt. Br. at 35.[20]

The Does contend that these cases put the DHS caseworkers and their supervisors on notice that Ms. Woodard could not undress and photograph I.B. without a warrant, consent, or exigent circumstances. We disagree that these cases would have put a reasonable social worker on notice that her conduct violated the Fourth Amendment.

First, *Franz* involved a police officer who searched a young child upon suspicion of abuse, and held that the officer needed a warrant, consent, or exigent circumstances to do so. In other words, the special needs doctrine did not apply. But a police search is not a social worker search, and *Franz* does not address the latter.

Second, *Dubbs* does not clearly establish Fourth Amendment law for a social worker's search for child abuse in this case. In *Dubbs*, the school indiscriminately tested the entire class and performed much more invasive examinations. The defendant school officials argued that

[20]In their reply brief, the Does drop their reference to *Ferguson* in their clearly-established argument and rely only on Franz, Dubbs, and Roska. See Aplt. Reply Br. at 9.

the special need was for generalized health assessment to comply with federal regulations, not to search for child abuse. Accordingly, Dubbs did not address the issue presented here—whether Ms. Woodard's search of I.B. for child abuse satisfied the Fourth Amendment as a special needs search.

Third, *Roska* also does not provide clearly established law. In *Roska*, we said that a special need must "make the warrant and probable-cause requirement impracticable." 328 F.3d at 1241 (quotations omitted). It held that, barring exigent circumstances, no special need "renders the warrant requirement impracticable when social workers enter a home to remove a child." *Id.* at 1242. *Roska* does not bear upon social workers searching and photographing a child at school for suspected child abuse.

Finally, in *Ferguson*, the Supreme Court held that hospital workers' reporting of drug tests taken in a maternity ward to police could not qualify for the special needs exception because their conduct was too intertwined with law enforcement. *Ferguson* says nothing about social workers searching and photographing a child at school because of suspected child abuse or whether such conduct is unacceptably entangled with law enforcement to qualify for special needs analysis. Nor have we, in contrast to the Fifth Circuit in *Roe*, ever held that a social worker search for suspected abuse context was too closely tied to law enforcement to qualify for the special needs doctrine.

Taken together, these four cases do not constitute clearly established law that the Does suffered a Fourth Amendment violation because no warrant was obtained. They are not factually similar enough to apply to the Does' claim. *See White*, 137 S. Ct. at 552 ("[I]t is again necessary to reiterate the longstanding principle that "clearly

established law should not be defined at a high level of generality . . . . [C]learly established law must be particularized to the facts of the case.") (quotations and citations omitted).

(ii) Other circuits

Four circuits have rejected the special needs doctrine as an exception to the warrant requirement and two have approved it for searches like the one here. This does not amount to a "clearly established weight of authority from other courts," *Estate of Lockett*, 841 F.3d at 1112 (quotations omitted), such that this "statutory or constitutional question [is] beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Also, the circuits rejecting the special needs doctrine often did so based on facts distinguishable from this case—for instance, the search occurred at the child's home, *see, e.g., Good*, 891 F.2d at 1092; Roe, 299 F.3d at 411-12, or involved taking the child out of school to a hospital, *see Tenenbaum*, 193 F.3d at 602.

b. No showing of clearly established law on minimal Fourth Amendment reasonableness standards

Despite the lack of law clearly showing the special needs doctrine did not apply to the search here, the Does could still attempt to show that Ms. Woodard's search failed to meet clearly established minimal Fourth Amendment reasonableness standards applicable to special needs searches.

When the Supreme Court first described the "special needs" exception in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), it said a special needs search must satisfy minimum standards drawn from *Terry v. Ohio*, 392 U.S. 1 (1968):

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."

T.L.O., 469 U.S. at 341 (alteration in original) (citation omitted) (quoting *Terry*, 392 U.S. at 20). As noted above, we also have measured reasonableness by balancing government and private interests. *See Dubbs*, 336 F.3d at 1214.[21]

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[21]Although the *Terry* reasonableness determination and the interest-balancing approach are not identical, courts have recognized overlap in these tests. *See, e.g., Jones v. Hunt*, 410 F.3d 1221, 1228-29 (10th Cir. 2005) (assessing reasonableness under *Terry* and quoting *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999), for the proposition that courts may "evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."). *See also Darryl H.*, 801 F.2d 902-03 (adopting approach that blends *Terry* analysis with interest-balancing test: "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.") (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

(i) Appellants' failure to show clearly established law

The Appellants offer almost no analysis to support their contention that the search violated clearly established minimal Fourth Amendment standards. Their opening brief devotes less than two pages to this issue. Although it cites several cases, including *Dubbs*, it does not provide any case analysis or otherwise begin to show how Appellants can meet the clearly established law burden to overcome qualified immunity. Aplt. Br. at 36-37. Their Reply Brief fares no better. It mixes arguments and case cites about warrant requirements and the special needs exception with arguments about reasonable searches. Aplt. Reply at 8-9. Other than parenthetical case summaries, however, the Reply lacks case analysis or explanation as to why these cases clearly establish that Ms. Woodard's search violated minimal Fourth Amendment protections. The Reply complains that the Appellees have failed to provide case law to support the search and then states it is "not impermissibly shift[ing] the burden" to the Appellees. *Id.* at 10. But that is exactly what their argument would do. The Appellants' failure to meet their burden should resolve the issue. The dissent attempts to do their work for them, but it does not show the law was clearly established, either.

(ii) The dissent

We have shown that in December 2014 the law did not clearly establish that a warrant was required to justify Ms. Woodard's search. This is so because the law did not clearly establish that Ms. Woodard could not rely on the special needs exception to justify the search. *See McInerney*, 791 F.3d at 1237 (performing clearly established analysis by examining whether it was clearly

established that an exception did not apply to the Fourth Amendment's warrant requirement).

Despite appearing to agree with the foregoing, the dissent contends the search violated clearly established Fourth Amendment requirements even assuming the special needs doctrine applied. We disagree for two related reasons—(1) the cases it relies on are factually distinguishable from this case, and (2) Supreme Court precedent calls for factually similar cases to constitute clearly established law. We respond to the dissent to address whether it was clearly established that the special needs doctrine's reasonableness standards were not met in this case.

First, the Does must "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552. The dissent relies on two cases that are materially different from this case. In *Dubbs*, the purpose of the search was to identify physical and developmental impediments in all children to comply with federal Head Start program requirements.[22] The state actors did not attempt to justify the search in *Dubbs* based on the special need of detecting child abuse—just the opposite: "The nurses who administered the examinations, Strayhorn and Baker, testified that the exams were in conformity with standards for well-child examinations and were not

[22]The dissent, quoting *Dubbs*, states that "'[t]he focus of the [Fourth] Amendment is . . . on the security of the person, not the identity of the searcher or the purpose of the search.'" Dissent Op. at 7 (quoting *Dubbs*, 336 F.3d at 1206). But this quotation from *Dubbs* addressed whether the physical examinations in that case were "searches" under the Fourth Amendment in the first place, not whether a given search was reasonable under the Fourth Amendment.

performed for the purpose of detecting child abuse." 336 F.3d at 1200. In Safford, the purpose of the search was to prevent a student from distributing medications to other students. 557 U.S. at 368. The purpose of Ms. Woodard's search was to check for reported child abuse. Although, as the dissent notes, all three searches served "the state's interest in child welfare," Dissent Op. at 6, the purpose of Ms. Woodard's search was different in kind from the others—to protect a child from reported abuse.

In *Dubbs*, the nature of the search was an intrusive examination of the genitals of all children in the class, "separated only by partitions, so that it was possible for other children to see or hear portions of the examinations performed on their classmates." *Dubbs*, 336 F.3d at 1199. "The girls were asked to lay spread-legged on a table where the nurses inspected the girls' labia; in some cases the nurses would 'palpate,' or touch, the genital area when a visual inspection was not adequate. Similarly, the nurses would palpate the boys' genitals to test for the presence of testes." *Id.* at 1200. Accordingly, not only was the state justification weaker in *Dubbs* than in this case, the search was far more invasive, far less private, and applied indiscriminately to the entire class. *Dubbs* held the search unconstitutional under "the 'special needs' balancing test," *id.* at 1214, but the factors to balance in this case are plainly different.

In *Safford*, school officers searched a student suspected of distributing medications to other students. 557 U.S. at 368. The search, which involved removal of the student's clothing and pulling aside her undergarments to expose private areas, id. at 369, was comparable to this case, but the circumstances underlying the search were different. The student searched in Safford was suspected of harming others through drug distribution. *Id.* at 377.

The child in this case was suspected of suffering abuse from a third party. The Safford Court asked whether the search was "'reasonably related in scope to the circumstances which justified the interference,'" *id.* at 375 (quoting *T.L.O.*, 469 U.S. at 341), and held that it was not, given that the school lacked facts that the alleged medications were dangerous or that the student hid them "in her underwear." *Id.* at 376. Neither *Safford* or *Dubbs* served to clearly establish that Ms. Woodard's search of I.B. was not reasonably related in scope to the circumstances—suspected child abuse. The dissent correctly states that the searches in all three cases involved the children's "intimate areas," but the purpose and circumstances of the search for suspected child abuse in this case differed too much for *Dubbs* and *Safford* to have guided Ms. Woodard with clearly established law.

Unlike the dissent, therefore, we do not see how a reasonable social worker in Ms. Woodard's position would, based on these cases, know that her search of I.B. violated the requirements for the special needs exception or the basic protections of the Fourth Amendment. "The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 138 S. Ct. at 590; see also *Mullenix*, 136 S. Ct. at 308 ("A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.") (quotations omitted). As we have shown, the facts in this case differ markedly from the facts in the cases the dissent attempts to use for clearly established law.

Second, the dissent's reliance on these cases runs counter to the Supreme Court's repeated instruction that "clearly established law should not be defined at a high

level of generality" but "must be particularized to the facts of the case." *White*, 137 S. Ct. at 552 (quotations omitted). The Court has stressed that the rule's high "degree of specificity" is "especially important in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 309. The dissent contends that the clearly established "particular rule" in December 2014, Dissent Op. at 6 (quoting *Wesby*, 138 S. Ct. at 590), was that a search "needed to be 'justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place,'" *id.* (quoting Aplt. Br. at 36). But this minimal Fourth Amendment standard applies to all searches. It is not particularized to the facts of this case. The dissent therefore attempts "to define clearly established law at a high degree of generality" contrary to the Supreme Court's instructions. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quotations omitted).[23]

Even if *Dubbs* and *Safford* offer plausible authority to support a special needs Fourth Amendment violation here, whether they supply clearly established law is at most debatable, and to be clearly established, "'existing

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[23]The Supreme Court has repeatedly emphasized for more than 35 years that generalized propositions of law are insufficient for clearly established law purposes. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (Court of Appeals "misapplied [qualified immunity] principles" when its "discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated— the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances—was clearly established."); *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam) (Court of Appeals was mistaken in using "the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness" for clearly established purposes because the proposition is "cast a high level of generality" (quotations omitted)).

precedent must have placed the statutory or constitutional question beyond debate.'" *White*, 137 S. Ct. at 551 (quoting *Mullenix*, 136 S. Ct. at 308). "It is not enough that the rule is suggested by then-existing precedent." *Wesby*, 138 S. Ct. at 590. Qualified immunity lies where "none of the cases [the parties and the dissent rely on] *squarely governs* the case here." *Mullenix*, 136 S. Ct. at 309 (brackets and quotations omitted).[24]

To the extent the Does attempt to argue that this is the rare alleged violation of minimal Fourth Amendment standards that is so "obvious" that a factually similar case is unnecessary for the clearly established law standard,[25]

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[24]The dissent also contends that *Safford* clearly establishes that "the categorically extreme intrusiveness" of a body search "requires some justification in suspected facts, general background possibilities fall short." Dissent Op. at 7 (quoting *Safford*, 575 U.S. at 376). But the Does and the dissent do not show that under the circumstances *in this case*, a reasonable social worker in Ms. Woodard's shoes would have known her conduct fell short. As alleged in the First Amended Complaint, the report that I.B. was being abused contained specifics—"little bumps on I.B.'s face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees." Aplt. App., Vol I at 15 ¶ 36. Combined with a report of child abuse, a reasonable social worker could understand these to be "suspected facts," not "general background possibilities." To the extent Appellants pled, as the dissent suggests, that "Ms. Woodard was never aware of facts that could have justified such an intrusive search of a four-year-old girl," Dissent Op. at 9, such an allegation is both conclusory and contradicted by other allegations in the First Amended Complaint.

[25]*See*, *e.g.*, *McCoy v. Meyers*, 887 F.3d 1034, 1053 (10th Cir. 2018) ("Even assuming that our previous cases were not sufficiently particularized to satisfy the ordinary clearly established law standard, ours is 'the rare obvious case, where the unlawfulness of the [state actor's] conduct is sufficiently clear even though existing precedent does not address similar circumstances.'" (quoting *Wesby*, 138 S. Ct. at 590); *see also White*, 137 S. Ct. at 552; *Brosseau*, 543 U.S. at 199.

see Aplt. Reply Br. at 6 (citing *Hope*, 536 U.S. at 741), this argument fails. "[T]his is not an obvious case where a body of relevant case law is not needed." *Wesby*, 138 S. Ct. at 591 (quotations omitted).

* * * *

In summary, the Does have not shown that Ms. Woodard's search violated clearly established Fourth Amendment law. We affirm the district court's conclusion that the Defendants, including supervisors, were entitled to qualified immunity and that the Fourth Amendment claims should be dismissed.[26]

B. Fourteenth Amendment Claims

This section addresses the two substantive due process claims for violation of parental rights and interference with familial association. We describe our standard of review and provide legal background on the facts required to allege these types of claims and how those facts must "shock the conscience." We then examine whether the Does' complaint states a plausible claim under these standards and, like the district court, find it lacking.

1. Standard of Review

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[26]In a different circuit with more developed law, the analysis of the "clearly established" prong of qualified immunity might have been different. As noted above, we do not address the first step of qualified immunity analysis—whether the Defendants violated the Fourth Amendment.

We note that El Paso County DHS later instituted a policy under which social workers must ask parental permission or obtain a court order before searching and photographing children for suspected abuse. Aplt. App., Vol. II at 7.

We review de novo a district court's Rule 12(b)(6) dismissal of a complaint for failure to state a claim. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal under Rule 12(b)(6) is appropriate if the complaint alone is legally insufficient to state a claim. *See Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010).

Under our de novo review, "[a]ll well-pleaded facts, as distinguished from conclusory allegations, must be taken as true," and we must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party. *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) (quotations omitted).

2. Legal Background

The following describes the parental right to direct medical care and the right of familial association. To state a claim for either, the plaintiff must show that the alleged conduct "shocks the conscience."

a. Substantive due process claims—"shocks the conscience"

In *Halley v. Huckaby*, 902 F.3d 1136 (10th Cir. 2018), we recently recounted that the Supreme Court recognizes two types of substantive due process claims: (1) claims that the government has infringed a "fundamental" right, *see*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997)

(assessing asserted right to assisted suicide); and (2) claims that government action deprived a person of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience, *see, e.g.*, *City of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (examining a high-speed police chase). *Halley*, 902 F.3d at 1153. "[W]e apply the fundamental-rights approach when the plaintiff challenges *legislative action*, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious *executive action*." *Id.* The Does' substantive due process claims—violation of the parental right to direct medical care and to familial association—challenge executive action, *id.* at 1154, and therefore are "shocks the conscience" claims.

Executive action that shocks the conscience requires much more than negligence. *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006). Even the actions of a reckless official or one bent on injuring a person do not necessarily shock the conscience. *Id.* "Conduct that shocks the judicial conscience" is "deliberate government action that is arbitrary and unrestrained by the established principles of private right and distributive justice." *Hernandez v. Ridley*, 734 F.3d 1254, 1261 (10th Cir. 2013) (quotations omitted). "To show a defendant's conduct is conscience shocking, a plaintiff must prove a government actor arbitrarily abused his authority or employed it as an instrument of oppression." *Id.* (brackets omitted) (quotations omitted). "The behavior complained of must be egregious and outrageous." *Id.*; *see Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) ("We set aside the conviction because such conduct 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency.") The Supreme Court found conscience-shocking behavior in a case involving a sheriff's application of stomach pumping

to force vomiting, *Rochin v. California*, 342 U.S. 165, 172 (1952). This Circuit recently found a social worker's various actions that led to physical and sexual abuse of a minor shocked the conscience. *T.D. v. Patton*, 868 F.3d 1209, 1213 (10th Cir. 2017).

b. Parental right to direct child's medical care

The Fourteenth Amendment protects the right of parents to make decisions "concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). This right provides "some level of protection for parents' decisions regarding their children's medical care." *PJ ex rel Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010). The right to direct a child's medical care is not absolute. "[W]hen a child's life or health is endangered by her parents' decisions, in some circumstances a state may intervene without violating the parents' constitutional rights." *Id.* at 1198. As noted above, a violation of this right must be conscience shocking.

c. Right of familial association

The government's "forced separation of parent from child, even for a short time, represents a serious impingement" on a parent's substantive due process right to familial association. *Jensen*, 603 F.3d at 1199 (quotations omitted). A familial association claim must be based on allegations of abusive government authority. *See Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993); *see also Jensen*, 603 F.3d at 1198-99; J.*B. v. Washington County*, 127 F.3d 919, 927 (10th Cir. 1997). A parent must allege "*intent* to interfere" with this right—that is, the state actor must have directed conduct at the familial relationship "with knowledge that the statements or

conduct will adversely affect that relationship." *Lowery v. City of Riley*, 522 F.3d 1086, 1092 (10th Cir. 2008). Again, the right is not absolute, but must be weighed against the state's interest in protecting a child's health and safety. *See Youngberg v. Romeo*, 457 U.S. 307, 320-21 (1982); *see also Jensen*, 603 F.3d at 1199; *Lowery*, 522 F.3d at 1092. In conducting this balancing, courts consider the severity of the infringement on the protected relationship, the need for defendants' conduct, and possible alternative courses of action. *See Griffin*, 983 F.2d at 1548.[27]

To state a claim, Ms. Doe must have alleged that (1) the Defendants intended to deprive her of her protected relationship with her daughter, s*ee Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1175 (10th Cir. 2013); and that (2) the Defendants either unduly burdened Ms. Doe's protected relationship, *see Jensen*, 603 F.3d at 1199, or effected an "unwarranted intrusion" into that relationship, *Trujillo v. Bd. of Cty. Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

3. Analysis

a. Right to direct medical care

Ms. Doe's allegations on the right to control medical treatment do not "shock the conscience." To be conscience-shocking, Ms. Woodard's (or her supervisors')

[27]In *Halley*, we explained that, the two-part test "simply describes the kind of behavior we find to shock the conscience in this context." 902 F.3d at 1154. "Namely, it shocks the conscience when: (1) the officials intended to deprive the plaintiff of a protected relationship with a family member, and (2) the officials' intrusion into the relationship was not warranted by state interests in the health and safety of the family member. Together, the facts alleged by the plaintiff on these points must meet the shocks-the-conscience standard." *Id.* (footnote and citation omitted).

behavior had to be so "arbitrary" to be "as an instrument of oppression," "egregious," "outrageous," and "so brutal and offensive" that it runs afoul of "traditional ideas of fair play and decency." *Hernandez*, 734 F.3d at 1261; *Breithaupt*, 352 U.S. at 435.

The allegations did not allege this level of severity. They did not allege interference with Ms. Doe's control of I.B.'s medical treatment other than Ms. Woodard's performing an initial examination to determine whether I.B. had been abused. To the extent this was a "medical decision," it hardly rose to the level of what precedent requires for "shocks the conscience."

b. Familial association

Ms. Doe's familial association allegations similarly did not "shock the conscience" under *Halley*. We consider whether the complaint alleged (1) a deprivation of Ms. Doe's protected relationship with I.B. that (2) "unduly burdened" that relationship in a manner that was "egregious," "outrageous," "unrestrained," "brutal," and a display of arbitrary power being used "as an instrument of oppression." *Moore*, 438 F.3d at 1040; *Hernandez*, 734 F.3d at 1261; *Breithaupt*, 352 U.S. at 435.

Again, the complaint did not allege this level of severity. The Does argue in their brief that their complaint should be read to allege that Ms. Woodard intended to separate I.B. from her mother to conduct an examination without the mother present. But even if the complaint could be read this way, it still needed to allege an intended deprivation or suspension of the parent-child relationship that shocks the conscience. *See, e.g., Thomas v. Kaven*, 765 F.3d 1183, 1195-96 (10th Cir. 2014) (complaint sufficiently stated claim for § 1983 familial

association claim where it was alleged Defendant, upon suspecting domestic sexual abuse, placed a medical hold on a child to prevent parents from taking the child home from the hospital). Here, the complaint lacked allegations that Ms. Woodard's motivation was anything other than to investigate potential child abuse.

Moreover, the search happened during school hours when I.B.'s mother would not otherwise have been with her. To the extent I.B. was separated from her mother during a time when she would have wanted her mother to be present, this is a far cry from the substantial separation required in other cases. *See, e.g., Thomas*, 765 F.3d at 1188-90, 1197-98 (Fourteenth Amendment claim stated where plaintiff's daughter allegedly separated coercively for weeks in mental health ward); *Roska*, 328 F.3d at 1238-39, 1246 (familial association Fourteenth Amendment claim stated where child was removed from home and placed under protective care for a week).

* * * *

In summary, the Does have failed to state a Fourteenth Amendment substantive due process claim for violation of parental rights or interference with familial association against the Defendants.

III. CONCLUSION

We affirm the district court's (1) dismissal of the I.B.'s Fourth Amendment claims under qualified immunity, and (2) dismissal of the Does' Fourteenth Amendment claims for failure to state a claim.[28]

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[28]We also affirm the district court's denial of the Does' motion for leave to amend their complaint. Amendment would have been futile

given this opinion's analysis of clearly established law. *See Jefferson Cty. Sch. Dist. No. R-1 v. Moody's Inv'rs Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999) ("Although [Federal Rule of Civil Procedure] 15(a) provides that leave to amend shall be given freely, the district court may deny leave to amend where amendment would be futile.").

BRISCOE, Circuit Judge, concurring in part, dissenting in part.

I agree with the majority that it is not clearly established that a social worker investigating an allegation of child abuse must obtain a warrant before searching a child. But, as the majority acknowledges, uncertainty about whether Ms. Woodard was required to obtain a warrant does not fully dispose of I.B.'s Fourth Amendment claim. Maj. Op. at 26. "[T]he Does could still attempt to show that Ms. Woodard's search failed to meet clearly established minimal Fourth Amendment reasonableness standards applicable to special needs searches." *Id.* The majority concludes that the Does have not made this showing because the law is not clearly established; in the majority's view, the cases applying the special needs exception to a search of the intimate areas of a child's body are too factually dissimilar from Ms. Woodard's search of I.B. *Id.* at 28.

I disagree. Even assuming the special needs exception applied, it was clearly established in December 2014 that Ms. Woodard's search of I.B.'s intimate areas—a search that Ms. Woodard conducted without parental consent or a specific suspicion that evidence of abuse would be found—was unconstitutional. Any reasonable person would have known, based on *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004), and *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009), that Ms. Woodard's search violated the Fourth Amendment. Accordingly, I would reverse the district court's dismissal of the Does' Fourth Amendment claims against April Woodard, Christina Newbill, Shirley Rhodus, and Richard Bengtsson in their individual

capacities, and remand for further proceedings. I would also reverse the district court's denial of the Does' motion for leave to file a Second Amended Complaint. For these reasons, I respectfully dissent.[1]

I

Ms. Woodard is entitled to qualified immunity "under § 1983 unless (1) [she] violated a federal statutory or constitutional right, and (2) the unlawfulness of [her] conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). I first address the "clearly established" prong. *McCoy v. Meyers*, 887 F.3d 1034, 1045 (10th Cir. 2018) ("Courts have discretion to decide the order in which to engage the two qualified immunity prongs." (alterations omitted) (quoting *Tolan v. Cotton*, 572 U.S. 650, 656 (2014)). "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589. Two controlling cases decided before December 2014—*Dubbs*, 336 F.3d 1194, and Safford, 557 U.S. 364— apply the special needs exception to a search of the intimate areas of a child's body. "Clearly established law 'must [also] be particularized to the facts of the case.'" *McCoy*, 887 F.3d at 1044 (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam)). I therefore discuss the facts of *Dubbs* and *Safford* in detail.

In *Dubbs*, a group of parents sued a Head Start program for violating their toddlers' Fourth Amendment rights by conducting medical exams on the toddlers without parental consent. 336 F.3d at 1199–1200. "The

[1] I agree with the majority's conclusions regarding the Does' Fourteenth Amendment claims.

children were required to lower or remove their underclothes and were given a medical examination that included, among other things, a genital exam and blood test." *Id.* at 1200. The district court granted summary judgment to the Head Start program because it found that the searches were reasonable under the special needs exception. *Id.* at 1201. The special need asserted was "that the physical examination of a child, done in order to comply with federal regulations, is an effective means of identifying physical and developmental impediments in children prior to them starting school."[2] *Id.* at 1214 (quotation marks omitted). Without "resolv[ing] whether the 'special needs' doctrine applie[d]," we reversed "because it [was] plain that, if performed without the necessary consent, the searches were unconstitutional even [under] the 'special needs' balancing test." *Id.* at 1214.

We explained that, "[i]n special needs cases, . . . the warrant and probable cause requirement [is replaced] with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest."[3] Id. at 1213. We also emphasized that "[t]he premise of the 'special needs' doctrine is that . . . compliance with ordinary Fourth Amendment requirements would be 'impracticable.'" *Id.* at 1214 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002)). The searches conducted by the Head Start program were plainly unconstitutional because "[t]here

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[2]We concluded that there was a genuine issue of fact about whether the "discovery of child abuse was one purpose of the exams." *Dubbs*, 336 F.3d at 1205.

[3]*Dubbs* was decided prior to *Safford*, so the special needs test is articulated slightly differently in each case.

[was] no reason[] . . . to think that parental notice and consent [was] 'impracticable.'" *Id.* at 1215.

Lack of parental consent was a decisive fact in *Dubbs* because "the requirement . . . of parental consent in the case of minor children[] serves important practical as well as dignitary concerns, even when a social welfare agency . . . believes it is acting for the good of the child." *Id.* at 1207. "Even beyond constitutional values of privacy, dignity, and autonomy, parental notice and consent for childhood physical examinations are of significant practical value." *Id.* Parents can "provide medical histories, discuss potential issues with the health care professionals, help to explain the procedures to the children, and reassure them about the disturbing and unfamiliar aspects of the exam—which included . . . visual . . . inspection of genitals by strangers." *Id.*

Six years after *Dubbs*, the Supreme Court also analyzed the constitutionality of a search of a child's intimate areas under the special needs exception. *See Safford*, 557 U.S. 364. In *Safford*, a 13-year-old student was accused of distributing prescription and over-the-counter medications to other students at her school. *Id.* at 368. The pills had previously made another student sick. *Id.* at 372. In an effort to locate the medications, an assistant principal and administrative assistant searched the accused student's backpack, but found nothing. *Id.* The assistant principal then "instructed [the assistant] to take [the student] to the school nurse's office to search her clothes for pills." *Id.* at 369. They found no medications. *Id.* Having already removed all of her clothing except her underwear, the student "was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree." *Id.* Again, "[n]o pills were found." *Id.* The

student's mother sued the assistant principal for violating her daughter's Fourth Amendment rights. *Id.*

The Court explained that this type of search "implicate[s] the rule of reasonableness as stated in [*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)], that 'the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 375 (second alteration in original) (quoting *T.L.O.*, 469 U.S. at 341). Under this special needs test, "[t]he scope [of the search] will be permissible[] . . . when it is 'not excessively intrusive in light of the age and sex of the [child] and the nature of the'" government's interest in conducting the search. *Id.* (quoting *T.L.O.*, 469 U.S. at 342).

The Court emphasized the severity of a search that "expos[es]" a child's "intimate parts." *Id.* at 377. "[B]oth subjective and reasonable societal expectations of personal privacy support the treatment of . . . a search [of a child's intimate areas] as categorically distinct" from more limited searches of her "outer clothing and belongings." *Id.* at 374. "The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Id.* at 377. "[G]eneral background possibilities fall short; a reasonable search [so] extensive calls for suspicion that it will pay off." *Id.* at 376. Ultimately, the Court held that the assistant principal's search was unconstitutional because he did not possess facts suggesting either that the alleged medications posed any "danger to the students" or that the student was hiding medications "in her underwear." *Id.* at 376–77.

The legal principle controlling the constitutionality of Ms. Woodard's search of I.B. is clearly established because *Dubbs* and *Safford* are "particularized to the facts of [this] case." *McCoy*, 887 F.3d at 1044 (quoting *Pauly*, 137 S. Ct. at 552). Both cases analyze the search of the intimate areas of a child's body under the special needs exception, which is the issue presented here. In both cases, the searches were justified by the state's interest in child welfare—"identifying physical and developmental impediments" in *Dubbs*, 336 F.3d at 1214, and preventing students from distributing medications in *Safford*. Both searches were conducted by multiple adults, on school property, without parental notification, consent, or presence. In both *Dubbs* and *Safford*, the searches violated the Fourth Amendment.

This "precedent [is] clear enough that every reasonable official would interpret it to establish the particular rule the [Does] seek[] to apply," *Wesby*, 138 S. Ct. at 590, namely that Ms. Woodard's search needed to be "justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place," Aplt. Br. at 36 (citing Safford, 557 U.S. at 375). *See Jones v. Hunt*, 410 F.3d 1221, 1228–31 (10th Cir. 2005) (reversing grant of qualified immunity to a social worker who seized a student on school property because the seizure was not "justified at its inception"). Given their factual similarities to the search at issue here, *Dubbs* and *Safford* "obviously resolve whether the circumstances . . . confronted" by Ms. Woodard satisfied the special needs exception. *Wesby*, 138 S. Ct. at 590 (quotation marks omitted).

The majority concludes that the searches at issue in *Dubbs* and *Safford* are too dissimilar from Ms. Woodard's search of I.B. for *Dubbs* and *Safford* to be clearly

established law. Maj. Op. at 28–32. I do not think that Defendants are entitled to qualified immunity based on the factual differences between *Dubbs*, *Safford*, and Woodard's search of I.B. "[T]here does not have to be 'a case directly on point[;]' existing precedent must [have] place[d] the lawfulness of the particular [action] 'beyond debate.'" *Wesby*, 138 S. Ct. at 590 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). At the very least, Safford clearly established the legal principle that, under the special needs exception, a government official's search of a child's body must be "reasonably related in scope to the circumstances which justified the interference in the first place." 557 U.S. at 375 (quoting *T.L.O.*, 469 U.S. at 341). *Safford* also established that, because of "the categorically extreme intrusiveness of a search down to the body," such a search "requires some justification in suspected facts, general background possibilities fall short." *Id.* at 376. To be "reasonable," a "search that extensive calls for suspicion that it will pay off." *Id.*

Ms. Woodard could not have thought herself exempt from *Safford*. "We have held that the Fourth Amendment subjects state social workers to its requirements," *Jones*, 410 F.3d at 1225, because "[t]here is no 'social worker' exception to the Fourth Amendment," *Dubbs*, 336 F.3d at 1205. Neither does the fact that Ms. Woodard was investigating an allegation of child abuse meaningfully set her apart from a school administrator investigating the distribution of medications on campus. *See Dubbs*, 336 F.3d at 1206 ("The focus of the [Fourth] Amendment is . . . on the security of the person, not the identity of the searcher or the purpose of the search."); *Franz v. Lytle*, 997 F.2d 784, 793 (10th Cir. 1993) (A police officer's "motive to protect [a] child [from abuse] does not vitiate [the child's] Fourth Amendment rights."). While the effective investigation of child abuse is "a strong

government interest," *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242 (10th Cir. 2003), that does not relieve a social worker of her obligation to justify the search of a child's intimate areas with "facts," not "general possibilities," *Safford*, 557 U.S. at 376.[4]

As I discuss in the next section, this is where Ms. Woodard fell short of meeting the standard required by clearly established law. The Does have pled an unconstitutional search under Safford because they have alleged that Ms. Woodard was not aware of specific facts to justify a reasonable suspicion that she would find evidence of abuse by examining I.B.'s intimate areas. *See McCoy*, 887 F.3d at 1052–53 (concluding that precedent was clearly established law even though "not factually identical" to the case on appeal because the precedent was "factually analogous" and "share[d] . . . decisive factual circumstance[s]" with the case on appeal).

II

Because I would conclude that there is clearly established law on the question of whether Ms. Woodard's search was constitutional under the special needs exception, I would also address the remaining prong of the qualified immunity test—whether Ms. Woodard "violated [I.B.'s] federal . . . constitutional right." *Wesby*, 138 S. Ct. at 589. Ms. Woodard's search needed to be "reasonably related in scope to the circumstances which justified the interference in the first place," meaning that the search

[4] "[W]e must be sensitive to the fact that society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family or caretaker setting." *Franz*, 997 F.2d at 792–93.

should "not [have been] excessively intrusive in light of the age and sex of [I.B.] and the nature of the" government interest. *Safford*, 557 U.S. at 375 (quoting *T.L.O.*, 469 U.S. at 341, 342). Certainly, the government's interest in thoroughly and promptly investigating allegations of child abuse is weighty. *See Roska*, 328 F.3d at 1242 ("It is true that the state has a strong interest in protecting children, and that this interest should be taken into account in evaluating the reasonableness of [a] search . . . ."). But that interest does not supersede I.B.'s Fourth Amendment right to be free from unreasonable search. *See id.* According to the operative First Amended Complaint, Ms. Woodard was never aware of facts that could have justified such an intrusive search of a four-year-old girl, even under the special needs exception. *See Jones*, 410 F.3d at 1223 ("When reviewing a dismissal pursuant to Rule 12(b)(6), we accept the well-pleaded allegations of the complaint as true and view them in the light most favorable to the plaintiff."). Because this analysis is fact-intensive, I recount and expand upon the facts discussed by the majority.

The El Paso County Department of Human Services "received a report that I.B. was being abused" on December 9, 2014. App. Vol. I at 15. "Allegations of abuse included little bumps on I.B.'s face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees." *Id.* The next day, on December 10, 2014, Ms. Woodard went to I.B.'s school. *Id.* at 16. At that time, Ms. Woodard had already "received permission from her supervisor[] . . . to view I.B.'s buttocks, stomach/abdomen, and back so [she] could look for marks/bruises." *Id.* (quotation marks omitted).

I.B was taken to the school nurse's office with Ms. Woodard and a school health paraprofessional. *Id.* Without first assessing the accuracy of the report of abuse—which, given the location of the alleged injuries, could have been accomplished without fully removing I.B.'s clothes—"Ms. Woodard instructed I.B. to show her buttocks and stomach and back." *Id.* Ms. Woodard and the school health employee then "took off all I.B.'s clothes" and "viewed I.B." *Id.* When Ms. Woodard later documented her findings, she noted that "the marks observed were not consistent with the" report of alleged abuse. *Id.* at 17.

Nevertheless, Ms. Woodard and the school nurse "prepared to take photographs." *Id.* at 16. "I.B. told Ms. Woodard she did not want photographs taken." *Id.* Undeterred, Ms. Woodard "took color photographs of private and unclothed areas of I.B.'s body." *Id.* At no point did Ms. Woodard notify Ms. Doe of her plan to search I.B. or seek consent from Ms. Doe to conduct the search. *See id.* at 17.

The next day, on December 11, 2014, Ms. Woodard visited the Does' home to continue her investigation. *Id.* at 16. On January 5, 2015, "[t]he case was closed as unfounded." *Id.* at 17.

Safford dictates the outcome of this case. The privacy intrusion at issue here is more serious than in *Safford*, where the student's "breasts and pelvic area" were briefly exposed "to some degree," 557 U.S. at 374, because Ms. Woodard removed all of I.B.'s clothes and took color photographs of I.B.'s naked body. To survive Fourth Amendment scrutiny, even under the special needs exception, Ms. Woodard's search would have required "specific suspicions" that I.B was in "danger" or that there

was "evidence of wrongdoing" in the private areas of I.B.'s body. *Id.* at 377. As alleged, Ms. Woodard had neither.

The Does' allegations do not support an inference that Ms. Woodard believed I.B. to be in particular danger. *See id.* at 375–76 ("[T]he content of the [vice principal's] suspicion failed to match the degree of intrusion" because "[h]e must have been aware of the nature and limited threat of the specific drugs he was searching for[.]"). DHS did not dispatch Ms. Woodard to investigate the allegation of abuse until the day after its receipt, when I.B. was already back at school. It is reasonable to infer that, had DHS or Ms. Woodard considered I.B. to be in particular danger, Ms. Woodard would have intervened more promptly. Nor is there any indication that, when Ms. Woodard arrived at the school, I.B. appeared more injured or more in danger than the report suggested.

Neither could Ms. Woodard have had a "specific suspicion[]" that evidence of abuse would be found in the private areas of I.B.'s body. *Id.* at 377. No facts were pled that support such a suspicion. The report of abuse was limited to I.B.'s neck, back, stomach, and knees—all non-private, or at least less private, areas of I.B.'s body. Nothing more than a "general background possibilit[y]" could have supported Ms. Woodard's apparent belief that she would find evidence of abuse by fully undressing I.B. *Id.* at 376. But as the Supreme Court has held, such general possibilities "fall short" when "the categorically extreme intrusiveness of a search down to the body of a" child is at issue. *Id.* Even if Ms. Woodard had initially limited her search to the areas of I.B.'s body implicated by the report of abuse—which Ms. Woodard did not do—she would have learned no facts to support expanding the search; "the marks observed were not consistent with the" report of abuse. App. Vol. I at 17. Therefore, based on

Safford, Ms. Woodard's search was unconstitutional under the special needs exception to the Fourth Amendment.

I would reach the same conclusion relying on *Dubbs*. Ms. Woodard's search was unreasonable because she had "no justification for proceeding without parental notice and consent." *Dubbs*, 336 F.3d at 1214. Ms. Woodard began to investigate the allegation of abuse the day after the report was received by DHS, ostensibly giving Ms. Woodard time to speak with Jane Doe, I.B.'s mother. App. Vol. I at 15–16. In fact, Ms. Woodard had time to secure her supervisor's approval for the search prior to arriving at I.B.'s school, *id.* at 16, making it all the more reasonable to infer that Ms. Woodard had time to seek consent from Ms. Doe. Instead, Ms. Woodard elected to search I.B. without Ms. Doe's consent, which left four-year-old I.B. alone in the school nurse's office as two adult strangers examined and photographed her naked body in search of signs of physical abuse. Ms. Doe could not "discuss potential issues with" Ms. Woodard, "help to explain" the search to I.B., or "reassure [I.B.] about the disturbing and unfamiliar aspects of the exam." *Dubbs*, 336 F.3d at 1207. "[I]t is plain that" Ms. Woodard's search of I.B. was "unconstitutional." *Id.* at 1214.

The unconstitutional nature of Ms. Woodard's search becomes even clearer upon consideration of new facts alleged in the proposed Second Amended Complaint.[5]

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[5]Because the Does' motion for leave to amend was not futile, in that it would state a claim under the Fourth Amendment, I would also reverse the district court's denial of the motion to amend. *See Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232, 1249 (10th Cir. 2009) ("[W]hen denial [of a motion to amend a pleading] is based on a determination that amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility.").

First, the Does allege that Ms. Woodard was aware, before she searched I.B., of a previous unfounded report of abuse from I.B.'s school. App. Vol. I at 206. Ms. Woodard also "knew that Jane Doe had been cooperative in [the] previous DHS investigation." *Id.* Second, the Does allege that Ms. Woodard "interviewed I.B. at her school prior" to the search. *Id.* at 230. During this interview, "I.B. told [Ms.] Woodard that she gets red dots on her face when she cries, but that she did not have any other 'owies.'" *Id.*

Because Ms. Woodard knew that I.B.'s school had previously made an unfounded report of abuse, it was less reasonable for Ms. Woodard to rely on a report from the same source to justify a search of the intimate areas of I.B.'s body. That Ms. Woodard knew Ms. Doe had cooperated in the previous DHS investigation also made it less reasonable for Ms. Woodard to search I.B. without first attempting to notify Ms. Doe. Finally, when I.B. explained the marks on her face and denied any other injuries, it was not reasonable for Ms. Woodard to then expand the search beyond the scope of reported abuse, to include I.B.'s entire body. Ms. Woodard's "search[,] as actually conducted," needed to be "reasonably related in scope to the circumstances which justified the [search] in the first place." *Safford*, 557 U.S. at 375. The new facts alleged in the proposed Second Amended Complaint make it all the more plain that Ms. Woodard's search was unconstitutional.

Because I would conclude that Ms. Woodard violated I.B.'s clearly established Fourth Amendment rights, "it [would] become[] [Defendants'] burden to prove that her conduct was nonetheless objectively reasonable." *Roska*, 328 F.3d at 1251. Defendants argue that Ms. Woodard's search was objectively reasonable because it was

authorized by statute. "In considering the objective legal reasonableness of the state officer's actions, one relevant factor is whether the defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question." *Id.* (quotation marks omitted). "[A]n officer's reliance on an authorizing statute does not render the conduct per se reasonable," but "the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Id.* at 1252 (quotation marks omitted).

> [A] court must consider whether reliance on the statute rendered the [official's] conduct "objectively reasonable," considering such factors as: (1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional.

Id. at 1253 (footnotes omitted).

Defendant's rely on Colorado Revised Statute § 19-3-306(1), which states: "Any . . . social worker . . . who has before him a child he reasonably believes has been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child." I do not think this statute renders Ms. Woodard's search reasonable.

First, the statute does not authorize Ms. Woodard to undress I.B. The statute specifically limits Ms. Woodard's authority to photograph "areas of trauma" that are

"visible." *Id.* That implies some areas of trauma are not visible. Once a child is undressed, all external areas of trauma become visible. But the statute says nothing about what procedures a social worker must follow to undress a child.

Moreover, Ms. Woodard did not photograph areas of trauma. The Does allege that Woodard took photographs of "private and unclothed areas of I.B.'s body," App. Vol. I at 16, even though the report of abuse only implicated non-private parts of I.B.'s body and "the marks observed [on I.B.'s body] were not consistent" with the report of abuse, *id.* at 17.

Ms. Woodard also let I.B. return to school and her mother's custody, which further suggests that Ms. Woodard did not "reasonably believe[I.B.] ha[d] been abused or neglected." Colo. Rev. Stat. § 19-3-306(1). Defendants have therefore not met their burden of showing that the state statute rendered Ms. Woodard's search objectively reasonable. *See Halley v. Huckaby*, 902 F.3d 1136, 1151–52 (10th Cir. 2018) (state statute authorizing interview of a suspected victim of child abuse "at any place" did not make it reasonable to think that "DHS [could] . . . take a child into custody anywhere and everywhere").

III

I concur in the majority's rulings on the Fourteenth Amendment claims and would AFFIRM on those claims. Because I would conclude the Does have alleged that Ms. Woodard violated I.B.'s clearly established Fourth Amendment rights, I would REVERSE in part and REMAND for further proceedings on the Does' Fourth Amendment claims, as alleged in the proposed Second

Amended Complaint, against April Woodard, Christina Newbill, Shirley Rhodus, and Richard Bengtsson in their individual capacities.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-1066
(D.C. No. 1:15-CV-01165-KLM)
(D. Colo.)

(Filed 01/03/19)

JANE DOE; I.B.,
Plaintiffs – Appellants,

v.

APRIL WOODARD, in her individual capacity; CHRISTINA NEWBILL, in her individual capacity; SHIRLEY RHODUS, in her individual capacity; RICHARD BENGTSSON, in his individual capacity; EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS,
Defendants – Appellees,

and

REGGIE BICHA, in his official capacity as Executive Director of the Colorado Department of Human Services; JULIE KROW, in her official capacity as Executive Director of the El Paso County Department of Human Services,
Defendants.

PARENTAL RIGHTS FOUNDATION; NATIONAL CENTER FOR HOUSING AND CHILD WELFARE;

NATIONAL COALITION FOR CHILD PROTECTION REFORM; PARENT GUIDANCE CENTER; MARK FREEMAN; PACIFIC JUSTICE INSTITUTE,
Amici Curiae.

JUDGMENT

Before **BRISCOE**, **LUCERO**, and **MATHESON**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/
ELISABETH A. SHUMAKER
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

(Filed 09/30/16)

JANE DOE, and
I.B., by her mother and next friend, Jane Doe,
Plaintiffs,

v.

APRIL WOODARD, El Paso County Department of Human Services caseworker, individually;
CHRISTINA NEWBILL, Supervisor, El Paso County Department of Human Services, individually;
SHIRLEY RHODUS, Children, Youth and Family Services Director, El Paso County Department of Human Services, individually;
RICHARD BENGTSSON, individually, and in his official capacity as Executive Director, El Paso County Department of Human Services for prospective relief;
REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief; and
EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS, comprised of Sallie Clark, Darryl Glenn, Dennis Hisey, Amy Lathen, and Peggy Littleton, in their official capacity,
Defendants.

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court[1] on the **County Defendants' Motion to Dismiss First Amended Complaint** [#40][2] and **Defendant Bicha's Motion to Dismiss First Amended Complaint** [#41]. Plaintiffs have filed a Response [#48], and Defendants have filed Replies [#49, #50]. The Court has reviewed the Motions, the Response, the Replies, the entire docket, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the County Defendants' Motion [#40] is **GRANTED in part** and **DENIED in part**, and Defendant Bicha's Motion [#41] is **DENIED without prejudice**.

I. BACKGROUND

A. Factual Background

This action arises out of the search of Plaintiff I.B., a four-year-old who was attending the Head Start program at Oak Creek Elementary School in Colorado Springs. The search was conducted by Defendant April Woodard, a caseworker from El Paso County Department of Human Services ("DHS"). *Am. Compl.* [#34] ¶¶ 1, 8, 22. Plaintiff

[1]The parties consented to proceed before the undersigned for all proceedings pursuant to 28 U.S.C. § 636(c) and D.C.COLO.LCivR 72.2. *See generally Consent Form* [#45].

[2]"[#40]" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Order.

I.B. and her mother, Jane Doe,[3] allege that in December 2014, Defendant Woodard violated their constitutional rights when she partially undressed I.B., performed a visual exam to check for signs of abuse, and took photographs of I.B.'s partially unclothed body using a cell phone. *Id.* ¶¶ 37-40, 116. Based on this search, Plaintiffs also assert claims against Defendants Christina Newbill, Ms. Woodard's supervisor; Richard Bengtsson, the Executive Director of El Paso County DHS; Reggie Bicha, the Executive Director of Colorado DHS; and the El Paso County Board of County Commissioners ("BOCC"). All Defendants other than Bicha are collectively referred to as the "County Defendants."

Prior to the incident giving rise to this suit, Plaintiffs allege that DHS investigated I.B.'s home "around half a dozen times, based on false reports that I.B. was being abused" over a two-year period from 2012-2014.[4] *Id.* ¶ 15. One such incident involves an investigation in 2013. Plaintiffs state that a report was filed on November 22, 2013, which stated that I.B. "had marks that resembled a hand print on her bottom" and that there was a bruise on I.B.'s lower back. *Id.* ¶ 24. As a result of this report a DHS caseworker removed I.B.'s clothing and checked her for signs of abuse. *Id.* ¶ 27. The DHS investigation was closed as unfounded on January 30, 2014. *Id.* ¶ 32. Plaintiff Jane Doe alleges that she was not aware that the 2013 search had occurred until "recently," by requesting records through the Colorado Open Records Act. *Id.* ¶ 31.

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[3]On July 17, 2015, the Court granted Plaintiffs' Motion to Proceed Anonymously. *See Order* [#27].

[4]Plaintiffs contend that not all of this documentation has been kept by DHS, however, and that only three of these incidents are recorded in the case files. *Id.* ¶ 19.

The investigation and search giving rise to this suit was the result of another report filed with DHS in December 2014, approximately a year after the November 2013 investigation was closed.[5] *Id.* ¶ 35, 43. According to Plaintiffs, the allegations of abuse described bumps on I.B.'s face, a bruise the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees. *Id.* ¶ 36 . Based on this report, Plaintiffs allege that Defendant Newbill authorized Defendant Woodard to take I.B. from her Head Start classroom to the school nurse's office, where Defendant Woodard, with the school nurse present, removed I.B.'s clothes, inspected her buttocks, stomach, and back for signs of abuse, and "took photographs of private and unclothed areas of I.B.'s body" with a cellphone issued by the County. *Id.* ¶¶ 37-40, 116. The next day, Defendant Woodard visited Plaintiffs' home to inspect for signs of abuse. *Id.* ¶ 42-43. The case was closed as unfounded on January 5, 2015. *Id.* ¶ 47. Plaintiffs allege that Jane Doe was not notified in advance that the December 2014 search of I.B. would occur, and that she only became aware of the search after I.B. mentioned that a woman had removed her clothes at school. *Id.* ¶¶ 48, 54. Plaintiffs contend that when Jane Doe confronted Defendant Woodard about the search, Woodard initially

[5]Although Plaintiff Jane Doe alleges that the report was filed in November 2014, Plaintiffs also note that DHS records date the second report as December 9, 2014. *Id.* ¶ 35, 43. For the sake of simplicity, the Court refers to this incident as the "December 2014 search" without any adjudication as to the exact date when this event occurred. Furthermore, with respect to references to a "search" of I.B., the County Defendants do not appear to dispute that Defendant Woodard's examination of I.B. for signs of child abuse was a "search" within the meaning of the Fourth Amendment; rather, the parties dispute the relevant standard governing this search. *See Motion to Dismiss* [#40] at 11.

denied having searched I.B., but later admitted to undressing and photographing her. *Id.* ¶¶ 51, 54.

A. Procedural Background

Plaintiffs filed a complaint initiating this civil action on June 3, 2015, *see Compl.* [#1], and subsequently filed an Amended Complaint on August 20, 2015, *see Am. Compl.* [#34]. Plaintiffs assert five claims for relief pursuant to 28 U.S.C. § 1983 alleging violations of I.B.'s Fourth and Fourteenth Amendment rights and violations of Plaintiff Jane Doe's Fourteenth Amendment rights. *Id.* ¶¶ 142-220.

Plaintiffs' First and Third Claims are similar insofar as they both allege wrongdoing by Defendants Woodard and Newbill in their individual capacities based on the December 2014 search of I.B. Plaintiffs' First Claim alleges a Fourth Amendment violation based on this search; specifically, Plaintiffs' contend that "there is a reasonable expectation of privacy in the clothed/private areas of a child's person" and thus, by "viewing I.B.'s unclothed or partially clothed body, and taking color photographs of what she observed," Defendant Woodard's December 2014 search was a violation of I.B.'s Fourth Amendment rights. *Id.* ¶¶ 148, 152. Plaintiffs allege that, by extension, Defendant Newbill violated I.B.'s Fourth Amendment rights because he directed Defendant Woodard to perform this search. *Id.* ¶ 153. Similarly, Plaintiffs' Third Claim is also brought only against Defendants

Woodard and Newbill based on the December 2014 search, but alleges a violation of Plaintiffs' Fourteenth Amendment "liberty interests in Jane Doe's care, custody, and control of I.B., and in familial association and privacy." *Id.* ¶ 182.

Plaintiffs' Second and Fourth Claims for Relief allege wrongdoing by both individual-capacity Defendants and official-capacity Defendants. *See id.* ¶¶ 160-179, 192-209. The individual-capacity portions of Plaintiffs' Second and Fourth Claims are brought against Defendants Rhodus and Bengtsson, and allege, respectively, a violation of I.B.'s Fourth Amendment rights and Plaintiffs' Fourteenth Amendment rights. Plaintiffs' contend that Defendants Rhodus and Bengtsson are "personally liable for the damages stemming from the unconstitutional search of I.B. by way of 'supervisory liability' because they both possessed personal responsibility for the local policy and custom of El Paso County DHS, and for the failure to train and supervise Defendants Woodard and Newbill[.]" *Id.* ¶¶ 161, 193. More specifically, Plaintiffs allege that Defendants Rhodus and Bengtsson violated I.B.'s Fourth Amendment rights and both Plaintiffs' Fourteenth Amendment rights insofar as they "knew or should have known that the current lack of training and supervision would cause their subordinates to inflict constitutional and related injuries, because of allegations in *Doe v. McAfee*, but chose to remain deliberately indifferent to the rights of I.B." *Id.* ¶¶ 173, 203.

The official-capacity portions of the Second and Fourth Claims are brought against Defendants Bengtsson and Bicha. Plaintiffs seek prospective relief against these Defendants, alleging that "[t]he statewide policy, and local policy and custom of El Paso County DHS, are causing a continuing violation of I.B.'s constitutional rights in that she may again be subjected to an unreasonable search, and that photographs of I.B. are insufficiently stored to protect her privacy." *Id.* ¶¶ 178, 208. They request that the Court enjoin Defendants from implementing these policies and declare them unconstitutional. *Id.* ¶¶ 179, 209.

Lastly, Plaintiffs' Fifth Claim for Relief alleges a *Monell* claim for damages against Defendant El Paso County Board of County Commissioners ("BOCC") for violation of I.B.'s Fourth and Fourteenth Amendment rights and Jane Doe's Fourteenth Amendment rights. *Id.* ¶¶ 210-220. Plaintiffs allege that Defendant BOCC, as the "policymaking body" of El Paso County, is responsible for the "custom and unwritten policies that developed at El Paso County DHS[.]" *Id.* ¶ 212.

On September 2, 2015, the County Defendants filed a Motion to Dismiss [#40], and on September 3, 2015, Defendant Bicha also filed a Motion to Dismiss [#41]. Both motions argue that Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim and, additionally, Defendant Bicha argues that the Eleventh Amendment bars Plaintiffs' claims for prospective relief against him. *See Motion to Dismiss* [#40] at 2; *Motion to Dismiss* [#41] at 2.

IV. LEGAL STANDARDS

A. Fed. R. Civ. P. 12(b)(6)

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994); Fed. R. Civ. P. 12(b)(6) (stating that a complaint may be dismissed for "failure to state a claim upon which relief can be granted"). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226,

1236 (10th Cir. 1999) (citation omitted). To withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) ("The complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." (quoting *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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Id. (brackets in original; internal quotation marks omitted).

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a factual allegation has been stated, "but it has not show[n] that the pleader is entitled to relief," as required by Fed. R. Civ. P. 8(a). *Iqbal*, 552 U.S. at 679 (second brackets added; citation and internal quotation marks omitted).

A. Rule 12(b)(1)

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) is to test whether the Court has jurisdiction to properly hear the case before it. Because "federal courts are courts of limited jurisdiction," the Court must have a statutory basis to exercise its jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002); Fed. R. Civ. P. 12(b)(1). Statutes conferring subject-matter jurisdiction on federal courts are to be strictly construed. *F & S Const. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) may take two forms: facial attack or factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a facial attack on a complaint, the Court accepts the allegations of the complaint as true. *Id.* By contrast, when reviewing a factual attack on a complaint, the Court "may not presume the truthfulness of the complaint's factual allegations." *Id.* at 1003. With a factual attack, the moving party challenges the facts upon which subject-matter jurisdiction depends. *Id.* The Court therefore must make its own findings of fact. *Id.* In order to make its findings regarding disputed jurisdictional facts, the Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)). The Court's reliance on "evidence outside the pleadings" to make findings concerning purely jurisdictional facts does not convert a motion to dismiss pursuant to Fed. R. Civ. P.

12(b)(1) into a motion for summary judgment pursuant to Fed. R. Civ. P. 56. *Id.*

V. DISCUSSION

The Court addresses Defendants' Motions as follows: (A) Plaintiffs' Fourth Amendment claims (the First and Second Claims); (B) Plaintiffs' Fourteenth Amendment claims (the Third and Fourth Claims); and (C) Plaintiffs' Monell claim against Defendant BOCC (the Fifth Claim).

A. Fourth Amendment Claims (First and Second Claims)

1. First Claim

The County Defendants argue that qualified immunity shields Defendants Newbill and Woodard from the Fourth Amendment violation alleged in the First Claim. *Motion to Dismiss* [#40] at 14. They contend that a child's Fourth Amendment rights in the context of a search conducted as a result of suspicions of abuse are "anything but clearly established," and note that the Circuit Courts of Appeal presently employ differing standards to determine the reasonableness of such a search. *Id.* at 15.

Plaintiffs disagree, stating that "the law governing the Fourth Amendment claims was clearly established at the time of the violation[.]" *Response* [#48] at 15. Plaintiffs also contend that it was "clearly established" that the examination of I.B. was a search under the Fourth Amendment and that the Fourth Amendment applies to social workers. *Id.* at 16. Further, Plaintiffs argue that, even if the Court determines that the constitutional right was unsettled, Defendant Woodard's search was unreasonable even under the less restrictive "special needs" doctrine employed by some courts. *Id.* at 20.

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgeral*d, 457 U.S. 800, 818 (1982). A motion based on a claim of qualified immunity imposes the burden on the plaintiff to show "both that a constitutional violation occurred and that the constitutional right was clearly established at the time of the alleged violation." *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) (quoting *Williams v. Berney*, 519 F.3d 1216, 1220 (10th Cir. 2008)). As recently reiterated by the Tenth Circuit Court of Appeals:

> Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. The plaintiff is not required to show, however, that the very act in question previously was held unlawful . . . to establish an absence of qualified immunity.

Henderson v. Glanz, 813 F.3d 938, 951 (10th Cir. 2015) (internal quotations and citations omitted). The Tenth Circuit "uses a 'sliding scale' system in which 'the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" *Tenorio v. Pitzer*, 802 F.3d 1160, 1174 (10th Cir. 2015) (J. Phillips dissenting) (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)). In *Saucier v. Katz*, the Supreme Court emphasized that determining whether a constitutional right was clearly established "must be

undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Shortly after *Saucier*, the Supreme Court reiterated in Hope v. Pelzer that "the salient question . . . is whether the state of the law . . . gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The parties' dispute whether the facts as alleged state a violation of I.B.'s Fourth Amendment rights and, additionally, whether the law is clearly established regarding a child's Fourth Amendment rights in the context of child abuse investigations. As noted above, the determination of qualified immunity invokes two separate questions: (1) whether a constitutional violation of a right occurred; and (2) whether the constitutional right was "clearly established" at the time of the violation. *Green*, 574 F.3d at 1300. However, the Court is not obligated to follow this order, and is free to "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

In the sections below, the Court first examines the special needs doctrine, an exception to the Fourth Amendment's warrant requirement, and whether it applies in the context of child abuse investigations. Second, the Court analyzes whether Defendants were entitled to qualified immunity. This requires the Court to analyze whether it was "clearly established" that Defendant Woodard's December 2014 search of I.B. by removing her clothes and photographing portions of her body was unlawful in light of the current state of the law and whether Defendants Woodard and Newbill could

"fairly be said to 'know' that the law forbade" the type of search performed by Defendant Woodard. *Harlow*, 457 U.S. at 818. Third, the Court then addresses Plaintiffs' alternative argument that they have sufficiently stated a claim regardless of whether the special needs doctrine applies to the December 2014 search.

a. Special needs doctrine in the context of child abuse investigations.

It is well-established that the Fourth Amendment protects people from unreasonable searches of their "persons, houses, papers, and effects." U.S. Const. Amend. IV. It is also well-established that "[s]earches conducted without a warrant are per se unreasonable under the Fourth Amendment – subject only to a few 'specifically established and well-delineated exceptions.'" *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003) (quoting *Katz v. United States*, 389 U.S. 347 (1967)).

There is no dispute that the search of I.B. was conducted without a warrant. In determining whether the search violated a clearly-established constitutional right for the purposes of applying principles of qualified immunity, the Court must necessarily consider whether the search of I.B. falls within an exception to the Fourth Amendment's warrant requirement. One exception to the warrant requirement of the Fourth Amendment is the "special needs" doctrine. *See Roska*, 328 F.3d at 1241. "'Special needs' is the label attached to certain cases where 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212 (10th Cir. 2003) (quoting *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*,

536 U.S. 822, 830 (2002)). "In special needs cases, the Court replaces the warrant and probable cause requirement with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest." *Id.* at 1213.

Searches conducted in the public school setting frequently fall within the special needs exception to the Fourth Amendment's warrant/probable cause requirement. Indeed, the case in which the doctrine was established was one such case: New Jersey v. T.L.O., 469 U.S. 325 (1985). In T.L.O., the Court held that the search of a student's purse by a school administrator did not implicate the Fourth Amendment's warrant requirement. *Id.* at 341-42. The Court reasoned that:

> [T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

Id. at 341. Other decisions from the United States Supreme Court have expanded the applicability of the special needs doctrine to other contexts, which the Tenth Circuit has summarized as follows:

> At this stage in development of the doctrine, the "special needs" category is defined more by a list of examples than by a determinative set of criteria. Among the cases said by the Court to involve "special needs" are: a

> principal's search of a student's purse for drugs in school; a public employer's search of an employee's desk; a probation officer's warrantless search of a probationer's home; a Federal Railroad Administration regulation requiring employees to submit to blood and urine tests after major train accidents; drug testing of United States Customs Service employees applying for positions involving drug interdiction; schools' random drug testing of athletes; and drug testing of public school students participating in extracurricular activities.

Dubbs, 336 F.3d at 1213. Based on these cases, the Tenth Circuit has observed that special needs cases in general "seem to share" at least three distinct features:

> (1) an exercise of governmental authority distinct from that of mere law enforcement—such as the authority as employer, the *in loco parentis* authority of school officials, or the post-incarceration authority of probation officers; (2) lack of individualized suspicion of wrongdoing and concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing.

Dubbs, at 1213-1214.

Depending on the context, courts have taken differing approaches to whether a search conducted pursuant to a child abuse investigation falls within this "special needs" exception to the Fourth Amendment's warrant/probable cause requirement. For example, in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), the Seventh Circuit held that the "visual inspection of a child's body by a professional caseworker, . . . may be taken without 'strict adherence' to the exacting standards of probable cause or the warrant requirement[.]" *Id.* at 902 (internal citation omitted);[6] *see also Wildauer v. Frederick Cty.*, 993 F.2d 369, 373 (4th Cir. 1993) (applying special needs doctrine to examination of children suspected of abuse). In contrast, the Second and Fifth Circuits both require probable cause or exigent circumstances for similar searches. *See Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1999) (requiring probable cause or exigent circumstances where child suspected of being abused was removed from school by caseworkers); *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002) ("We conclude, therefore, that a social worker must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances to justify the visual body cavity search of a juvenile.").

The Tenth Circuit, however, has not directly addressed whether the special needs doctrine applies to

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[6]In Darryl H., the children searched by the caseworkers were in public school when the caseworkers removed them from class for a visual inspection due to suspicion of child abuse. *Id.* at 896-97. More recently, however, the Seventh Circuit has limited this holding, stating that the "special needs" exemption does not apply to visual inspections on private property, even if the private property is a private school. *See Michael C. v. Gresbach*, 526 F.3d 1008, 1016 n.3 (7th Cir. 2008).

caseworkers performing a search of a child pursuant to a child abuse investigation. The only case in which that court has applied the special needs doctrine in the context of child abuse investigations is *Doe v. Bagan*, 41 F.3d 571, 575 (10th Cir. 1994). There, the court concluded that the special needs standard applied to the interview of a student in a public school as part of child abuse investigations. *Id.* at 575 n.3. However, this involved a "seizure" of a child, not a search, and the child interviewed was not the alleged victim of child abuse, but the alleged perpetrator. *Id.* at 574.

b. Whether Defendants are entitled to qualified immunity.

In light of the precedent discussed above, the Court finds that the law was not clearly established, and hence that qualified immunity shields Defendants Woodard and Newbill from Plaintiffs' First Claim. Plaintiffs concede that "[t]he Tenth Circuit has not always been clear in its application of the Fourth Amendment to social workers in child abuse investigations," and the Court agrees. *Response* [#48] at 16. Although Plaintiffs[7] are correct in stating that the "Fourth Amendment applies to state social workers or case workers in the context of child abuse investigations," this issue is not in dispute. *Id.* The

[7]In their Amended Complaint, Plaintiffs also cite to "allegations" made in Doe v. McAfee, 13-cv-01287-MSK-MJW in support of their argument that the law was clearly established that the search of I.B. was subject to the warrant requirement. *Am. Compl.* [#34] ¶ 173. However, allegations alone do not qualify as "clearly established" law, *see Henderson*, 813 F.3d at 951, and the Court made no determination with respect to the allegations of unconstitutional strip searches of children, *see Doe v. McAfee*, 13-cv-01287-MSK-MJW at Docket Entries 73, 91. Rather, the Court dismissed the Fourth Amendment claims because the plaintiffs only alleged that the defendants "attempted" to strip search plaintiffs. *Id.* at Docket Entry 91 pg. 11.

special needs doctrine is not an exception to Fourth Amendment protections; rather, it is an exception to the warrant requirement under the Fourth Amendment. *See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 832 (2002) (applying the special needs doctrine and finding that a school's drug testing of students engaged in extracurricular activities did not violate the Fourth Amendment).

The "salient question [regarding qualified immunity] . . . is whether the state of the law . . . gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741. In this instance, the state of the law did not give Defendants fair warning that the taking photographs of portions of I.B.'s unclothed body required a warrant. Few cases have actually involved the taking of photographs and those that do also involve visual body cavity searches that were far more egregious invasions of privacy than any of the allegations before the Court. *See, e.g., Franz v. Lytle*, 997 F.2d 784, 785 (10th Cir. 1993) (describing police officers' multiple examinations and photographing of two year-old child's vaginal area); *Roe*, 299 F.3d at 399 (stating that caseworker "instructed Mrs. Roe to spread [her child's] labia and buttocks, so that she could take pictures of the genital and anal areas."); *Tenenbaum*, 193 F.3d at 591 (explaining that child was removed from school and taken to hospital where she was subjected to an examination involving the "insertion of a cotton swab in [her] vagina and anus.").

Nonetheless, even were the Court to conclude that the law clearly established that Defendants needed a warrant to search I.B., this would not end the analysis; rather, the Court would be required to consider the "objective legal

reasonableness" of the state actor's actions. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The Tenth Circuit has held that one relevant factor in this analysis is "whether the defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question."[8]*See Roska*, 328 F.3d at 1251. Whether a state actor's reliance on a statute rendered the conduct "objectively reasonable" requires the Court to consider: "(1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional." *Id.* at 1253.

Here, the County Defendants cite Colo. Rev. Stat. § 19-3-306 as the authority under which they took the photographs of I.B. The statute provides that a "social worker . . . who has before him a child he reasonably believes has been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child." C.R.S. § 19-3-306(1). As an initial matter, the Court notes that the third factor in the *Roska* test is plainly not applicable here, and neither party makes any such argument. With respect to the first factor – the degree of specificity in the statute – the statute makes no mention of the need to obtain a warrant, parental consent, or the need for exigent circumstances; indeed, the language of the statute stating that a social worker "may take" implicitly, if not explicitly, *permits* such photographs. Therefore, because the statute specifically

[8]Although relevant to whether a state actor's actions were "objectively reasonable," the Tenth Circuit has held that "the presence of a statute is not relevant to the question of whether the law is 'clearly established.'" *Roska*, 328 F.3d at 1251-52.

authorizes photographs of visible trauma on children, the Court finds that it is highly specific. Moreover, given this reading and the absence of any case law to the contrary, the Court further concludes that Defendant Woodard's search likely complied with the statute; therefore, the second factor of the *Roska* test is also met. Finally, the statute is limited to circumstances in which the social worker has before her a child "she reasonably believes has been abused or neglected." Notably, this language closely tracks the standard of review for determining whether a search was constitutional when the special needs exception applies to a search, i.e., that a search must be "'justified at its inception,' and 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Edwards ex rel. Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir.1989) (quoting *T.L.O.*, 469 U.S. at 341)). Based on such language, the Court finds that a social worker could have reasonably concluded that the statute was constitutional. Thus, application of the Roska test establishes that the statute weighs heavily in favor of a finding that Defendants' conduct was "objectively reasonable." *See Roska*, 328 F.3d at 1252 ("[T]he existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.").

Based on the authorities cited above, and in light of the absence of any other Tenth Circuit case on point, the Court cannot conclude that Defendants Woodard and Newbill could "fairly be said to 'know' that the law forbade" the search without a warrant. *Harlow*, 457 U.S. at 818.

c. Plaintiffs have not sufficiently alleged a Fourth Amendment violation under the special needs doctrine.

The Court's conclusion that it was not clearly established that a warrant was required does not end the analysis. If it is not clear whether the Fourth Amendment required a warrant in this circumstance, the "special needs" exception to the warrant requirement is implicated. *See, e.g., Roska*, 328 F.3d at 1248-49; *Dubbs*, 336 F.3d at 1213-14. For purposes of fully addressing the circumstances alleged in the First Amended Complaint, the Court assumes without deciding that the special needs doctrine would apply here.

The cases addressing the special needs doctrine overwhelmingly establish that in order for the doctrine to apply, Defendants' conduct must (at a minimum) comport with the Fourth Amendment's requirement of reasonableness. *See Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990) (denying claim of qualified immunity when defendant caseworkers' alleged conduct, if true, "would violate the most minimal standard" under the Fourth Amendment). This is true because even in cases where the special needs doctrine applies, a state actor's search is nonetheless a violation of the Fourth Amendment if it is not "'justified at its inception,' and [not] 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Edwards*, 883 F.2d at 884 (10th Cir.1989) (quoting *T.L.O.*, 469 U.S. at 341)). Therefore, the Court considers Plaintiffs' alternate argument that the search violated the special needs doctrine.

In their Response, Plaintiffs attempt to persuade the Court that it "need not even resolve whether the 'special

needs' doctrine applies here because it is plain that the search of I.B. was unconstitutional even if the doctrine is employed." *Response* [#48] at 20.[9] However, this argument is not persuasive. Plaintiffs' complaint simply lacks allegations that Defendant Woodard's search was unjustified and not reasonably related in scope to the circumstances. To the contrary, Plaintiffs allege that Defendant Woodard's search "was unreasonable in that Jane Doe **did not consent to the search . . . nor was there a court order, and no emergency or other exigent circumstances existed**[.]" *Am. Compl.* [#34] ¶ 154 (emphasis added). Further, Plaintiffs' argument in their Response relies on the same reasoning: there, they contend that there "was no justification for proceeding **without parental notice and consent or a court order**[.]" *Response* [#48] at 21 (emphasis added). In other words, Plaintiffs merely claim that the search was unconstitutional because there was no consent, Defendants did not obtain a warrant, and there were no exigent circumstances. However, the special needs doctrine is an *exception* to these requirements; if it applies, the absence of those facts does not give rise to a cognizable claim for violation of the Fourth Amendment. *See Dubbs*, 336 F.3d at 1212-13. Moreover, Plaintiffs cannot now embellish their allegations in response to Defendants' motions to dismiss, because doing so is an improper attempt to amend their complaint to bolster

[9]Although this statement is unclear, it appears that Plaintiffs are urging the Court to adopt a similar reasoning as the Tenth Circuit in *Snell*. There, the Tenth Circuit held that the defendants could not assert qualified immunity as a defense, but did not reach the issue of whether the special needs doctrine applied to search at issue, explaining: "We need not decide the precise contours of the fourth amendment standard that would apply, however, because the conduct alleged in these cases would violate the most minimal standard of which we can conceive[.]" *Snell*, 920 F.2d at 698.

their existing claim. *See Blackmon v. U.S.D. 259 Sch. Dist.*, 769 F. Supp. 2d 1267, 1276 n.47 (D. Kan. 2011) ("To the extent Plaintiff tried to assert additional or different claims in her response to Defendant's motion to dismiss, these claims are not allowed."); *see also In re Qwest Commc'ns Int'l, Inc.*, 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004) ("The plaintiffs may not effectively amend their Complaint by alleging new facts in their response to a motion to dismiss.").

In conclusion, the absence of any allegations tending to show that the search was not "justified at its inception" and not "reasonably related in scope to the circumstances which justified the interference in the first place" vitiates the viability of a claim for violation of the Fourth Amendment in light of the special needs doctrine. Therefore, because the Court concludes that Plaintiffs have not sufficiently stated a claim under the special needs doctrine, and because the law prohibiting taking photographs of children suspected of being abused was not clearly established at the time of the alleged violation, the County Defendants' Motion to Dismiss on the basis of qualified immunity is **granted** with respect to Plaintiffs' First Claim. However, in light of the Court's determination that Plaintiffs' allegations implicate the applicability of the special needs doctrine, the First Claim is **dismissed without prejudice**. *Reynoldson v. Shillinger*, 907 F.2d 124, 127 (10th Cir. 1990) (stating that prejudice should not attach to a dismissal when the plaintiff's allegations, "upon further investigation and development, could raise substantial issues"). To be clear, in order to state a viable claim for violation of the Fourth Amendment under the special needs doctrine, Plaintiff must allege facts to demonstrate that the search was unreasonable regardless of the absence of a warrant, consent, and/or exigent circumstances.

2. Second Claim

As previously discussed, Plaintiffs' Second Claim consists of two parts: a supervisory liability claim against Defendants Rhodus and Bengtsson in their individual capacities based on their alleged failure to train and supervise Defendants Woodard and Newbill, and a claim against Defendants Bengtsson and Bicha in their official capacities for prospective relief. *Am. Compl.* [#34] ¶¶ 160-179. These claims are both premised on two alleged violations of I.B.'s Fourth Amendment rights: the December 2014 search of I.B. and the alleged failure to "require sufficient safeguards for the color photographs obtained from strip searches."

a. Supervisory liability claim against Defendants Rhodus and Bengtsson.

As an initial matter, the Court's determination that Defendants Woodard and Newbill are entitled to qualified immunity also applies to Defendants Rhodus and Bengtsson, to the extent both claims are premised on the December 2014 search of I.B. and similar searches. The Court therefore does not further analyze supervisory liability premised on alleged violations relating to the December 2014 search. Nonetheless, Plaintiffs also allege that "Defendants Rhodus and Bengtsson did not . . . require sufficient safeguards for the color photographs obtained from strip searches." *Am. Compl.* [#34] ¶ 171. More specifically, Plaintiffs maintain that there is no technology in place to "prevent color photographs of the private areas of children from being uploaded from cell phones to the Internet, or uploaded or synced to another device[.]" *Id.* ¶ 118. Plaintiffs also assert that "anyone who works at DHS" has access to the physical files

containing these photographs, and nothing prevents anyone from viewing and accessing these files. *Id.* ¶ 122.

Because "[p]ersonal participation is an essential allegation in a Section 1983 claim" *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976) (citations omitted), a defendant in a position of general supervisory authority cannot be held vicariously liable for constitutional violations allegedly committed by his or her subordinates. *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2003) ("Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person's constitutional rights."). Thus, to state a claim against a defendant-supervisor, a plaintiff must demonstrate that: "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010).

The County Defendants argue that Plaintiffs' claim fails as a matter of law because the allegations of insufficient storage or safeguarding of photographs relate only to a potential violation, not one that has actually occurred. *Motion* [#40] at 27. The Court agrees. The Fourth Amendment protects against actual invasions of privacy; it does not protect against potential invasions of privacy. *See Dow Chem. Co. v. United States*, 476 U.S. 227, 239 n.5 (1986) ("Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. '[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.") (quoting *United States v. Karo*, 468 U.S. 705, 712 (1984)). Here, Plaintiffs do not allege that the storage of photographs in and of

itself is a violation of the Fourth Amendment; they allege that Defendants Rhodus and Bengtsson have not required "sufficient safeguards for the color photographs obtained from strip searches." *Am. Compl.* [#34] ¶ 171. However, the allegation that these photographs might be obtained by someone without authorization is insufficient as a matter of law to state a Fourth Amendment violation. *Karo*, 468 U.S. at 712.

Therefore, because the Court has previously found that the County Defendants are entitled to qualified immunity with respect to the December 2014 search, and because the remainder of Plaintiffs' supervisory liability allegations state a mere potential violation of the Fourth Amendment, the County Defendants' Motion with respect to the individual-capacity claims under the Second Claim is **granted**.

b. Official-capacity claims against Defendants Bengtsson and Bicha.

Plaintiffs also assert the Second Claim against Defendant Bengtsson, the Executive Director of El Paso County DHS, and Defendant Bicha, the Executive Director of Colorado DHS, in their official capacities and request prospective relief pursuant to *Ex parte Young*. *Am. Compl.* [#34] ¶¶ 12-13, 162; *Response* [#48] at 9. Plaintiffs contend that "statewide policy, and local policy and custom encourages strip searching children whenever injuries are alleged." *Id.* With respect to state policy in particular,[10] Plaintiffs allege that "Colorado State DHS

[10]Curiously, Plaintiffs do not allege that Colo. Rev. Stat. § 19-3-306(1) – which appears to expressly permit the taking of photographs without a warrant, exigent circumstances, or parental consent – is an expression of "state policy." Instead, Plaintiffs allege that Defendants "interpret" the statute "as permission to strip search children[.]" *Am.*

has stated in Responses to Joint Budget Committee (JBC) Questions from the legislature," that "[t]here is no limitation on the taking of the photographs because the purpose is to document injuries, regardless of where the injuries may be." *Id.* ¶ 89. Plaintiffs further allege that this so-called state policy directs caseworkers to "consult local policy regarding the use of the photograph," but that, to date, no local written policies have been developed by El Paso County DHS. *Id.* ¶¶ 93, 94.[11] Thus, Plaintiffs request that the Court enjoin Defendants Bengtsson and Bicha from continuing to apply the alleged state policy. *Id.* ¶ 179.

"Suits against state officials in their official capacity should be treated as suits against the state." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)); *see also Duncan v. Gunter*, 15 F.3d 989, 991 (10th Cir. 1994) (stating that state officers sued in their official capacity are not "persons" subject to

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Compl. [#34] ¶ 101. Plaintiffs' Amended Complaint otherwise scarcely mentions this statute. It is difficult for the Court to conceive of a state statute authorizing certain behavior as anything other than an expression of state policy. Regardless, the Court need not determine whether the statute is an expression of state policy for purposes of addressing the official capacity claims.

[11]The Amended Complaint purports to quote certain documents or policies that appear to be from Colorado DHS. *See, e.g., id.* ¶¶ 89, 90-93. However, neither party has provided copies of the policies for the Court's consideration. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (documents central to a claim and referred to in a plaintiff's complaint may be considered on a Rule 12(b)(6) motion to dismiss without converting it to a Rule 56 motion for summary judgment). Nonetheless, in light of the Court's obligation to construe the allegations in a light most favorable to Plaintiffs, the Court assumes both the existence of these documents and the truth of Plaintiffs' detailed allegations purporting to quote from these documents.

suit under 42 U.S.C. § 1983). Thus, pursuant to the Eleventh Amendment, the Court lacks subject matter jurisdiction to adjudicate an action brought by a citizen of Colorado against the state of Colorado, its agencies, or its officials in their official capacities. *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995). However, the doctrine of sovereign immunity does not bar "a suit brought in federal court seeking to prospectively enjoin a state official from violating federal law." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1980)). The Supreme Court has clarified that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

Thus, Plaintiffs here must allege that there is an ongoing violation and that prospective relief would remedy this violation. In other words, it is insufficient for Plaintiffs to allege that they were previously harmed by Defendants' actions; they must allege that the injury is ongoing. *See Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011). Given this requirement, the Court first addresses Defendant Bicha's argument that Plaintiffs have not alleged a continuing or ongoing violation of federal law. Despite the fact that Defendant raises this argument at the conclusion of his briefing, the contention that Plaintiffs' claim against Defendants Bengtsson and Bicha is moot implicates the Court's subject-matter jurisdiction and thus must be resolved prior to addressing the merits of Plaintiffs' claims. *Herrara v. Alliant Speciality Ins. Servs., Inc.*, No. 11-cv-00050-REB-CBS, 2012 WL 959405, at *3 (D. Colo. Mar. 21, 2012) (stating that issues of subject-matter jurisdiction "must be

resolved before the court may address other issues presented in the motion").

Pursuant to Article III of the United States Constitution, federal courts only have jurisdiction to hear particular cases and controversies. *Colo. Outfitters Ass'n v. Hickenlooper*, --- F.3d ---, Nos. 14-1290, 14-1292, 2016 WL 1105363, at *2 (10th Cir. Mar. 22, 2016) (citing *Susan B. Anthony List v. Driehaus*, --- U.S. ---, 134 S.Ct. 2334, 2341 (2014)). "To satisfy Article III's case-or-controversy requirement, a plaintiff must demonstrate standing to sue by establishing (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likel[ihood] that the injury will be redressed by a favorable decision." *Colo. Outfitters Ass'n*, 2016 WL 1105363, at *2 (citing *Susan B. Anthony List*, 134 S. Ct. at 2341) (internal quotation marks omitted).

"[A] federal court can't 'assume' a plaintiff has demonstrated Article III standing in order to proceed to the merits of the underlying claim, regardless of the claim's significance." *Colo. Outfitters Ass'n*, 2016 WL 1105363, at *2 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). "[T]he elements of standing 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case.'" *Colo. Outfitters Ass'n*, 2016 WL 1105363, at *2 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Here, Plaintiffs disclose that they have relocated out-of-state but that they have "plans to return to Colorado for

frequent visits and in connection with this lawsuit." *Response* [#48] at 12 n.4. Given that Plaintiffs seek to enjoin Defendants Bengtsson and Bicha from continuing to implement alleged state policies, the Court must consider whether "the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (1992) (internal quotation marks omitted). However, although Defendant Bicha raises this issue, it is insufficiently addressed in the briefing before the Court. Further, Plaintiffs provide no facts or details about how I.B. will continue to be subject to searches allegedly condoned by Defendants' policies other than a vague reference that she and her family plan to visit Colorado in the future.[12] Although Plaintiffs argue that standing is determined based on the facts existing at the time the complaint was filed, this is not entirely true. Response [#48] at 12 n.4. As the Tenth Circuit has made clear, "[a]lthough a plaintiff may present evidence of a past injury to establish standing for **retrospective** relief, [s]he must demonstrate a continuing injury to establish standing for **prospective** relief." *Jordan*, 654 F.3d at 1019 (emphasis added) (citing *PETA v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir. 2002)).

Indeed, in a similar case to this one, the United States Supreme Court vacated the Ninth Circuit's holding that a caseworker's decision to seize and interrogate a girl in school during the course of investigating child abuse allegations violated the Fourth Amendment. S*ee Camreta v. Greene*, 563 U.S. 692, 710 (2011).There, the Court vacated the Ninth Circuit's conclusion that a Fourth Amendment violation had occurred both because the plaintiff had reached the age of majority and also because

[12]For example, Plaintiffs make no allegation that I.B. will be enrolled in school during these future visits, which could at least imply that searches might occur in the future.

she had moved to a different state with no intention of relocating back to Oregon, the state in which the violation allegedly occurred. *Id.*

Unlike the situation in *Camreta*, however, this Court lacks facts and briefing on Article III standing. In light of the Supreme Court's decision in *Camreta*, the Court concludes that it cannot resolve the issue of mootness, and therefore **denies without prejudice** Defendants' motions to dismiss with respect to the official-capacity claims, and will allow a limited period of jurisdictional discovery on the issue of Article III standing, as explained in more detail below. *See Sizova v. Nat. Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) ("Although a district court has discretion in the manner by which it resolves an issue of subject matter jurisdiction under Rule 12(b)(1), a refusal to grant discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant[.]") (internal citations omitted).

B. Fourteenth Amendment Claims (Third and Fourth Claims)

Plaintiffs' Third Claim is an individual-capacity claim brought pursuant to the Fourteenth Amendment against Defendants Woodard and Newbill based on Defendant Woodard's December 2014 search. *Am. Compl.* [#34] ¶¶ 180-191. Plaintiffs state that the "right that Plaintiffs are asserting is Jane Doe's 'fundamental right or liberty interest' in the care, custody, and control of I.B., and the reciprocal right that I.B. has to have decisions made by her natural parent." *Response* [#48] at 33. In their Fourth Claim, Plaintiffs' bring a supervisory liability claim against Defendants Bengtsson and Rhodus based on their alleged "responsibility for the local policy and custom of El Paso County DHS, and for the failure to train and

supervise Defendants Woodard and Newbill, by virtue of their job." *Am. Compl.* [#34] ¶ 193. Additionally, the Fourth Claim contains an official-capacity claim against Defendants Bengtsson and Bicha which seeks prospective relief. *Id.* ¶ 209.

Parents have a protected liberty interest under the Fourteenth Amendment "in the care, custody and control of their children." *Gomes v. Wood*, 451 F.3d 1122, 1127 (10th Cir. 2006) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). "That interest is 'perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.'" *Id.* (quoting *Troxel*, 530 U.S. at 65). This right includes "some level of protection for parents' decisions regarding their children's medical care." *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010). "Neither the Supreme Court nor the Tenth Circuit has defined the precise scope of the right to direct a child's medical care" but it is nonetheless clear that this right "is not absolute." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). "[W]hen a child's life or health is endangered by her parents' decisions, in some circumstances a state may intervene without violating the parents' constitutional rights." *Jensen*, 603 F.3d at 1198.

The Fourteenth Amendment also protects a parent's right to familial association, and proscribes the forced separation of parent from child by the government absent extraordinary circumstances. *Gomes*, 451 F.3d at 1128. "But a parent must allege 'intent to interfere' with this right—that is, the defendant must have directed conduct at the familial relationship 'with knowledge that the statements or conduct will adversely affect that relationship.'" *Thomas*, 765 F.3d at 1196 (quoting *Lowery v. Cnty. of Riley*, 522 F.3d 1086, 1092-93 (10th Cir. 2008)). Further, the right to familial association "must be weighed

against the state's interest in protecting a child's health and safety in order to determine whether state actors unduly burdened that right in a given case." *Id.* Thus, to state a claim for deprivation of the right of familial association, a parent must allege that:

> (1) [D]efendants intended to deprive them of their protected relationship with their [child], . . . and that (2) balancing the [parents'] interest in their protected relationship with [their child] against the state's interests in [the child's] health and safety, defendants either unduly burdened plaintiffs' protected relationship, . . . or effected an 'unwarranted intrusion' into that relationship[.]

Id.

The County Defendants argue that "the contours of Jane Doe's and I.B.'s reciprocal rights to care, custody, and control" under the Fourteenth Amendment are not well established in the context of an investigation of child abuse, and hence qualified immunity shields these Defendants. *Motion* [#40] at 16. The County Defendants also contend that, regardless of whether the constitutional right is clearly established, the facts alleged fail to state a claim under the Fourteenth Amendment. *Id.* at 17.

The Court agrees with the latter argument, and finds that Plaintiffs have failed to allege a constitutional violation of their Fourteenth Amendment rights. Plaintiffs' claim appears to be premised solely on the

visual search conducted by Defendant Woodard.[13] Plaintiffs allege that Jane Doe has "a right to have medical decisions such as a physical examination made by the parent, not the state," and that "Woodard searched I.B. without prior notice to Jane Doe[.]" *Am. Compl.* [#34] ¶¶ 185-86. Moreover, in their Response, Plaintiffs state that Jane Doe has a right to consent to "what is essentially a medical procedure—a physical examination of I.B.'s naked body, or portions of it, for injuries" and that I.B. "has a reciprocal right to have such a decision made by . . . her mother, Jane Doe." *Response* [#48] at 34. But the visual exam of a child, which is the violation alleged by Plaintiffs, is not "essentially a medical procedure." Moreover, Plaintiffs have not alleged that the December 2014 search in any way "affected [Jane Doe's] right to direct [I.B.'s] medical care." *Thomas*, 765 F.3d at1195 (holding that plaintiffs did not state a claim for violation of right to direct medical care where doctors informed social services of potential parental medical neglect). Nor have Plaintiffs alleged that the December 2014 search caused any "interference with [I.B.'s] medical treatment" or that there was any ongoing medical treatment affected by the December 2014 search. *Id.*

To the extent that Plaintiffs argue that Defendants violated the right to familial association, Plaintiffs do not allege that Defendant Woodard or Newbill intended to separate I.B. from Jane Doe (nor do they allege that she was actually separated from her mother apart from the voluntary separation that occurred by sending her to pre-school). *Thomas*, 765 F.3d at 1196. Moreover, they do not allege that "[t]he conduct . . . [was] directed at the intimate relationship with knowledge that the . . . conduct [would]

[13]Plaintiffs do not allege a violation of the Fourteenth Amendment based on the photographs. *See Am. Compl.* [#34] ¶¶ 180-191.

adversely affect that relationship." J.*B. v. Washington Cty*., 127 F.3d 919, 927 (10th Cir. 1997). Given this conclusion, it also follows that Plaintiffs have failed to allege a Fourteenth Amendment violation with respect to Claim Four, which alleges supervisory liability and official-capacity claims based on Defendant Woodard's search. Accordingly, because the Court concludes that Plaintiffs have failed to allege a violation of their Fourteenth Amendment rights, the Motion is **granted** with respect to Claims Three and Four.

C. Monell Claim Against Defendant BOCC (Fifth Claim)

Plaintiffs' Fifth Claim seeks monetary damages against Defendant BOCC pursuant to *Monell v. New York City Department of Social Services*, 426 U.S. 658 (1978). In that case, the United States Supreme Court held that a municipality cannot be held liable pursuant to Section 1983 merely based on the unauthorized actions of its agents. The municipality may only be liable if it had an "official municipal policy of some nature" that was the "direct cause" or "moving force" behind the alleged constitutional violations. *Id.* at 691; *City of Okla. City v. Tuttle*, 471 U.S. 808, 820 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-85 (1986). Later Supreme Court cases have indicated that the plaintiff must show that "the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." S*chneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013) (citing *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

Thus, a plaintiff must first show (1) the existence of a municipal custom or policy and (2) a direct and causal link between the custom or policy and the violation alleged.

Jenkins v. Wood, 81 F.3d 988, 993 (10th Cir. 1996). A plaintiff may demonstrate the existence of a municipal policy or custom by providing evidence of: (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice; (3) the decisions of employees with final policymaking authority; (4) the ratification by final policymakers of the decisions of subordinates; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused. *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010).

Notably, the policies about which Plaintiffs complain are state policies rather than municipal policies. Specifically, Plaintiffs identify these policies as the "custom and unwritten policies" that "encourage[] strip searching children whenever injuries are alleged" "that developed at El Paso County DHS[.]" *Am. Compl.* [#34] ¶¶ 212, 214, 216. Although it is undisputed that the "custom and unwritten policies" were followed by employees of the El Paso County DHS – i.e., a branch of the statewide Colorado DHS – Plaintiffs nonetheless contend that because El Paso County (the municipality) is responsible for the policies that developed at the El Paso County branch of the statewide Colorado DHS, this claim is properly brought as a *Monell* claim against the municipal county (i.e., Defendant BOCC, the policymaking body of El Paso County) instead of Colorado DHS. *Id.* ¶ 213. In other words, although there is no dispute that a county division of a state agency implemented the policies at issue, Plaintiffs contend that the municipal county exerted such influence over the local branch of the state agency so as to make the municipal county – as opposed to Colorado DHS – actually responsible for the policies. In support, Plaintiffs conclusorily allege that Defendant

BOCC, as the "policymaking body of El Paso County . . . is responsible for the custom and unwritten policies that developed at El Paso County DHS as municipal policy[.]" *Id.* ¶ 212. Plaintiffs further allege that El Paso County DHS is "funded in part and receives oversight provided by the DHS Advisory Commission, appointed by BOCC. Thus, BOCC has the power to approve or condemn El Paso County DHS local policies and custom." *Id.* ¶ 213.

In short, rather than disputing the existence of a municipal policy, the parties primarily dispute who was responsible for the alleged El Paso County DHS policy.[14] The Court therefore addresses whether Defendant BOCC was actually responsible for the municipal policy that was the "moving force behind the deprivation." *Myers v. Bd. of Cnty. Comm'rs of Okla. City*, 151 F.3d 1313, 1316 (10th Cir. 1998). Section 1983 imposes liability on "those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *McMillian*

[14]It is not clear whether the County Defendants actually dispute the existence of El Paso County DHS policy. The only mention of an El Paso County DHS policy is contained in the County Defendants' argument regarding supervisory liability. There, the County Defendants argue that "[i]t is not sufficient that a plaintiff simply assert that an existing training program for employees represents a 'policy' for which the municipality is responsible." *Motion* [#40] at 26. But Plaintiffs do not allege that El Paso County DHS merely failed to train its employees; Plaintiffs contend that El Paso County DHS has a "local policy and custom" that actively "*encourages* strip searching children whenever injuries are alleged, . . . and photographing areas of their bodies normally covered by clothing[.]" *Am. Compl.* [#34] ¶ 214. Nonetheless, given the Court's conclusion that Defendant BOCC is not responsible, as a matter of law, for El Paso County DHS policies, the Court does not reach the issue of whether Plaintiff has alleged the existence of such a policy at all.

v. Monroe Cty., Ala., 520 U.S. 781, 785 (1997) (quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989)). This analysis is dependent on state law. *Id.* at 786.

Here, Plaintiffs do not allege that an employee of El Paso County violated their constitutional rights; they allege that employees of El Paso DHS violated their constitutional rights, and El Paso County DHS is an arm of the state. *Am. Compl.* [#34] ¶¶ 9, 10. Nonetheless, Plaintiffs contend that Defendant BOCC is responsible for the alleged policy causing the violations because Defendant BOCC has the "power to approve or condemn El Paso County DHS local policies and custom," it partly funds El Paso County DHS and El Paso County DHS receives oversight from "the DHS Advisory Commission, appointed by BOCC." *Am. Compl.* [#34] ¶ 213. Even viewing these allegations through the favorable lens required by Rule 12(b)(6), it is apparent that these are highly *indirect* methods of influencing the policies and customs of El Paso County DHS, the entity employing the individuals who allegedly caused a violation of Plaintiffs' constitutional rights. See *McMillian*, 520 U.S. at 785 ("A court's task is to identify those officials or governmental bodies who speak with final policymaking authority[.]").

Instead, Colorado law makes clear that the state board of human services and its executive director have the final authority to create and implement rules for the operation of the various county branches of the DHS, and thus are ultimately responsible for any policies implemented by the county branches. *See* C.R.S. §§ 26-1-107, 108. For example, the state board is responsible for creating rules governing the "minimum standards and qualifications for county department personnel" which are "binding upon the several county departments." C.R.S. §§ 26-1-107. Moreover, the county board of a DHS county branch must

"act in accordance with rules adopted by the state board when addressing public assistance and welfare duties, responsibilities, and activities of the county department." C.R.S. § 26-1-116. Thus, even accepting as true Plaintiffs' allegation that Defendant BOCC has some influence over El Paso County DHS, that allegation is insufficient as a matter of law, because Colorado law vests "final policymaking authority" with Colorado DHS. *McMillian*, 520 U.S. at 785. *See also Nielander v. Bd. of Cty. Comm'rs of Cty. of Republic, Kan.*, 582 F.3d 1155, 1170 (10th Cir. 2009) (affirming district court's dismissal of claim against county because the government official's authority was derived from the state, rather than county); *Smith v. Cty. of Stanislaus*, No. CV-11-1655-LJO-SKO, 2012 WL 1205522, at *5 (E.D. Cal. Apr. 11, 2012) (holding plaintiff failed to state a *Monell* claim against a county because defendants were not employees of the county).

Accordingly, the County Defendants' motion with respect to Plaintiffs' Fifth Claim is **granted** because Plaintiffs have not adequately alleged that Defendant BOCC is responsible for the policy which allegedly caused the violations of Plaintiffs' constitutional rights.

VI. CONCLUSION

For the foregoing reasons, the Court **grants in part** and **denies in part** the County Defendants' Motion [#40] and **denies without prejudice** Defendant Bicha's Motion [#41]. Thus, the remaining claim in this matter is the portion of the Second Claim in which Plaintiffs allege an official-capacity claim against Defendants Bengtsson and Bicha, who are the remaining Defendants in this action. Accordingly,

IT IS HEREBY **ORDERED** that the County Defendants' Motion to Dismiss [#40] is **GRANTED in part** and **DENIED in part**, and Defendant Bicha's Motion to Dismiss [#41] is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER **ORDERED** that the First Claim, as well as the individual-capacity claims against Defendants Bengtsson and Rhodus in the Second Claim, are **DISMISSED WITHOUT PREJUDICE**. *See Reynoldson*, 907 F.2d at 127.

IT IS FURTHER **ORDERED** that the Third, Fourth, and Fifth Claims in Plaintiffs' Amended Complaint [#34] are **DISMISSED WITH PREJUDICE** pursuant to Fed. R. Civ. P. 12(b)(6). *See Helmick v. Utah Valley State Coll.*, 394 F. App'x 465, 467 (10th Cir. 2010) (dismissal based on the merits is with prejudice).

IT IS FURTHER **ORDERED** that, with respect to the official-capacity claims for prospective relief in the Second Claim against Defendants Bengtsson and Bicha, the Motions [#40, 41] are **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER **ORDERED** that discovery relating to whether Plaintiffs have standing to assert the Second Claim for relief shall be conducted as follows:

> (a) The parties are limited to two (2) depositions per side of no more than three hours each;
> (b) The parties are limited to seven (7) interrogatories, seven (7) requests for production of documents, and seven (7) requests for admission per side;

(c) All such discovery shall be conducted separately from and prior to any other discovery in the case;
(d) All such discovery shall be completed **on or before December 15, 2016**; and
(e) The deadline to file any further motion to dismiss the Second Claim for Relief on the basis of mootness is **January 17, 2017**.

Dated: September 30, 2016.

BY THE COURT:

/s/ *Kristin L. Mix*
Kristen L. Mix
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

(Filed 06/12/17)

JANE DOE, and
I.B., by her mother and next friend, Jane Doe,
Plaintiffs,

v.

JULIE KROW, in her official capacity as Executive Director, El Paso County Department of Human Services for prospective relief, and
REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief,
Defendants.

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on Plaintiffs' **Motion to Amend First Amended Complaint** [#54][1] (the

[1]"[#54]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Order.

"Motion"). Defendants filed a Response [#55] in opposition to the Motion, and Plaintiffs filed a Reply [#57]. The Court has reviewed the Motion, Response, Reply, the entire case file, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the Motion [#54] is **DENIED**.

As an initial matter, a Scheduling Conference has not yet been held, and thus Plaintiffs' request to amend the Amended Complaint is timely. The Court therefore considers arguments raised by the parties related to whether justice would be served by amendment. Specifically, the Court should grant leave to amend "freely . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave should generally be permitted unless the moving party unduly delayed or failed to cure, the opposing party would be unduly prejudiced, or the proposed amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Plaintiffs seek to amend the Amended Complaint "primarily to allege facts demonstrating that the search at issue here was unreasonable under the special needs doctrine[,]" in order to revive two claims that the Court previously dismissed without prejudice.[2] *Motion* [#54] at 3; *see also* Order [#51]. Defendants argue that Plaintiffs acted with undue delay, that Defendants would be prejudiced by the amendment, that Plaintiffs failed to cure deficiencies by previous amendment, and that the proposed amendments are futile. *See Response* [#55] at

[2]Plaintiffs' proposed Second Amended Complaint includes Claims Three through Five, which the Court previously dismissed with prejudice. *See Order* [#51]. Given Plaintiffs' clarification that they "are not attempting to revive these claims, but have included them in the event a single operative document is needed for appeal," the Court does not consider these claims. *Motion* [#54] at 7 n.4.

3-7. Because the Motion [#54] can be resolved on futility grounds, the Court addresses solely that argument.

An amendment is futile if it would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Innovatier, Inc. v. CardXX, Inc.*, No. 08-cv-00273-PAB-KLM, 2010 WL 148285, at *2 (D. Colo. Jan. 8, 2010) (citing *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004)). "In ascertaining whether plaintiff's proposed amended complaint is likely to survive a motion to dismiss, the court must construe the complaint in the light most favorable to plaintiff, and the allegations in the complaint must be accepted as true." *Murray v. Sevier*, 156 F.R.D. 235, 238 (D. Kan. 1994). Moreover, "[a]ny ambiguities must be resolved in favor of plaintiff, giving him the benefit of every reasonable inference drawn from the well-pleaded facts and allegations in his complaint." *Id.* (quotations omitted).

Plaintiffs argue that they should be permitted to amend the Amended Complaint because the Court previously dismissed *without prejudice* Plaintiffs' Fourth Amendment claims and explained that "in order to state a viable claim for violation of the Fourth Amendment under the special needs doctrine, Plaintiffs must allege facts to demonstrate that the search was unreasonable regardless of the absence of a warrant, consent, and/or exigent circumstances." *Order* [#51] at 21. Although Plaintiffs attempt to add facts that bolster their Fourth Amendment claims, they have not addressed the Court's determination that Defendants were entitled to qualified immunity because the law was not clearly established with respect to whether Defendants needed a warrant in order to search the minor Plaintiff. *See id.* at 16. In the absence of any case clearly establishing Plaintiffs' rights as asserted, the Court cannot find that Defendants "knowingly

violate[d] the law," even assuming that they committed a constitutional violation. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003). Plaintiffs have not directed the Court to any legal authority that would indicate that the Court's previous "clearly established" analysis for purposes of qualified immunity is incorrect. Accordingly, Defendants remain entitled to qualified immunity on these claims, and the proposed amendments are futile.

Lastly, Plaintiffs also request that the Court hold a hearing or status conference on the Motion "in order to best address any arguments or related matters." *See Motion* [#54] at 10. However, the Court is fully apprised of the issues relevant to the Motion [#54] based on the parties' briefs. Accordingly, Plaintiffs' request for a hearing on the Motion is **denied**.

For the foregoing reasons,

IT IS HEREBY **ORDERED** that the Motion [#54] is **DENIED**.

Dated: June 12, 2017

BY THE COURT:

/s/ *Kristin L. Mix*
Kristen L. Mix
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

(Filed 01/19/18)

JANE DOE, and
I.B., by her mother and next friend, Jane Doe,
Plaintiffs,

v.

JULIE KROW, in her official capacity as Executive Director, El Paso County Department of Human Services for prospective relief, and
REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief,
Defendants.

STIPULATION OF DISMISSAL OF REMAINING PENDING CLAIMS WITH PREJUDICE

The parties, by and through respective counsel, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), hereby stipulate that Plaintiffs' remaining pending claim—the official-capacity claims for prospective relief in the Second Claim for Relief against Defendants Krow and Bicha from Plaintiffs' First Amended Complaint be dismissed with prejudice, with each party to cover its own fees and costs

as to this claim. This Court previously dismissed Plaintiffs' Third, Fourth, and Fifth Claims for Relief with prejudice, and dismissed portions of Plaintiffs' First and Second Claims for Relief without prejudice. *See* ECF No. 50 at pp. 36, 37. This Court subsequently denied Plaintiffs' motion to amend to reinstate the previously dismissed portion of their First and Second Claims for Relief. *See* ECF No. 77.

Accordingly, the parties also respectfully request that this Court vacate the evidentiary hearing set for February 23, 2018. Given that this Court has denied Plaintiffs all relief, pursuant to Fed. R. Civ. P. 58(d), Plaintiffs request that final judgment be entered in this action and that judgment be set out in a separate document.

Respectfully submitted this 19th day of January, 2018.

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

(Filed 01/26/18)

JANE DOE, and
I.B., by her mother and next friend, Jane Doe,
Plaintiffs,

v.

JULIE KROW, in her official capacity as Executive Director, El Paso County Department of Human Services for prospective relief, and
REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief,
Defendants.

AMENDED FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the orders entered in this case, and in light of the parties' Stipulation of Dismissal of Remaining Claims with Prejudice [#83], filed January 19, 2018, which provides for the resolution of all outstanding claims, the following FINAL JUDGMENT is entered.

Pursuant to the Order [#51] entered by Magistrate Judge Kristen L. Mix on September 30, 2016, which order is incorporated by reference, it is

ORDERED that the County Defendants' Motion to Dismiss First Amended Complaint [#40] is GRANTED in part and DENIED in part. It is

FURTHER ORDERED that Defendant Bicha's Motion to Dismiss First Amended Complaint [#41] is DENIED WITHOUT PREJUDICE. It is

FURTHER ORDERED that the First Claim, as well as the individual-capacity claims against Defendants Bengtsson and Rhodus in the Second Claim, are DISMISSED WITHOUT PREJUDICE. It is

FURTHER ORDERED that the Third, Fourth, and Fifth Claims in Plaintiffs' Amended Complaint [#34] are DISMISSED WITH PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(6).

Pursuant to the parties' Stipulation of Dismissal of Remaining Claims with Prejudice [#83], it is

FURTHER ORDERED that the official-capacity claims for prospective relief in the Second Claim against Defendants Krow and Bicha are DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that each party shall cover its own fees and costs.

DATED at Denver, Colorado January 26, 2018.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By /s/ L. Galera
Laura Galera, Deputy Clerk

APPENDIX G

CONSTITUTIONAL PROVISION INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

APPENDIX H

STATUTORY PROVISION INVOLVED

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , 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 immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

42 U.S.C § 1983.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

(Filed 08/20/15)

JANE DOE, and
I.B., by her mother and next friend, Jane Doe,
Plaintiffs,

v.

APRIL WOODARD, El Paso County Department of Human Services caseworker, individually;
CHRISTINA NEWBILL, Supervisor, El Paso County Department of Human Services, individually;
SHIRLEY RHODUS, Children, Youth and Family Services Director, El Paso County Department of Human Services, individually;
RICHARD BENGTSSON, individually, and in his official capacity as Executive Director, El Paso County Department of Human Services for prospective relief;
REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief; and
EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS, comprised of Sallie Clark, Darryl Glenn, Dennis Hisey, Amy Lathen, and Peggy Littleton, in their official capacity,
Defendants.

FIRST AMENDED COMPLAINT

Plaintiffs, I.B. and Jane Doe, by and through their undersigned counsel, Telios Law PLLC, allege against Defendants:

I. INTRODUCTION

1. On at least two occasions, a caseworker from the El Paso County Department of Human Services (DHS) strip searched and/or photographed private areas of I.B.'s person without obtaining consent from her mother, or even notifying her mother, despite the fact that allegations of abuse were known to be likely unfounded because of previous false reports.

2. The searches were conducted as a result of statewide DHS policy and a local El Paso County unwritten, but well-established, policy and custom that allowed for the widespread strip searching and photographing of children suspected of being abused without regard to Fourth Amendment reasonableness.

3. As a result of one search in particular, I.B. and Jane Doe bring this action against Defendants for damages for violation of their constitutional rights under the Fourth and Fourteenth Amendments. As a result of Defendants' unlawful actions, Jane Doe and I.B. have suffered psychological distress. Plaintiffs also seek declaratory and injunctive relief against the unconstitutional DHS policies, and to have the photographs of I.B. destroyed.

II. SUBJECT MATTER JURISDICTION

4. This action arises under the United States Constitution, particularly the Fourth and Fourteenth Amendments, and under federal law, particularly 42 U.S.C. §§ 1983 and 1988. This Court has original jurisdiction of this claim under, and by virtue of, 28 U.S.C. § 1331, and 28 U.S.C. § 1343. This Court is authorized to award attorney's fees under 42 U.S.C. § 1988.

III. PERSONAL JURISDICTION

5. This Court has personal jurisdiction over Defendants pursuant to proper service of summons with a copy of this Complaint and the fact that Defendants are geographically located in the state of Colorado.

IV. VENUE

6. Venue is proper in the United States District Court of Colorado under 28 U.S.C. § 1391(b), because all Defendants are residents of the state of Colorado and a substantial part of the events or omissions giving rise to the claims occurred in the state of Colorado.

V. PARTIES

7. Plaintiff, Jane Doe, is a natural person who was at the time of the searches of I.B., a resident of Colorado Springs, Colorado. She is a disabled veteran of the United States Army, and is now a fulltime mother.

8. Plaintiff, I.B., Jane Doe's daughter, is a natural person who was at the time of the searches, a resident of Colorado Springs, Colorado, and was four years old at the time of the incident giving rise to the claims.

9. Defendant, April Woodard, is a natural person, a caseworker for the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages.

10. Defendant, Christina Newbill, is a natural person, a supervisor and social worker for the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages.

11. Defendant, Shirley Rhodus, is a natural person, Children, Youth and Family Services Director for the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages.

12. Defendant, Richard Bengtsson, is a natural person, the Executive Director of the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages. He is also sued in his official capacity as the Executive Director of El Paso County DHS for prospective relief.

13. Defendant, Reggie Bicha, is a natural person, the Executive Director of the Colorado DHS, and is sued in his official capacity, for prospective relief only.

14. Defendant, El Paso County Board of County Commissioners (BOCC), comprised of Sallie Clark, Darryl Glenn, Dennis Hisey, Amy Lathen, and Peggy Littleton, is the governing body of El Paso County. El Paso County DHS reports to El Paso County, and is partially financed by it.

VI. GENERAL ALLEGATIONS

The background for the incident

15. From 2012 through 2014, DHS investigated I.B.'s home around half a dozen times, based on false reports that I.B. was being abused.

16. I.B. lives in a home with her mother, Jane Doe, her younger brother, and her live-in stepfather, mother's boyfriend, who is a military veteran.

17. Each time they visited the house, DHS caseworkers examined the pantry, fridge, kids' room, Jane Doe's room, and spare room, despite the fact that all false allegations were of physical abuse.

18. Each time, the report of abuse was false.

19. Each time, either the case was closed as unfounded, or no documentation was kept at all, as only three incidents are recorded in the case files.

20. Even though Jane Doe asked for documentation, DHS personnel never provided her with documentation of the false reports and DHS investigations.

21. Jane Doe finally got information about her own files through a Colorado Open Records Act (CORA) request filed by her counsel, but the files do not contain all the visits that actually happened.

First Search of I.B.

22. I.B. attended the Head Start program at Oak Creek Elementary School in Colorado Springs.

23. I.B.'s teacher told I.B.'s stepfather that he looked like a violent person, because, in common with many military personnel, he wore leather gear, rode a motorcycle, and had tattoos.

24. According to DHS records, on November 22, 2013, a report came in that I.B. "had marks that resembled a hand print on her bottom." The reporter also stated that there was a "bruise the size of a dollar bill" on I.B.'s lower back.

25. At the time of the report to DHS, a teacher had observed I.B.'s bottom, as had the behavioral health consultant at the school.

26. I.B. was three at this time.

27. Amanda Albert, a DHS caseworker, also "observed" I.B.'s bottom, but did not find marks that resembled a hand print on her bottom. Instead, she found a rash on I.B.'s bottom that "did not appear as though this mark came from a hand, belt, or other object."

28. Ms. Albert found a very small abrasion in I.B.'s back with a linear welt that looked like a reaction to a band aid.

29. The caseworker also checked I.B.'s younger brother, E.B., for marks or bruises.

30. Jane Doe was not asked for permission for the strip search of either child, nor was she notified that three adults had viewed I.B.'s private areas.

31. In fact, she was never informed about the strip search, even afterwards, and only recently discovered it through a CORA request.

32. The investigation was closed as unfounded on January 30, 2014.

33. Thus, that report was a deliberate false report.

34. Shortly after this search, another report was called in January 22, 2014, apparently also from the school, related to a bruise on I.B.'s forehead, which was also determined to be unfounded. No further information was provided in the records.

The Second Search of I.B.

35. Several months later, DHS again received a report that I.B. was being abused. According to DHS records, this was December 9, 2014. At this time, I.B. was four.

36. Allegations of abuse included little bumps on I.B.'s face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees.

37. According to DHS records, on December 10, Ms. April Woodard, a DHS caseworker, received permission from her supervisor, Ms. Christina Newbill, to view I.B.'s "buttocks, stomach/abdomen, and back so Caseworker could look for marks/bruises."

38. The Oak Creek Elementary health paraprofessional, Doris Swanstrom, met with Ms. Woodard in the nurse's room. Ms. Woodard instructed I.B. to show her buttocks and stomach and back.

39. I.B. states that an adult took off all I.B.'s clothes. The adults viewed I.B. and prepared to take photographs.

40. I.B. told Ms. Woodard she did not want photographs taken. Nevertheless, the caseworker took color photographs of private and unclothed areas of I.B.'s body.

41. I.B. is still upset that photographs of her unclothed body were taken without her consent.

42. Ms. Woodard called on Jane Doe, following up on the report of child abuse. Ms. Woodard also inspected the home.

43. According to DHS records, this happened on December 11, 2014. However, Jane Doe recalls this visit as happening at the time she had just purchased her groceries for Thanksgiving dinner, so DHS records may be in error as to the date.

44. At that time, Ms. Woodard informed Jane Doe, in front of I.B., that she should not ever spank I.B., despite the fact that parental spanking is legal in Colorado.

45. To this day, I.B. tells her mother, "Mommy, you know you can't spank me because you will get in trouble, and I know that!"

46. Jane Doe was upset that someone kept filing false reports. She asked the DHS caseworker if she could pull her child out of school. The DHS caseworker said that she could, but it would "look suspicious."

47. Ms. Woodard eventually concluded that the marks observed were not consistent with the reporter's statement, and that I.B. gets pretend play mixed up with reality. The case was closed as unfounded on January 5, 2015.

48. Jane Doe thought the incident had been resolved after Ms. Woodard's visit. But about a week after Ms. Woodard visited her home, while driving to school, I.B. said something alarming about her encounter with the caseworker: "Mommy, do you remember when the woman with white hair came to my school? I hope she doesn't come again, because I don't like it when she takes all my clothes off."

49. Jane Doe immediately contacted the school about the incident. No one at the school would admit to a strip search. Jane Doe remained persistent in her search for answers, even going as far as to contact the superintendent. Eventually, she was informed by school officials that it was in fact a DHS caseworker who performed the strip search.

50. Jane Doe attempted to contact Lisa Little, a DHS supervisor whose name is on the files. Ms. Little never returned the call.

51. Eventually, Jane Doe spoke to Ms. Woodard, who denied having performed a strip search of I.B.

52. A few weeks later, the situation became even more concerning to Jane Doe when I.B. informed her mother that they had also taken pictures of I.B. with her clothes off, even though she told them not to.

53. Jane Doe tried for weeks to get a response from DHS, and was ignored.

54. Around January 28, 2015, Ms. Woodard finally contacted Jane Doe and told her the case was closed. At that time, Jane Doe asked again if Ms. Woodard had searched I.B. under her clothes. Finally, Ms. Woodard admitted that she did undress and photograph I.B.

without asking for permission. She insisted that she was well within her right to do so.

55. Ms. Woodard stated to Jane Doe that she and the school nurse observed I.B.'s "buttocks, back, and stomach" due to concerns of physical abuse.

56. Jane Doe asked Ms. Woodard why she had lied before. Ms. Woodard said it was because she had legitimate concerns for I.B.'s safety, and Jane Doe did not need to know at the time about the strip search.

57. Jane Doe asked about her right as a mother to know or consent to a strip search of her child's private areas.

58. Ms. Woodard informed Jane Doe that if there is suspicion of abuse, those rights are voided.

59. No allegations of abuse of I.B. were made against Jane Doe directly in connection with this incident.

60. Jane Doe responded by telling Ms. Woodard that she had called a lawyer.

61. The very next day, a different DHS caseworker came to Jane Doe's home, claiming that a report of abuse had been alleged against I.B.'s younger brother.

62. No records of this visit were produced in response to a CORA request.

63. At that time, Jane Doe asked the caseworker what she could do to stop the persistent false reporting and the intrusive investigations. The DHS caseworker simply responded, "The more it happens, the more it will keep happening." She also informed Jane Doe that pulling

the children out of school would make Jane Doe "look even more guilty."

64. Just like the numerous other reports lodged against Jane Doe's children, this report was also unfounded.

65. After this incident, I.B. no longer wished to attend school, and said that she did not feel safe.

Effect on Family

66. As a result of the compelled search and photographing, I.B. did not feel safe at school. I.B. suffered trauma similar to that suffered by children who are sexually abused, and the trauma is likely to continue. I.B. is still angry and upset at the incident in November or December 2014 and talks about it frequently. She has also experienced an erosion of her natural protective boundaries, including an inappropriate willingness to take off her clothes for strangers.

67. After hiring counsel, I.B. left school, and no longer receives the benefit of Head Start.

68. Jane Doe has suffered distress at the violation of her parental rights. She fears for the safety of her children. She is distressed at the intrusion suffered by them, and at their potential exposure to sexual abuse.

69. Based upon information and belief derived from sworn testimony from Ms. Lisa Little, color photographs of I.B.'s private areas taken by DHS caseworkers likely exist and are insufficiently secured by DHS. The fact that nude photographs of I.B. are not sufficiently secured, and that access to them may be given to anyone who works at DHS, is distressing to Jane Doe.

70. Jane Doe and I.B. remain in fear that DHS will once again subject I.B. to an unconstitutional search and that damages will be exacerbated. This fear is primarily based on Jane Doe being told that the more reports of abuse are lodged against I.B.—false or otherwise—the more DHS will be involved in their lives. While Jane Doe and I.B. currently live in Colorado, they have plans to relocate out-of-state; however, they also have concrete plans to return. These plans include regular visits to grandparents who live here. Moreover, they plan to return to Colorado for the proceedings in connection with this lawsuit, all under the watchful eye of DHS. Jane Doe and I.B. fear that a search of I.B. may be compelled against Jane Doe's consent based on the position DHS has taken thus far.

Background on Strip Searching and Photographing Children in Child Abuse Context

71. Children are taught early that no one should look at or touch (or photograph) their private parts except for health reasons and in a professional medical setting.

72. They are specifically taught not to allow strangers to see or touch their private parts, especially adult strangers. A strip search, which involves exposing one's private parts to adult strangers, is contrary to this training, and creates safety issues for children.

73. Strip searches are demeaning, dehumanizing, and degrading.

74. A strip search during a child abuse investigation is very different from examination of the same part of the body during an annual checkup in context, methodology, and safeguards.

75. Children often experience strip searches as sexual abuse.

76. Strip searches also raise the real possibility of actual child abuse. Child abusers seek situations where they have access to children. Some known offenders have acquired access through government employment to examine or photograph children's naked bodies.

77. Photographs of strip searches can be, and sometimes are, used as child pornography. Many pictures of naked children end up on the Internet.

78. Known sexual offenders have used search terms such as "youth strip search" and "nude strip search" to obtain child pornography.

79. The careless handling of photographs under DHS policy creates a real risk that the photographs will enter the stream of child pornography.

DHS Training and the Lack Thereof

80. It is clearly-established law in the Tenth Circuit that the Fourth Amendment applies to caseworkers. It is also clearly-established law that parents and children have Fourteenth Amendment rights.

81. Upon information and belief, Defendants Woodard and Newbill have received no training from DHS or El Paso County on Fourth Amendment limitations on search and seizure, as applied to social workers. Defendants Rhodus and Bengtsson have not provided such training.

82. One DHS supervisor testified that she does not even know what the Fourth Amendment says.

83. DHS training materials contain no guidance about constitutional ways to examine children or photograph their private areas. They contain no guidance about parents' and children's constitutional rights not to consent to invasive searches of children.

84. DHS training materials and regulations contain no restrictions on searches of private areas of the body related to the age, gender, or sexual orientation of either the child or the caseworker.

85. Training on how to photograph children consists of instructions to take a color photograph of the body part, as well as a photograph of the child's face, to connect the face and the body part.

86. DHS training materials and regulations contain no guidance about how to secure photographs of private areas of children or to safeguard such photos from making their way into the stream of online child pornography.

87. DHS training is in line with its unwritten policies and customs.

DHS' Unconstitutional Policies and Customs

88. Defendants Rhodus, Bengtsson, and Colorado State DHS have instituted and approved unconstitutional policies and customs.

89. Colorado State DHS has stated in Responses to Joint Budget Committee (JBC) Questions from the legislature, dated 12-3-2013, "There is no limitation on the taking of the photographs because the purpose is to document injuries, regardless of where the injuries may be." It also stated, "Workers are trained to collect photographic evidence of physical abuse whenever it is

encountered whether it is in 'private areas' or areas not covered by clothing." And it stated, "The Department has not developed specific oversight procedures regarding obtaining photographic evidence of abuse."

90. As of November 2014, however, DHS had a written "policy" entitled "Practice Guidance" "The Use of Photography During the Course of a Child Abuse and/or Neglect Assessment" (hereinafter "statewide policy"), which was drafted in "response to a request for clarification regarding CDHS' position on the use of photography and provisions in state rule and statute that govern its use."

91. Pursuant to this policy, DHS takes the position that if a caseworker has a BSW, MSW, or DSW, section 19-3-306 of the Colorado Revised Statutes further clarifies their role, by allowing a social worker "who has in front of them a child believed to be abused or neglected" to "take color photographs." The policy does not provide guidance that the photography, or searches to enable photography, must be done in accordance with Fourth Amendment reasonableness. In fact, the child's or parent's rights are never mentioned.

92. The statewide policy states that parental consent for photographs is not required.

93. The statewide policy notes that if a child welfare worker is faced with a situation where the area of the child that needs to be photographed is normally clothed, the worker should "consult local policy regarding the use of photograph."

94. To date, no local written policies or guidelines about strip searching and photographing the portion of the body normally clothed have been developed in El Paso

County; however, El Paso County DHS has clearly defined unwritten policies and customs. Its agents regularly perform strip searches, (also called "body audits" or "skin checks") and photograph the results of those searches.

95. All the policies, customs, and practices developed as local policy are either in accordance with, or specifically endorsed by the statewide policy.

96. In accordance with the statewide policy, under El Paso County DHS local policy and custom, parental consent is not needed. It is routine not to contact or inform parents of the strip search beforehand. Usually, parents will be notified afterwards, but not always.

97. A DHS supervisor testified that under federal law, caseworkers do not need to try to contact parents before investigating a child under the clothing.

98. When abuse is alleged, the child is typically interviewed without parents present, but normally the interview is not audiotaped or videotaped. If parents later wish to review the interview protocols or know what was said, the only documentation is the brief notes in the DHS file.

99. El Paso County DHS unwritten policy and custom is to search any area of a child's body upon which abuse is alleged. When physical injuries to children's private areas under clothes are alleged, caseworkers routinely view those private areas.

100. DHS personnel rely on a statute, C.R.S. § 19-3-306, which provides that any social worker who has before him a child he reasonably believes has been abused or

neglected may take or cause to be taken color photographs of the areas of trauma visible on the child.

101. Just like the statewide policy guidance, El Paso County DHS local policy and custom interprets that as permission to strip search children to make their private areas visible. However, El Paso County does not limit the statue to licensed social workers, but interprets it to apply to any child welfare worker, regardless of training or qualifications. Defendants Bicha, Bengtsson, and Rhodus have provided no constitutional limitations on how DHS interprets the statute.

102. El Paso County DHS has no requirement that the caseworkers performing searches or photographing children suspected of abuse be licensed social workers; and in fact, many are not.

103. If a child is at school when an allegation of a mark on a private area of a child is made, a DHS caseworker visits and carries out the strip search at school.

104. Caseworkers have discretion to request a medical examination for genital searches, but that is not required, as they are permitted to perform such a search themselves. Whether genital searches take place is wholly within the discretion and comfort level of the individual caseworker.

105. Searches of private areas of a child happen dozens, perhaps hundreds, of times a year in El Paso County alone.

106. Operating under the custom and policy, caseworkers routinely omit notifying parents, obtaining consent, obtaining medical orders, or asking parents if they will comply with an official medical examination.

107. These searches routinely take place in a casual (rather than clinical or professional) setting: a room in the child's home, any room provided at school, or available space in any other setting where the child may be at the time a caseworker makes contact with her. It is DHS protocol to search the children in these environments.

108. DHS policies and customs provide no clinical approach, no special clothing, and no depersonalizing of the child's body parts to be examined, as occurs in a medical examination.

109. DHS policies and customs have no limitations on these searches related to the age or gender of the child.

110. DHS policies and customs have no formal limitations on these searches related to the gender of the social worker and the child. Usually the social worker will be the same gender as the child, or at least one of two people present will be the same gender, but there is no requirement that this be the case. There is no policy or provision to protect children where either the social worker or the child may be same-sex-oriented or transgender.

111. DHS has no policies of the type commonly known as "child protection policies," which define appropriate and inappropriate touching of a child, regardless of the gender of the adult.

112. The custom and policy has inadequate safeguards for protecting children from the trauma of such a search, often experienced by children as sexual abuse, or from intentional sexual abuse by perpetrators in such circumstances.

113. Usually, the child is told to remove his or her own clothes, though in cases of a small child, sometimes the caseworker will remove the clothes.

114. A DHS caseworker views the area of the child's body and takes color photographs. A color photograph is taken of the area of the child's body implicated by the allegations. An accompanying photo is also taken of the child's face, to provide positive identification for the color photograph of the body part.

115. The photograph is taken of the mark, or of the child's body to show there was "no mark," to have a record that there was no abuse. Pictures of both "marks" and "no-marks," to include private areas under clothes, are taken and stored.

116. Color photographs of children, including of private areas of the child, are taken on cell phones issued by the County.

117. The color photographs stay on the cell phones up to many weeks, until the social worker writes the report on that child.

118. Beyond the basic confidentiality agreement to work at DHS, the policies have no safeguards or protocol in place to prevent color photographs of the private areas of children from being uploaded from cell phones to the Internet, or uploaded or synced to another device, such as a home computer. There is no technology in place to prevent this.

119. DHS policies have no safeguards or mechanism to make sure that color photographs of the private areas of children are permanently deleted from these cell phones.

120. At some point, the color photographs of children's faces and their body parts may be downloaded into electronic files.

121. Commonly, they are printed out, labeled, and kept indefinitely in paper files.

122. These paper files are stored in one or more filing rooms at DHS. Multiple people have access to these files, and therefore to the color photographs. People who have access include all managers, all caseworkers, all case aides, all county attorneys, and anyone who works at DHS.

123. Anyone who has access to the filing room can access and view any of the files and color photographs. Any person could check the file of any child.

124. The photographs are not safeguarded under HIPAA standards, as would take place in a medical examination.

DHS Personal and Entity Responsibility for Training, Policies, and Procedures

125. The responsibilities of Defendants Rhodus and Bengtsson are stated in their official job descriptions, and they are personally responsible for caring out these duties.

126. Richard Bengtsson, Executive Director of the El Paso County DHS, directs all the programs and services of DHS. He is responsible for developing and implementing departmental goals, objectives, and policies. He oversees all DHS personnel and is supposed to ensure that "qualified, trained people are performing human services functions." He is responsible for developing and implementing constitutional policies, having qualified, trained people in place, and protecting children from

unconstitutional and harmful actions. He is also responsible because he has adopted and approved of unconstitutional local policies and customs of: searching the private areas of children's bodies without consent or a court order; taking color photographs of those areas; and failing to safeguard those photographs. He has failed to have trained people in place and failed to protect children. In addition, he may be sued consistent with the Eleventh Amendment, in his official capacity for prospective relief and may be enjoined in his official capacity from carrying out unconstitutional policies to the extent they violate federal law.

127. Shirley Rhodus, Children, Youth and Family Services (CYFS) Director, is responsible for instruction and training of DHS managers, and updating them in agency practices, policies and procedures. She develops, implements, and monitors CYFS programs "to ensure compliance with all applicable federal, State and local regulations." Her job is to develop, establish and communicate policies and procedures, as well as to make sure they are implemented. She is responsible for developing, implementing and training in constitutional policies, which she has not carried out. She is also responsible because she adopted and approved of unconstitutional local policies and customs of: searching the private areas of children's bodies without consent or a court order; taking color photographs of those areas; and failing to safeguard those photographs.

128. Reggie Bicha, Executive Director of the Colorado Department of Human Services, is responsible for DHS policies. He may be sued consistent with the Eleventh Amendment, in his official capacity for prospective relief and may be enjoined in his official capacity from carrying

out unconstitutional policies to the extent they violate federal law.

El Paso County Responsibility for DHS Policies, and Procedures

129. "Local policy" is developed by El Paso County DHS, but oversight is also provided by the El Paso County BOCC, as agents of El Paso County. El Paso County is also responsible for the welfare and safety of children in the County.

130. The El Paso County Commissioners use county sales tax to fund DHS. The County provides more than a quarter of DHS funding.

131. In addition, the County has a Department of Human Services Advisory Commission, which has the mandate to review DHS programs and funding and monitor the implementation of DHS initiatives and mandatory services. Because it uses citizen taxes to fund DHS and has responsibility for oversight, it is responsible for the local policies and customs of El Paso County DHS.

132. It has the power to approve, condemn, and otherwise direct DHS policies by virtue of its funding and oversight.

133. It has a duty to the citizens of El Paso County to protect the welfare of children and safeguard them from constitutional violations and from being endangered by intrusive searches and careless handling of photographs of private areas of their bodies.

134. Rather than review and monitor DHS adequately, the BOCC chose instead to approve and support these unconstitutional policies.

Awareness of the Issues

135. In April of 2013, *Doe v. McAfee et al*, 13-CV-01287-MSK-MJW, was filed against defendants, who included the El Paso BOCC and Richard Bengtsson. Upon information and belief, Shirley Rhodus was also aware of the lawsuit's allegations.

136. *Doe v. McAfee* alleged that searches under children's clothes, and taking pictures of private areas of children, without consent or a court order, were a violation of constitutional rights, and that these searches were occurring on a routine basis in El Paso County. The case also alleged that such actions endanger children. While the actual strip search claims were dismissed, because the caseworker failed in her spirited effort to search and photograph the child, six claims of retaliation against the family were permitted to go forward against County personnel.

137. Recently, the DHS Advisory Commission, which is appointed by and acts on behalf of the Board of County Commissioners to oversee DHS, was served a Colorado Open Records Act request. It was asked for the following:

> (a) "Any meeting minutes, recordings of meetings, or other records of the El Paso County Department of Human Services Advisory Commission which reflect discussion or policy making regarding an El Paso County Department of Human Services policy related to investigating child abuse allegations where the child's clothing must be removed to investigate the injury."
> (b) "Any meeting minutes, recordings of meetings, or other records of the El Paso

> County Department of Human Services Advisory Commission which reflect discussion or policy making regarding an El Paso County Department of Human Services policy related to investigating child abuse allegations where clothing is removed and color photographs are taken, including any guidance on how to handle photographs that are taken."

138. According to the County, no records exist that are responsive to that request.

139. Thus, despite the issues raised in the lawsuit, the issue has not been formally discussed, nor have formal policies been developed, but the local custom and informal policy continues to thrive.

140. The lawsuit was also drawn to the attention of state DHS by the JBC Committee of the Colorado General Assembly.

141. State DHS responded by developing a statewide policy that has key Fourth Amendment protections missing.

VII. CLAIMS FOR RELIEF

First Claim for Relief

Violation of I.B.'s rights under the Fourth Amendment of the U.S. Constitution to be free from unreasonable searches and to personal privacy by Defendants Woodard and Newbill.

142. Plaintiffs incorporate here by reference the allegations set forth above.

143. Defendants at all times acted under the color of state law.

144. The Fourth Amendment to the United States Constitution provides that all individuals, including children, have a right to be free from unreasonable searches, and is applicable to the states through the Fourteenth Amendment.

145. Under this standard, state actors, including social workers, may not perform a search of a child unless the constitutional standard of reasonableness is met.

146. It is clearly established law in the Tenth Circuit that there is no "social worker" exception to the Fourth Amendment, and the Fourth Amendment applies to social workers and their investigations.

147. A child has a right to be free from an unreasonable search, just like someone suspected of a crime.

148. Under the Fourth Amendment, there is a reasonable expectation of privacy in the clothed/private areas of a child's person.

149. The search of private areas of a child's person is a severe violation of subjective expectations of privacy.

150. Unless there is an emergency, a child's clothed/private areas may not be searched without parental consent or a court order.

151. Fourth Amendment rights are violated when a government official views, photographs, or otherwise records another's unclothed or partially clothed body without meeting the constitutional standard.

152. Around November or December 2014, Defendant Woodard searched I.B.'s person by viewing I.B.'s unclothed or partially clothed body, and taking color photographs of what she observed.

153. Defendant Newbill directed Defendant Woodard to perform that search.

154. The search of I.B. was unreasonable in that Jane Doe did not consent to the search of I.B.'s body, or to having areas of I.B.'s body covered by clothing photographed, nor was there a court order, and no emergency or other exigent circumstances existed to make obtaining consent or a court order impractical.

155. Despite the fact that Jane Doe was not accused of abusing I.B., Woodard never even notified Jane Doe afterwards. Indeed, when confronted, she lied to Jane Doe, stating that she had not performed such a search. It took Jane Doe weeks to track down the information after I.B. informed her mother that she had been searched.

156. Upon information and belief, color photographs of I.B. taken by Defendant Woodard documenting this strip search exist and are insufficiently secured.

157. Defendants' actions violated rights secured to I.B. by the Fourth Amendment of the United States Constitution.

158. In conducting the search, Defendants acted intentionally, willfully, and wantonly, and in heedless and reckless disregard of I.B.'s right to be free from an unreasonable search.

159. I.B. suffered injuries and damages from violation of her rights.

Second Claim for Relief

Violation of I.B's rights under the Fourth Amendment of the U.S. Constitution to be free from unreasonable searches and to personal privacy by Defendants Rhodus and Bengtsson, in their individual capacities, and by Defendants Bengtsson and Bicha in their official capacities for prospective relief.

160. Plaintiffs incorporate here by reference the allegations set forth above.

161. Defendants Rhodus and Bengtsson are personally liable for the damages stemming from the unconstitutional search of I.B. by way of "supervisory liability" because they both possessed personal responsibility for the local policy and custom of El Paso County DHS, and for the failure to train and supervise Defendants Woodard and Newbill, by virtue of their job descriptions and the personal responsibility thereof as stated in the preceding paragraphs.

162. As stated above, statewide policy, and local policy and custom encourages strip searching children whenever injuries are alleged. DHS workers view and photograph areas of children's bodies normally covered by clothing, without consent by parents or a court order, and often even without notification.

163. These policies and custom also permit the photographs to be later stored in an unlocked file room at El Paso County DHS, with access to the photographs available to anyone who works for DHS.

164. The continued application of the policies and customs over which Defendants Rhodus and Bengtsson possessed personal responsibility caused the search of I.B.

to take place in the unreasonable manner described in the preceding paragraphs, and caused the photographs of I.B. which were taken to be insufficiently secured to protect her privacy. Accordingly, the local policy and custom of El Paso County DHS, as directed by Rhodus and Bengtsson, was a direct cause of the deprivation of I.B.'s constitutional rights.

165. Defendants Rhodus and Bengtsson reasonably knew or should have known that the current inadequate policies and customs would cause their subordinates to inflict constitutional and related injuries. Defendants knew or should have known that this custom and policy was both unconstitutional and endangered children, because of clearly established law, and because of allegations in *Doe v. McAfee*.

166. Based on this information of which, upon information and belief, Defendants Rhodus and Bengtsson had actual knowledge, Defendants Rhodus and Bengtsson have been on notice for at least two years that a custom and policy had developed where caseworkers were strip searching and photographing children without proper safeguards, and that there were both constitutional and safety problems with this custom and policy.

167. Despite the unconstitutionality of their policies, and the risks to children inherent in such policies, Defendants Rhodus and Bengtsson remained deliberately indifferent to the rights of I.B. by not only personally acquiescing in, being responsible for, and promulgating the local policy and custom permitting and encouraging such strip searches, but providing no reasonable limitations and safeguards to such strip searches.

168. Defendants Rhodus and Bengtsson also had personal responsibility either to train and supervise caseworkers directly or to oversee and provide training and supervision for El Paso County DHS and the Children, Youth and Family Services Division.

169. The training program for protection of children from unconstitutional Fourth Amendment searches and from related trauma and possible sexual abuse was inadequate to train Defendants Woodard and Newbill to carry out their duties.

170. Defendants Rhodus and Bengtsson did not train caseworkers on when and how to conduct an examination that does not have abusive overtones, and that would not provide opportunities or temptations for caseworkers who are, or could become, sexual offenders.

171. Defendants Rhodus and Bengtsson did not train and supervise with a view to protecting the medical privacy of children, or require sufficient safeguards for the color photographs obtained from strip searches.

172. Given the high probability of constitutional violations, the fact that constitutional violations in fact occurred, the shockingly high rate of child sexual abuse by public employees in public institutions, and the known and present danger of permitting public officials to examine children's private areas, the need for more training and supervision, or different training and supervision, was obvious.

173. Moreover, Defendants Rhodus and Bengtsson reasonably knew or should have known that the current lack of training and supervision would cause their subordinates to inflict constitutional and related injuries,

because of allegations in *Doe v. McAfee*, but chose to remain deliberately indifferent to the rights of I.B.

174. Defendants Rhodus and Bengtsson were on notice that their inadequate training and supervision might lead to child abuse or otherwise endanger children, because of allegations in *Doe v. McAfee*, yet they continued to act knowingly and with deliberate indifference.

175. Given that constitutional law, standard public policy, and a reasonable standard of care all hold that government workers and those who work with children should not do informal examinations of children's private areas, this failure to train exposed I.B. to severe danger.

176. Defendants Rhodus and Bengtsson violated clearly-established rights secured to I.B. by the Fourth Amendment of the United States Constitution. Defendants Rhodus and Bengtsson personally failed to train and supervise Defendants Woodard and Newbill adequately, or possessed personal responsibility for an overall agency failure to inadequately train or supervise.

177. The statewide policy, local policy and custom of El Paso County DHS, and the failure to train and supervise Defendants Woodard and Newbill, were direct causes of the deprivation of I.B.'s constitutional rights.

178. The statewide policy, and local policy and custom of El Paso County DHS, are causing a continuing violation of I.B.'s constitutional rights in that she may again be subjected to an unreasonable search, and that photographs of I.B. are insufficiently stored to protect her privacy.

179. Because the continued implementation of the aforementioned policy and custom violate federal law under 42 U.S.C. § 1983 and the United States Constitution, Reggie Bicha on behalf of the state DHS, and to the extent his agents are not otherwise enjoined, Richard Bengtsson on behalf of El Paso County DHS, is liable in his official capacity for prospective relief to enforce federal law.

Third Claim for Relief

Violation of Jane Doe's and I.B.'s Fourteenth Amendment constitutional liberty interests and constitutional rights to familial privacy by Defendants Woodard and Newbill.

180. Plaintiffs incorporate here by reference the allegations set forth above.

181. Defendants acted at all times under color of state law.

182. Jane Doe and I.B. both had clearly-established constitutional liberty interests in Jane Doe's care, custody, and control of I.B., and in familial association and privacy.

183. Jane Doe and I.B. both had a reasonable expectation of privacy that their familial relationships would not be subject to unwarranted state intrusion.

184. A parent's fundamental liberty interests include the care and management of her child. The child in turn has fundamental liberty interests and a right to have her care directed by her mother.

185. The right to family association includes the right to have medical decisions such as physical examination made by the parent, not the state. The parent has the

right to make those decisions, and the child has a right to have these decisions made by her parent, not the state.

186. Around November or December 2014, Woodard searched I.B. without prior notice to Jane Doe, and without consent from her. Woodard never even notified Jane Doe afterwards. It took Jane Doe weeks to track down the information, after I.B. informed her mother she had been searched.

187. Defendant Newbill directed Defendant Woodard to perform the search.

188. Defendants had no compelling interest in failing to request consent from Jane Doe prior to searching I.B., as Jane Doe was not alleged to have been responsible for any alleged abuse of I.B.

189. Defendant Woodward's actions after the search also demonstrate that Defendants' interests in interfering with Plaintiffs' familial rights did not outweigh Jane Doe's right to make decisions for her child, and I.B.'s right to have those decisions made by her mother.

190. When asked, Defendant Woodard initially lied to Jane Doe about the search, further violating her rights. She said that Jane Doe did not have a right even to know about the search, and that her rights as a parent had been voided by the (false) allegation of abuse. When Jane Doe found out the truth and said she was talking to an attorney, Defendant Woodard retaliated by initiating a search of Jane Doe's son, I.B.'s little brother, the very next day.

191. Defendants' conduct was willful and wanton, and done heedlessly and recklessly, without any regard for I.B.'s and Jane Doe's constitutional rights, their privacy, or their safety.

Fourth Claim for Relief

Violation of Jane Doe's and I.B.'s Fourteenth Amendment constitutional liberty interests and constitutional rights to familial privacy by Defendants Rhodus and Bengtsson in their individual capacities, and by Defendants Bengtsson and Bicha in their official capacities for prospective relief.

192. Plaintiffs incorporate here by reference the allegations set forth above.

193. Defendants Rhodus and Bengtsson are personally liable for the damages stemming from the unconstitutional search of I.B. by way of "supervisory liability" because they both possessed responsibility for the local policy and custom of El Paso County DHS, and for the failure to train and supervise Defendants Woodard and Newbill, by virtue of their job descriptions and the personal responsibility thereof as stated in the preceding paragraphs.

194. As stated above, statewide policy, and local policy and custom encourages strip searching children whenever injuries are alleged, viewing and photographing areas of their bodies normally covered by clothing, without consent by parents or a court order, and often even without notification.

195. These policies and custom also permit the photographs to be later stored in an unlocked file room at the El Paso County Department of Human Services, with access to the photographs available to anyone who works for the Department.

196. The continued application of the policies and customs over which Defendants Rhodus and Bengtsson

possessed responsibility caused the search of I.B. to take place in November or December 2014 without the consent or knowledge of her mother, Jane Doe. Accordingly, the statewide, and local policy and custom of El Paso County DHS was a direct cause of the deprivation of Plaintiffs' constitutional rights.

197. Defendants Rhodus and Bengtsson reasonably knew or should have known that the current inadequate policies and customs would cause their subordinates to inflict constitutional and related injuries. Defendants knew or should have known that this custom and policy was both unconstitutional and endangered children, because of clearly established law, and because of allegations in *Doe v. McAfee*.

198. Based on this information of which, upon information and belief, Defendants Rhodus and Bengtsson had actual knowledge, Defendants Rhodus and Bengtsson have been on notice for at least two years that a custom and policy had developed where caseworkers were strip searching and photographing children without proper safeguards, and that there were both constitutional and safety problems with this custom and policy.

199. Despite the unconstitutionality of their policies, and the risks to children inherent in such policies, Defendants Rhodus and Bengtsson remained deliberately indifferent to the rights of I.B. by not only personally acquiescing in, being responsible for, and promulgating the local policy and custom permitting and encouraging such strip searches, but providing no reasonable limitations and safeguards to such strip searches.

200. Defendants Rhodus and Bengtsson also had personal responsibility either to train and supervise

caseworkers directly or to oversee and provide training and supervision for El Paso County DHS and the Children, Youth and Family Services Division.

201. The training program to protect families' liberty interests in the care, custody, and control of their children, and to give families adequate and complete information about DHS activity with respect to their children, was also inadequate.

202. Defendants Rhodus and Bengtsson did not train caseworkers on the rights of parents to the care, custody, and control of their children, and children's reciprocal rights, during the strip searching and photographing process.

203. Defendants Rhodus and Bengtsson reasonably knew or should have known that the current lack of training and supervision would cause their subordinates to inflict constitutional and related injuries, because of clearly-established law and allegations in *Doe v. McAfee*, but chose to remain deliberately indifferent to the rights of I.B.

204. Defendants Rhodus and Bengtsson were on notice that their inadequate training and supervision might lead to violation of Plaintiffs' Fourteenth Amendment rights, because of allegations in *Doe v. McAfee*, yet they continued to act knowingly and with deliberate indifference.

205. Given that constitutional law, standard public policy, and a reasonable standard of care all hold that government workers and those who work with children should not do informal examinations of children's private areas, this failure to train exposed I.B. to severe danger.

206. Defendants Rhodus and Bengtsson violated clearly-established liberty interests and familial privacy rights secured to Plaintiffs by the Fourteenth Amendment of the United States Constitution. Defendants Rhodus and Bengtsson personally failed to train and supervise Defendants Woodard and Newbill adequately, or possessed personal responsibility for an overall agency failure to inadequately train or supervise.

207. The statewide policy, local policy and custom of El Paso County DHS, and the failure to train and supervise Defendants Woodard and Newbill, were direct causes of the deprivation of Plaintiffs' constitutional rights.

208. The statewide policy, and local policy and custom of El Paso County DHS, are causing a continuing violation of Plaintiffs' constitutional rights in that I.B. may again be searched without Jane Doe's consent, and that photographs from I.B.'s search continue to be stored without regard to Plaintiffs' Fourteenth Amendment rights.

209. Because the continued implementation of the aforementioned statewide and local policy and custom violate federal law under 42 U.S.C. § 1983 and the United States Constitution, Reggie Bicha on behalf of the state DHS, and to the extent his agents are not otherwise enjoined, Richard Bengtsson on behalf of El Paso County DHS, is liable in his official capacity for prospective relief to enforce federal law.

Fifth Claim for Relief

***Monell* Claim against Defendant El Paso County Board of County Commissioners for violation of I.B.'s**

Fourth and Fourteenth Amendment rights and Jane Doe's Fourteenth Amendment rights.

210. Plaintiffs incorporate here by reference the allegations set forth above.

211. Defendant acted at all times under color of state law.

212. BOCC is the policymaking body of El Paso County, and as such, is responsible for the custom and unwritten policies that developed at El Paso County DHS as municipal policy, and is the appropriate entity to be named for suit when municipal liability is alleged.

213. Though El Paso County DHS is an agency and arm of the state, it is both funded in part and receives oversight provided by the DHS Advisory Commission, appointed by BOCC. Thus, BOCC has the power to approve or condemn El Paso County DHS local policies and custom.

214. As stated above, local policy and custom encourages strip searching children whenever injuries are alleged, viewing and photographing areas of their bodies normally covered by clothing, without consent by parents or a court order, and often even without notification.

215. These policies also permit the photographs to be later stored in an unlocked file room at the El Paso County DHS, with access to the photographs available to anyone who works for DHS.

216. Based on the allegations in another lawsuit against Defendant, *Doe v. McAfee*, Defendants either knew or should have known of a clear and persistent pattern of illegal strip searches of children being

performed in accordance with local unwritten policy and custom in El Paso County by El Paso County DHS agents each year.

217. Despite having either actual or constructive notice of the widespread practice of strip searching and photographing children without parental consent or a court order, and that such policy and custom was violating constitutional rights, Defendants remained deliberately indifferent, continuing to fund El Paso County DHS, making no rules, and holding no discussion to change the local policy and custom. The Advisory Commission did not even discuss the issue.

218. The El Paso BOCC has failed in its responsibilities to the children of El Paso County, not only approving and encouraging the violation of their constitutional rights but exposing them to trauma and the risk of sexual abuse.

219. Among other things, this approval by the BOCC of the unconstitutional and dangerous local policy and custom of El Paso County DHS was a direct cause of the deprivation of I.B.'s Fourth and Fourteenth Amendment rights, and Jane Doe's Fourteenth Amendment rights.

220. I.B. and Jane Doe suffered injuries and damages from violation of their rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court award them relief as follows:

Declare that the statewide policy and El Paso County DHS local policy and customs are unconstitutional in violation of the Fourth and Fourteenth Amendments;

Enter judgment on behalf of Plaintiffs and against all Defendants but Richard Bengtsson and Reggie Bicha in their official capacities, for special and general damages on their claims, to be determined at trial by a jury, including but not limited to expenses incurred, psychological damages and treatment, and pain and suffering;

Enter judgment for injunctive relief against Richard Bengtsson and Reggie Bicha in their official capacities that: (1) DHS may not apply its unconstitutional policies to I.B., and any searches or seizures of I.B. must be performed in compliance with the Fourth Amendment; (2) all photographs of I.B. in the possession of DHS must be destroyed or securely stored with limited access; and (3) El Paso County DHS must institute policies and training that will protect I.B.'s constitutional rights and her safety.

Enter judgment on behalf of Plaintiffs and against all individual Defendants acting in their individual capacities for exemplary, punitive and/or treble damages in an amount sufficient to deter similar misconduct, jointly and severally, to be determined at trial by a jury;

Enter judgment for reasonable attorneys' fees and costs incurred in bringing this action in accordance with 42 U.S.C. § 1988, including expert witness fees;

Enter judgment for pre- and post-judgment interest to the extent allowed by law; and

Grant such other and further relief as it deems equitable and just.

JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.

Respectfully submitted this 20th day of August, 2015.

/s/ Theresa Lynn Sidebotham
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APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

(Filed 12/09/16)

JANE DOE, and
I.B., by her mother and next friend, Jane Doe,
Plaintiffs,

v.

APRIL WOODARD, El Paso County Department of Human Services caseworker, individually;
CHRISTINA NEWBILL, Supervisor, El Paso County Department of Human Services, individually;
SHIRLEY RHODUS, Children, Youth and Family Services Director, El Paso County Department of Human Services, individually;
RICHARD BENGTSSON, individually, and in his official capacity as Executive Director, El Paso County Department of Human Services for prospective relief;
REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief; and
EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS, comprised of Sallie Clark, Darryl Glenn, Dennis Hisey, Amy Lathen, and Peggy Littleton, in their official capacity,
Defendants.

~~FIRST~~

SECOND AMENDED COMPLAINT

Plaintiffs, I.B. and Jane Doe, by and through their undersigned counsel, Telios Law PLLC, allege against Defendants:

I. INTRODUCTION

~~On at least two occasions~~

1. In 2014, a caseworker from the El Paso County Department of Human Services (DHS) strip searched and~~/or~~ photographed ~~private~~unclothed areas of I.B.'s person, in an objectively unreasonable manner, and without obtaining consent from her mother, or even notifying her mother~~, despite the fact that allegations of abuse were known to be likely unfounded because of previous false reports~~.

2. The searches were conducted as a result of the interpretation of a Colorado statute through statewide DHS policy guidance, and a local El Paso County unwritten, but well-established, policy and custom that allowed for the widespread strip searching and photographing of children suspected of being abused without regard to Fourth Amendment reasonableness.

II. SUBJECT MATTER JURISDICTION

3. This action arises under the United States Constitution, particularly the Fourth and Fourteenth Amendments, and under federal law, particularly 42 U.S.C. §§ 1983 and 1988. This Court has original jurisdiction of this claim under, and by virtue of, 28 U.S.C.

§ 1331, and 28 U.S.C. § 1343. This Court is authorized to award attorney's fees under 42 U.S.C. § 1988.

III. PERSONAL JURISDICTION

4. This Court has personal jurisdiction over Defendants pursuant to proper service of summons with a copy of this Complaint and the fact that Defendants are geographically located in the state of Colorado.

IV. VENUE

5. Venue is proper in the United States District Court of Colorado under 28 U.S.C. § 1391(b), because all Defendants are residents of the state of Colorado and a substantial part of the events or omissions giving rise to the claims occurred in the state of Colorado.

V. PARTIES

6. Plaintiff, Jane Doe, is a natural person ~~who was at the time of the searches of I.B.,~~ and a resident of El Paso County, Colorado~~ Springs, Colorado.~~. She is a disabled veteran of the United States Army, and is now a fulltime mother. She is I.B.'s parent and next friend in this action.

7. Plaintiff, I.B., Jane Doe's daughter, is a natural person who was at the time of the searches, a resident of Colorado Springs, Colorado, and was four years old at the time of the incident giving rise to the claims. Beginning around Christmas 2016, she will be a resident of El Paso County, Colorado, and, beginning in January 2017, will be enrolled in public school in El Paso County.

8. Defendant, April Woodard, is a natural person, a caseworker for the El Paso County DHS, acting under

color of law, including state statutes and local ordinances, regulations, policies, customs, and usages.

9. Defendant, Christina Newbill, is a natural person, a supervisor and social worker for the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages.

10. Defendant, Shirley Rhodus, is a natural person, Children, Youth and Family Services Director for the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages.

11. Defendant, Richard Bengtsson, is a natural person, the Executive Director of the El Paso County DHS, acting under color of law, including state statutes and local ordinances, regulations, policies, customs, and usages. He is also sued in his official capacity as the Executive Director of El Paso County DHS for prospective relief.

12. Defendant, Reggie Bicha, is a natural person, the Executive Director of the Colorado DHS, and is sued in his official capacity, for prospective relief only.

13. Defendant, El Paso County Board of County Commissioners (BOCC), comprised of Sallie Clark, Darryl Glenn, Dennis Hisey, Amy Lathen, and Peggy Littleton, is the governing body of El Paso County. El Paso County DHS reports to El Paso County, and is partially financed by it.

VI. GENERAL ALLEGATIONS

The background for the incident

14. From 2012 through 2014, DHS investigated I.B.'s home around half a dozen times, based on ~~false~~apparently unfounded reports that I.B. was being abused.

15. I.B. ~~lives~~lived in a home with her mother, Jane Doe, her younger brother, and her live-in stepfather, mother's boyfriend, who is a military veteran. They have since married.

16. Each time they visited the house, DHS caseworkers examined the pantry, fridge, kids' room, Jane Doe's room, and spare room, despite the fact that all ~~false~~unfounded allegations were of physical abuse.

~~1. Each time, the report of abuse was false,~~

17. Each time, either the case was closed as unfounded, or no documentation was kept at all, as only three incidents are recorded in the case files.

18. Even though Jane Doe asked for documentation, DHS personnel never provided her with documentation of the ~~false~~unfounded reports and DHS investigations.

19. Jane Doe finally got information about her own files through a Colorado Open Records Act (CORA) request filed by her counsel, but the files do not contain all the visits that actually happened.

~~First~~The Search of I.B.

~~2. I.B. attended the Head Start program at Oak Creek Elementary School in Colorado Springs.~~

~~3. I.B.'s teacher told I.B.'s stepfather that he looked like a violent person, because, in common with many~~

~~military personnel, he wore leather gear, rode a motorcycle, and had tattoos.~~

~~4. According to DHS records, on November 22, 2013, a report came in that I.B. "had marks that resembled a hand print on her bottom." The reporter also stated that there was a "bruise the size of a dollar bill" on I.B.'s lower back.~~

~~5. At the time of the report to DHS, a teacher had observed I.B.'s bottom, as had the behavioral health consultant at the school.~~

~~6. I.B. was three at this time.~~

~~7. Amanda Albert a DHS caseworker, also "observed" I.B.'s bottom, but did not find marks that resembled a hand print on her bottom, instead she found a rash on I.B.'s bottom that "did not appear as though this mark came from a hand, belt, or other object."~~

~~8. Ms. Albert found a very small abrasion in I.B.'s back with a linear welt that looked like a reaction to a band aid.~~

~~9. The caseworker also checked I.B.'s younger brother, E.B., for marks or bruises.~~

~~10. Jane Doe was not asked for permission for the strip search of either child, nor was she notified that three adults had viewed I.B.'s private areas.~~

~~11. In fact, she was never informed about the strip search, even afterwards, and only recently discovered it through a CORA request.~~

~~12. The investigation was closed as unfounded on January 30, 2014.~~

~~13. Thus, that report was a deliberate false report.~~

~~14. Shortly after this search, another report was called in January 22, 2014, apparently also from the school, related to a b4ruise on I.B.'s forehead, which was also determined to be unfounded. No further information was provided in the records.~~

~~The Second Search of I.B.~~

~~Several months later DHS again received a~~

20. In late 2014, DHS received another report that I.B. was being abused. According to DHS records, this was December 9, 2014. At this time, I.B. was four, and was attending Head Start, which claims to be a private preschool that rents the facility of a public school.

21. DHS Caseworker, April Woodard, was assigned to respond to the report.

22. Upon information and belief, it is standard practice for a caseworker to review all history of prior referrals and case history during the initial phases of the investigation. Such history regarding I.B. was available to Defendant Woodard prior to her face-to-face interaction with I.B., and was, at some point, reviewed.

23. As relevant to this case, I.B. had previously been the subject of a report of abuse—apparently from her Head Start program—that resulted in a caseworker viewing I.B.'s buttocks during the course of the investigation. In November 2013, DHS received a report that alleged, among other things, that I.B. had marks that resembled a red, raised handprint on her bottom.

Caseworker Amanda Albert performed an investigation, observing I.B.'s buttocks and interviewing I.B.'s mother, Jane Doe. After investigation, the case was closed as unfounded. Caseworker Albert's report demonstrated that the reporter's statement about the red handprint was inconsistent with what Albert observed; that Jane Doe was cooperative in the investigation; and that there were no safety concerns at this time.

24. Therefore, upon information and belief, Defendant Woodard knew that Jane Doe had been cooperative in a previous DHS investigation, and that reports from I.B.'s Head Start program might not be reliable.

25. According to DHS records, on December 10, 2014, Ms. Woodard went to I.B.'s Head Start program to investigate the report. At that time, she received permission from her supervisor, Ms. Christina Newbill, to view I.B.'s "buttocks, stomach/abdomen, and back so Caseworker could look for marks/bruises."

~~21~~26. Allegations of abuse on this occasion included little bumps on I.B.'s face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees.

~~15. According to DHS records, on December 10, Ms. April Woodard, a DHS caseworker, received permission from her supervisor, Ms. Christina Newbill, to view I.B.'s "buttocks, stomach/abdomen, and back so Caseworker could look for marks/bruises."~~

~~22~~27. The Oak Creek Elementary health paraprofessional, Doris Swanstrom, met with Ms. Woodard in the nurse's room. Ms. Woodard

instructed I.B. to show her buttocks and stomach and back.

~~23~~28. I.B. states that an adult took off all I.B.'s clothes. The adults viewed I.B. and prepared to take photographs.

~~24~~29. I.B. told Ms. Woodard she did not want photographs taken. Nevertheless, the caseworker took color photographs of private and unclothed areas of I.B.'s body.

~~25~~30. I.B. is still upset that photographs of her unclothed body were taken without her consent.

~~26~~31. Ms. Woodard later called on Jane Doe, following up on the report of child abuse. Ms. Woodard also inspected the home.

~~27~~32. According to DHS records, this happened on December 11, 2014. However, Jane Doe recalls this visit as happening at the time she had just purchased her groceries for Thanksgiving dinner, so DHS records may be in error as to the date, or Jane Doe may be in error.

~~28~~33. At that time, Ms. Woodard informed Jane Doe, in front of I.B., that she should not ever spank I.B., despite the fact that parental spanking is legal in Colorado.

~~29~~34. ~~To this day,~~ I.B. now tells her mother, "Mommy, you know you can't spank me because you will get in trouble, and I know that!"

~~30~~35. Jane Doe was upset that someone kept filing false reports. She asked the DHS caseworker if she could pull her child out of school. The DHS caseworker said that she could, but it would "look suspicious."

~~31~~36. Ms. Woodard eventually concluded that the marks observed were not consistent with the reporter's statement, and that I.B. gets pretend play mixed up with reality. The case was closed as unfounded on January 5, 2015.

~~32~~37. Jane Doe thought the incident had been resolved after Ms. Woodard's visit. But about a week after Ms. Woodard visited her home, while driving to school, I.B. said something alarming about her encounter with the caseworker: "Mommy, do you remember when the woman with white hair came to my school? I hope she doesn't come again, because I don't like it when she takes all my clothes off."

~~33~~38. Jane Doe immediately contacted the school about the incident. No one at the school would admit to a strip search. Over several weeks, Jane Doe remained persistent in her search for answers, even going as far as ~~to contact~~contacting the superintendent of the school district. Eventually, she was informed by school officials that it was in fact a DHS caseworker who performed the strip search.

~~34~~39. Jane Doe attempted to contact Lisa Little, a DHS supervisor whose name is on the files. Ms. Little never returned the call.

~~35~~40. Eventually, Jane Doe spoke to Ms. Woodard, who denied having performed a strip search of I.B.

~~36~~41. A few weeks later, the situation became even more concerning to Jane Doe when I.B. informed her mother that they had also taken pictures of I.B. with her clothes off, even though she told them not to. Jane Doe tried for weeks to get a response from DHS, and was ignored. Around January 28, 2015, Ms. Woodard finally

contacted Jane Doe and told her the case was closed. At that time, Jane Doe asked again if Ms. Woodard had searched I.B. under her clothes. Finally, Ms. Woodard admitted that she did undress and photograph I.B. without asking for permission. She insisted that she was well within her right to do so.

~~37~~42. Ms. Woodard stated to Jane Doe that she and the school nurse observed I.B.'s "buttocks, back, and stomach" due to concerns of physical abuse.

~~38~~43. Jane Doe asked Ms. Woodard why she had lied before. Ms. Woodard said it was because she had legitimate concerns for I.B.'s safety, and Jane Doe did not need to know at the time about the strip search.

~~39~~44. Jane Doe asked about her right as a mother to know or consent to a strip search of her child's private areas.

~~40~~45. Ms. Woodard informed Jane Doe that if there is suspicion of abuse, those rights are voided.

~~41~~46. No allegations of abuse of I.B. were made against Jane Doe directly in connection with this incident.

~~42~~47. Jane Doe responded by telling Ms. Woodard that she had called a lawyer.

~~43~~48. The very next day, a different DHS caseworker came to Jane Doe's home, claiming that a report of abuse had been alleged against I.B.'s younger brother.

~~44~~49. No records of this visit were produced in response to a CORA request.

~~45~~50. At that time, Jane Doe asked the caseworker what she could do to stop the persistent false reporting and the intrusive investigations. The DHS caseworker simply responded, "The more it happens, the more it will keep happening." She also informed Jane Doe that pulling the children out of school would make Jane Doe "look even more guilty."

~~46~~51. Just like the numerous other reports lodged against Jane Doe's children, this report was also apparently unfounded.

~~47~~52. After this incident, I.B. no longer wished to attend school, and said that she did not feel safe.

Effect on Family

~~48~~53. As a result of the compelled search and photographing, I.B. did not feel safe at school. ~~I.B.~~Upon information and belief, I.B. may have suffered trauma similar to that suffered by children who are sexually abused, and the trauma is likely to continue. I.B. is still angry and upset at the incident in November or December 2014 and talks about it frequently. She has also experienced an erosion of her natural protective boundaries, including an inappropriate willingness to take off her clothes for strangers. She has also begun acting out in this way with peers, which is a significant concern.

~~49~~54. After hiring counsel, I.B. left school, and no longer ~~receives~~received the benefit of Head Start.

~~50~~55. Jane Doe has suffered distress at the violation of her parental rights. She fears for the safety of her children. She is distressed at the intrusion suffered by them, and at their potential exposure to sexual abuse.

~~51~~56. Based upon information and belief derived from sworn testimony from Ms. Lisa Little, color photographs of I.B.'s private areas taken by DHS caseworkers likely exist and are insufficiently secured by DHS. The fact that nude photographs of I.B. are not sufficiently secured, and that access to them may be given to anyone who works at DHS, is distressing to Jane Doe.

~~52~~57. Jane Doe and I.B. remain in fear that DHS will once again subject I.B. to an unconstitutional search and that damages will be exacerbated. This fear is primarily based on Jane Doe being told that the more reports of abuse are lodged against I.B.—false or otherwise—the more DHS will be involved in their lives. ~~While Jane Doe and I.B. currently live in Colorado, they have plans to relocate out of state; however, they also have concrete plans to return. These plans include regular visits to grandparents who live here. Moreover, they plan to return to Colorado for the proceeding in connection with this lawsuit, all under the watchful eye of DHS. Jane Doe and I.B. fear that a~~Jane Doe and I.B. fear that an unreasonable search of I.B. may be compelled against Jane Doe's consent based on the position DHS has taken thus far.

58. Jane Doe currently resides in El Paso County, Colorado and I.B. will take up permanent residence with her mother around Christmas 2016. Beginning with the spring 2017 semester, I.B. will attend public school in El Paso County, Colorado.

Background on Strip Searching and Photographing Children in Child Abuse Context

~~53~~59. Children are taught early that no one should look at or touch (or photograph) their private parts except for health reasons and in a professional medical setting.

~~54~~60. They are specifically taught not to allow strangers to see or touch their private parts, especially adult strangers. A strip search, which involves exposing one's private parts to adult strangers, is contrary to this training, and creates safety issues for children.

~~55~~61. Strip searches are demeaning, dehumanizing, and degrading.

~~56~~62. A strip search during a child abuse investigation is very different from examination of the same part of the body during an annual checkup in context, methodology, and safeguards.

~~57~~63. Children often experience strip searches as sexual abuse.

~~58~~64. Strip searches also raise the real possibility of actual child abuse. Child abusers seek situations where they have access to children. Some known offenders have acquired access through government employment to examine or photograph children's naked bodies.

~~59~~65. Photographs of strip searches can be, and sometimes are, used as child pornography. Many pictures of naked children end up on the Internet.

~~60~~66. Known sexual offenders have used search terms such as "youth strip search" and "nude strip search" to obtain child pornography.

~~61~~67. The careless handling of photographs under DHS policy creates a real risk that the photographs will enter the stream of child pornography. It is also a violation of the child's privacy when numerous people have the right and ability to view photographs of the child's naked body.

68. The analysis of whether a search is justified at its inception and reasonably related in scope to the circumstances must take into account the significant damage potentially done to children by the search itself, as well as the additional intrusion that photographing a child's private areas presents.

DHS Training and the Lack Thereof

~~62~~69. It is clearly-established law in the Tenth Circuit that the Fourth Amendment applies to caseworkers. It is also clearly-established law that parents and children have Fourteenth Amendment rights.

~~63~~70. Upon information and belief, Defendants Woodard and Newbill have received no training from DHS or El Paso County on Fourth Amendment limitations on search and seizure, as applied to social workers. Defendants Rhodus and Bengtsson have not provided such training.

~~64~~71. One DHS supervisor testified that she does not even know what the Fourth Amendment says.

~~65~~72. DHS training materials contain no guidance about constitutional ways to examine children or photograph their private areas. They contain no guidance for DHS personnel about parents' and children's constitutional rights not to consent to invasive searches of children.

73. There is also no training on analyzing whether the search is justified at its inception and reasonably related in scope to the circumstances that justified the interference, particularly in light of the degradation and risk of trauma to the child.

~~66~~74. DHS training materials and regulations contain no restrictions on searches of private areas of the body ~~related~~as they relate to the age, gender, or sexual orientation of either the child or the caseworker.

~~67~~75. Training on how to photograph children consists of instructions to take a color photograph of the body part, as well as a photograph of the child's face, to connect the face and the body part. There is no training on who is allowed to take photos under C.R.S. § 19-3-306, or whether trauma "visible on the child" includes after a strip search makes the area visible.

~~68~~76. DHS training materials and regulations contain no guidance about how to secure photographs of private areas of children or to safeguard such photos from making their way into the stream of online child pornography.

~~69~~77. DHS training is in line with its unwritten policies and customs.

DHS' Unconstitutional Policies and Customs

~~70~~78. Defendants Rhodus, Bengtsson, and Colorado State DHS have instituted and approved unconstitutional policies and customs.

~~16. Colorado State DHS has stated in Responses to Joint Budget Committee (JBC) Questions from the legislature, dated 12-3-2013, "There is no limitation on the taking of the photographs because the purpose is to~~

~~document injuries, regardless of where the injuries may be," It also stated, "Workers are trained to collect photographic evidence of physical abuse whenever it is encountered whether it is in 'private areas' or areas not covered by clothing." And it stated, "The Department has not developed specific oversight procedures regarding obtaining photographic evidence of abuse."~~

~~17. As of November 2014, however, DHS had a written "policy" entitled "Practice guidance" "The Use of Photography During theCou4rse of a Child Abuse and/or Neglect Assessment" (hereinafter "statewide policy"), which was drafted in response to a request for clarification regarding CDHS' position on the use of photography and provisions n state rule and statute that govern its use."~~

~~18. Pursuant to this policy, DHS takes the position that if a caseworker has a BSW, MSW, or DSW, section 19-3-306 of the Colorado Revised Statutes further clarifies their role, by allowing a social worker "w3ho has in front of them a child believed to be abused or neglected" to "take color photographs." The policy does not provide guidance that the photography, or searches to enable photograph, must be done in accordance with Fourth Amendment reasonableness. In fact, the child' or parent's rights are never mentioned.~~

~~19. The statewide policy states that parental consent for photographs is not required.~~

~~20. The statewide policy notes that if a child welfare worker is faced with a situation where the area of the child that needs to be photographed is normally clo0thed, the worker should "consult local policy regarding the use of photograph."~~

~~71~~79.~~To date,~~ At the time of the search of I.B., no local written policies or guidelines about strip searching and photographing the portion of the body normally clothed ~~have~~had been developed in El Paso County; however, El Paso County DHS ~~has~~had clearly defined unwritten policies and customs that were not subject to constitutional limits or that otherwise constrained caseworker discretion. Its agents regularly perform strip searches, (also called "body audits" or "skin checks") and photograph the results of those searches. The following allegations describe the well-established custom and informal policy at El Paso County DHS in effect at the time of I.B.'s search and which, upon information and belief, continues today.

~~21. All the policies, customs, and practices developed as local policy are either in accordance with, or specifically endorsed by the statewide policy.~~

~~22. In accordance with the statewide policy, under El Paso County DHS local policy and custom, parental consent is not needed. It is routine not to contact or inform parents of the strip search beforehand. Usually, parents will be notified afterwards, but not always.~~

~~23. A DHS supervisor testified that under federal law, caseworkers do not need to try to contact parents before investigating a child under the clothing.~~

~~24. When abuse is alleged, the child is typically interviewed within parents present, but normally the interview is not audiotaped or videotaped. If parents later wish to review the interview protocols or know what was said, the only documentation is the brief notes in the DHS file.~~

~~25. El Paso County DHS unwritten policy and custom is to scar4ch any area of a child's body upon which abuse is alleged. When physical injuries to children's private areas under clothes are alleged, caseworkers routinely view those private areas.~~

~~72~~80. DHS personnel rely on a statute, C.R.S. § 19-3-306, ~~which~~as justification for performing strip searches and taking photographs. The statute provides that any social worker who has before him a child he reasonably believes has been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child.

~~73~~81. ~~Just like~~The phrase "visible on the ~~statewide policy guidance, El Paso County DHS local policy and custom interprets that~~child" in the statute is interpreted as permission to strip search children to make their private areas visible~~. However, El Paso County does~~, which was not ~~limit the statute to licensed social workers, but interprets it to apply to any child welfare worker, regardless of training or qualifications. Defendants Bicha, Bengtsson, and Rhodus have provided no constitutional limitations on how DHS interprets the statute.~~reasonably the legislature's intent.

~~74~~82. ~~El Paso County DHS has~~There is no requirement that the caseworkers performing searches or photographing children suspected of abuse be licensed social workers—as is required by the statute; and in fact, many are not.

83. The statute is also interpreted and applied in El Paso County—consistent with state DHS practice guidance—to not require parental consent before a search and photography is performed. This interpretation has

been reached despite the fact that the statute does not address consent. It is routine not to contact or inform parents of the strip search beforehand. Usually, parents will be notified afterwards, but not always. In some cases, parents are lied to. Under DHS policies, caseworkers believe that parents have no constitutional rights once abuse has been alleged.

84. When abuse is alleged, the child is typically interviewed without parents present, but normally the interview is not audiotaped or videotaped. If parents later wish to review the interview protocols or know what was said, the only documentation is the brief notes in the DHS file.

85. It is customary for caseworkers to search any area of a child's body upon which abuse is alleged. When physical injuries to children's private areas under clothes are alleged, caseworkers routinely view those private areas.

~~75~~86. If a child is at school when an allegation of a mark on a private area of a child is made, a DHS caseworker visits and carries out the strip search at school.

~~26. Caseworkers have discretion to request a medical examination for genital searches, but that is not required, as they are permitted to perform such a search themselves. Whether genital searches take place is wholly within the discretion and comfort level of the individual caseworker.~~

~~27. Searches of private areas of a child happen dozens, perhaps hundreds, of times a year in El Paso County alone.~~

~~28. Operating under the custom and policy, caseworkers routinely omit notifying parents, obtaining consent, obtaining medical orders, or asking parents if they will comply with an official medical examination.~~

~~76~~87. These searches routinely take place in a casual (rather than clinical or professional) setting: a room in the child's home, any room provided at school, or available space in any other setting where the child may be at the time a caseworker makes contact with her. It is DHS protocol to search the children in these environments.

88. ~~DHS policies and customs provide~~Caseworkers have discretion to request a medical examination for genital searches, but that is not required, as they are permitted to perform such a search themselves. Whether genital searches take place is wholly within the discretion and comfort level of the individual caseworker.

~~77~~89. In contrast to safeguards that typically occur in a medical examination, no clinical approach, no special clothing, and no depersonalizing of the child's body parts to be examined, ~~as occurs in a medical examination~~are provided.

~~29. DHS policies and customs have no limitations on these searches related to the age or gender of the child.~~

~~78~~90. ~~DHS policies and customs have~~There are no formal limitations on these searches related to the gender of the social worker and the child. Usually the social worker will be the same gender as the child, or at least one of two people present will be the same gender, but there is no requirement that this be the case. There is no policy or provision to protect children where either the social worker or the child may be same-sex-oriented or transgender.

~~30. DHS has no policies of the type commonly known as "child protection policies," which define appropriate and inappropriate touching of a child, regardless of the gender of the adult.~~

~~31. The custom and policy has inadequate safeguards for protecting children from the trauma of such a search, often experienced by children as sexual abuse, or from intentional sexual abuse by perpetrators in such circumstances.~~

~~79~~91. Usually, the child is told to remove his or her own clothes, though in cases of a small child, sometimes the caseworker will remove the clothes.

~~80~~92. A DHS caseworker views the area of the child's body and takes color photographs. A color photograph is taken of the area of the child's body implicated by the allegations. An accompanying photo is also taken of the child's face, to provide positive identification for the color photograph of the body part.

~~81~~93. The photograph is taken of the mark, or of the child's body to show there was "no mark," to have a record that there was no abuse. Pictures of both "marks" and "no-marks," to include private areas under clothes, are taken and stored.

~~82~~94. Color photographs of children, including of private areas of the child, are taken on cell phones issued by the County. The color photographs stay on the cell phones up to many weeks, until the social worker writes the report on that child.

~~83~~95. Beyond the basic confidentiality agreement to work at DHS, the policies have no safeguards or protocol in place to prevent color photographs of the private areas

of children from being uploaded from cell phones to the Internet, or uploaded or synced to another device, such as a home computer. There is no technology in place to prevent this.

~~84~~96. ~~DHS policies have~~There are no safeguards or mechanism to make sure that color photographs of the private areas of children are permanently deleted from these cell phones.

~~85~~97. At some point, the color photographs of children's faces and their body parts may be downloaded into electronic files. Commonly, they are printed out, labeled, and kept indefinitely in paper files.

~~86~~98. These paper files are stored in one or more filing rooms at DHS. Multiple people have access to these files, and therefore to the color photographs. People who have access include all managers, all caseworkers, all case aides, all county attorneys, and anyone who works at DHS.

~~87~~99. Anyone who has access to the filing room can access and view any of the files and color photographs. Any person could check the file of any child.

~~88~~100. The photographs are not safeguarded under HIPAA standards, as would take place in a medical examination.

101. DHS has no policies of the type commonly known as "child protection policies," which define appropriate and inappropriate touching of a child, regardless of the gender of the adult. The custom and policy has inadequate safeguards for protecting children from the trauma of such a search, often experienced by children as sexual abuse, or from intentional sexual abuse by perpetrators in such circumstances.

102. Colorado State DHS has stated in Responses to Joint Budget Committee (JBC) Questions from the legislature, dated 12-3-2013, "There is no limitation on the taking of the photographs because the purpose is to document injuries, regardless of where the injuries may be." It also stated, "Workers are trained to collect photographic evidence of physical abuse whenever it is encountered whether it is in 'private areas' or areas not covered by clothing." And it stated, "The Department has not developed specific oversight procedures regarding obtaining photographic evidence of abuse."

103. As of November 2014, however, DHS had a written "policy" entitled "Practice Guidance" "The Use of Photography During the Course of a Child Abuse and/or Neglect Assessment" (hereinafter "statewide policy"), which was drafted in "response to a request for clarification regarding CDHS' position on the use of photography and provisions in state rule and statute that govern its use."

104. Pursuant to this policy, DHS takes the position that if a caseworker has a BSW, MSW, or DSW, section 19-3-306 of the Colorado Revised Statutes further clarifies their role, by allowing a social worker "who has in front of them a child believed to be abused or neglected" to "take color photographs." The policy does not provide guidance that the photography, or searches to enable photography, must be done in accordance with Fourth Amendment reasonableness. In fact, the child's or parent's rights are never mentioned.

105. The statewide policy states that parental consent for photographs is not required.

106. The statewide policy notes that if a child welfare worker is faced with a situation where the area of the child that needs to be photographed is normally clothed, the worker should "consult local policy regarding the use of photograph."

107. All the policies, customs, and practices developed as local policy are either in accordance with, or specifically endorsed by the statewide policy.

108. The search of I.B. that took place in this case suffered from the deficiencies of the aforementioned local practice and custom, in accordance with, or specifically endorsed by, the statewide policy interpreting section 19-3-306.

DHS Personal and Entity Responsibility for Training, Policies, and Procedures

~~89~~109. The responsibilities of Defendants Rhodus and Bengtsson are stated in their official job descriptions, and they are personally responsible for ~~caring~~carrying out these duties.

~~90~~110. Richard Bengtsson, Executive Director of the El Paso County DHS, directs all the programs and services of DHS. He is responsible for developing and implementing departmental goals, objectives, and policies. He oversees all DHS personnel and is supposed to ensure that "qualified, trained people are performing human services functions." He is responsible for developing and implementing constitutional policies, having qualified, trained people in place, and protecting children from unconstitutional and harmful actions. He is also responsible because he has adopted and approved of unconstitutional local policies and customs of: searching

the private areas of children's bodies without consent or a court order; taking color photographs of those areas; and failing to safeguard those photographs. He has failed to have trained people in place and failed to protect children. In addition, he may be sued consistent with the Eleventh Amendment, in his official capacity for prospective relief and may be enjoined in his official capacity from carrying out unconstitutional policies to the extent they violate federal law.

~~91~~111. Shirley Rhodus, Children, Youth and Family Services (CYFS) Director, is responsible for instruction and training of DHS managers, and updating them in agency practices, policies and procedures. She develops, implements, and monitors CYFS programs "to ensure compliance with all applicable federal, State and local regulations." Her job is to develop, establish and communicate policies and procedures, as well as to make sure they are implemented. She is responsible for developing, implementing and training in constitutional policies, which she has not carried out. She is also responsible because she adopted and approved of unconstitutional local policies and customs of: searching the private areas of children's bodies without consent or a court order; taking color photographs of those areas; and failing to safeguard those photographs.

~~92~~112. Reggie Bicha, Executive Director of the Colorado Department of Human Services, is responsible for DHS policies. He may be sued consistent with the Eleventh Amendment, in his official capacity for prospective relief and may be enjoined in his official capacity from carrying out unconstitutional policies to the extent they violate federal law.

El Paso County Responsibility for DHS Policies, and Procedures

~~93~~113. "Local policy" is developed by El Paso County DHS, but oversight is also provided by the El Paso County BOCC, as agents of El Paso County. El Paso County is also responsible for the welfare and safety of children in the County.

~~94~~114. The El Paso County Commissioners use county sales tax to fund DHS. The County provides more than a quarter of DHS funding.

~~95~~115. In addition, the County has a Department of Human Services Advisory Commission, which has the mandate to review DHS programs and funding and monitor the implementation of DHS initiatives and mandatory services. Because it uses citizen taxes to fund DHS and has responsibility for oversight, it is responsible for the local policies and customs of El Paso County DHS.

~~96~~116. It has the power to approve, condemn, and otherwise direct DHS policies by virtue of its funding and oversight.

~~97~~117. It has a duty to the citizens of El Paso County to protect the welfare of children and safeguard them from constitutional violations and from being endangered by intrusive searches and careless handling of photographs of private areas of their bodies.

~~98~~118. Rather than review and monitor DHS adequately, the BOCC chose instead to approve and support these unconstitutional policies.

Awareness of the Issues

~~99~~119. In April of 2013, *Doe v. McAfee et al*, 13-CV-01287-MSK-MJW, was filed against defendants, who included the El Paso BOCC and Richard Bengtsson. Upon information and belief, Shirley Rhodus was also aware of the lawsuit's allegations.

~~100~~120. *Doe v. McAfee* alleged that searches under children's clothes, and taking pictures of private areas of children, without consent or a court order, were a violation of constitutional rights, and that these searches were occurring on a routine basis in El Paso County. The case also alleged that such actions endanger children. While the actual strip search claims were dismissed, because the caseworker failed in her spirited effort to search and photograph the child, six claims of retaliation against the family were permitted to go forward against County personnel.

121. *Doe v. McAfee* put Defendants Rhodus and Bengtsson on notice that the unwritten policy and custom of strip searching children and taking photographs were deficient to ensure that the searches were not performed in an unconstitutional manner and that caseworker discretion needed to be constrained in order to ensure searches would be constitutional.

122. Despite being aware of the widespread custom of strip searching children during the course of a child abuse investigation with practically no limits or safeguards, Defendants Rhodus and Bengtsson remained deliberately indifferent to the risk of constitutional harm in that, upon information and belief, they did not develop any formal policies, perform trainings, or institute other formal guidance to ensure that any strip searches were performed in a constitutional manner.

123. Instead, Defendants Rhodus and Bengtsson permitted the local custom and informal policy of permitting strip searches any time allegations of abuse or neglect are lodged to continue.

~~101~~124. Recently, the DHS Advisory Commission, which is appointed by and acts on behalf of the Board of County Commissioners to oversee DHS, was served a Colorado Open Records Act request. It was asked for the following:

> a. "Any meeting minutes, recordings of meetings, or other records of the El Paso County Department of Human Services Advisory Commission which reflect discussion or policy making regarding an El Paso County Department of Human Services policy related to investigating child abuse allegations where the child's clothing must be removed to investigate the injury."
> b. "Any meeting minutes, recordings of meetings, or other records of the El Paso County Department of Human Services Advisory Commission which reflect discussion or policy making regarding an El Paso County Department of Human Services policy related to investigating child abuse allegations where clothing is removed and color photographs are taken, including any guidance on how to handle photographs that are taken."

~~102~~125. According to the County, no records exist that are responsive to that request.

~~103~~126. Thus, despite the issues raised in the lawsuit, the issue has not been formally discussed, nor have formal policies been developed, but the local custom and informal policy continues to thrive.

~~104~~127. The lawsuit was also drawn to the attention of state DHS by the JBC Committee of the Colorado General Assembly.

~~105~~128. State DHS responded by developing ~~a~~ statewide policy guidance that has key Fourth Amendment protections missing.

VII. CLAIMS FOR RELIEF

First Claim for Relief

Violation of I.B's rights under the Fourth Amendment of the U.S. Constitution to be free from unreasonable searches and to personal privacy by Defendants Woodard and Newbill.

~~106~~129. Plaintiffs incorporate here by reference the allegations set forth above.

~~107~~130. Defendants at all times acted under the color of state law.

~~108~~131. The Fourth Amendment to the United States Constitution provides that all individuals, including children, have a right to be free from unreasonable searches, and is applicable to the states through the Fourteenth Amendment.

~~109~~132. Under this standard, state actors, including social workers, may not perform a search of a child unless the constitutional standard of reasonableness is met. It is clearly established law in the Tenth Circuit that there is no "social worker" exception to the Fourth Amendment,

and the Fourth Amendment applies to social workers and their investigations.

~~32. A child has a right to be free from an unreasonable search, just like someone suspected of a crime.~~

~~110~~133. Under the Fourth Amendment, there is a reasonable expectation of privacy in the clothed/private areas of a child's person. The search of private areas of a child's person is a severe violation of subjective expectations of privacy.

~~111~~134. Unless there is an emergency, a child's clothed/private areas may not be searched without parental consent or a court order.

~~33. Fourth Amendment rights are violated when a government official views, photographs, or otherwise records another's unclothed or partially clothed body without meeting the constitutional standard.~~

~~112~~135. Around November or December 2014, Defendant Woodard strip searched I.B.~~'s person by viewing I.B.'s unclothed or partially clothed body,~~ and ~~taking~~took color photographs of what she observed.

~~113~~136. Defendant Newbill directed Defendant Woodard to perform that ~~search~~strip search and take color photographs of what Defendant Woodard observed.

~~114~~137. The search of I.B. was unreasonable in that Jane Doe did not consent to the search of I.B.'s body, or to having areas of I.B.'s body covered by clothing photographed, nor was there a court order, and no emergency or other exigent circumstances existed to make obtaining consent or a court order impractical.

138. ~~Despite the fact~~The special needs doctrine utilized in other school contexts does not apply because strip searching a child to take photographs as potential evidence that may be used in the event of a criminal prosecution of child abuse or a civil dependency and neglect proceeding is contrary to the Supreme Court's precedent in *Ferguson v. Charleston*, 532 U.S. 67 (2001).

139. The only purpose for taking photographs in the context of investigating the allegations against I.B. was to collect and preserve evidence. Taking photographs, as opposed to visual inspection alone, does not accomplish the special need of ensuring the safety of a child which, upon information and belief, is the asserted Governmental interest at play that the Government utilizes to justify a warrantless search.

140. In the alternative, even if Defendants Woodard and Newbill could have believed that performing a strip search of I.B. was permissible without a court order, consent, or exigent circumstances under the special needs doctrine, the search still failed to meet the objective standard of reasonableness required by the Fourth Amendment.

141. The search of I.B. was unreasonable because it was not justified at its inception or reasonable in its scope, in that the excessively intrusive strip search was not necessary to substantiate the report of physical abuse and was not necessary to protect I.B.'s safety. In light of the highly intrusive nature of a strip search, especially where photographs are taken, it was unreasonable for Defendant Woodard to perform the search, and Defendant Newbill to direct and approve it, without information supporting the idea that removing all of I.B.'s clothing would either

substantiate the report of abuse, or was necessary to protect her safety.

142. The report of abuse that led to Defendant Woodard's investigation was one of minor physical injury. No sexual abuse was alleged, nor were any injuries alleged to be on I.B.'s buttocks or breast area. As such, the report did not justify removing all of I.B.'s clothing to examine these areas, or justify searching her buttocks or breast area.

143. When Defendant Woodard interviewed I.B. at her school prior to the strip search, I.B. told Defendant Woodard that she gets red dots on her face when she cries, but that she did not have any other "owies." As such, Defendant Woodard had information that actually negated performing an additional invasive search, because of I.B.'s statement that no evidence of abuse would be found on her intimate parts.

144. I.B. alleges that someone removed all her clothing. Upon information and belief, Defendant Woodard strip searched and examined I.B.'s intimate parts, specifically her buttocks and breast area, without consent. Upon information and belief, Defendant Woodard took photographs of what she observed. All was done with Defendant Newbill's direction and approval.

145. The strip search of I.B. was not reasonable in scope because it was excessively intrusive in light of the Government's asserted need to investigate the report of child abuse of I.B. or ensure I.B.'s safety, and because the facts that were known contradicted the need for such an intrusive search.

146. Under Colorado law, a person who knowingly takes a photograph of another person's intimate parts

without that person's consent in a situation where the person photographed has a reasonable expectation of privacy, commits criminal invasion of privacy. See § 18-7-801, C.R.S.

147. In light of Colorado law that consentless observation and photography of another's intimate parts is a crime in a situation where that person has a reasonable expectation of privacy, it was unreasonable for Defendant Woodard and Defendant Newbill to perform the strip search in this case in reliance upon section 19-3-306, which does not, by its plain language, authorize searches without consent, and only authorizes searches of injuries "visible" on the child. Defendant Woodard's lies suggest that she intuitively realized that the search was not reasonable.

148. The language "visible on the child" in § 19-3-306 does not imply that strip searches are reasonable in scope, let alone that they should be routinely done, as they are.

149. Strip searches are a severe invasion of privacy, and taking photographs during a strip search makes the character of the intrusion even more severe, as those photographs may be distributed to law enforcement, County attorneys, defense attorneys, or others if the case progresses. The photographs were handled in a way that was insufficiently secure. Upon information and belief, multiple individuals and attorneys connected with this case have viewed the photographs taken of I.B. during the strip search.

150. Less intrusive means to investigating the report of child abuse of I.B. were available before I.B. should have been subjected to a strip search:

a. Visual inspection of I.B. without removing all her clothing;
b. Interviewing I.B. about the suspected abuse;
c. Interviewing I.B.'s mother, Jane Doe, who herself was not accused of abusing I.B.~~, Woodard never even notified.~~ and was documented to have been cooperative with previous investigations;
d. Conducting the search in a manner that would protect I.B. from the trauma associated with such a search, such as performing the search with safeguards such as a medical search, or not moving clothing over private areas;
e. Performing the search in I.B.'s home, with her mother, Jane Doe ~~afterwards. Indeed, when confronted, she lied to Jane Doe, stating that she had not performed such a searched. It took Jane Doe~~present, when Defendant Woodard visited the home as part of the investigation;
f. Informing her mother of the search, rather than lying to her for weeks ~~to track down the information after I.B. informed her mother that she had been searched~~, so that she could assist I.B. to process any related trauma, either personally or with professional help.

~~115~~151. In light of the very minor allegations of abuse and the less restrictive means available to accomplish Defendants' stated purpose of investigating child abuse allegations and ensuring the safety of I.B., the strip search was objectively unreasonable.

~~116~~152. Upon information and belief, color photographs of I.B. taken by Defendant Woodard documenting this strip search exist and are insufficiently secured.

~~117~~153. Defendants' actions violated rights secured to I.B. by the Fourth Amendment of the United States Constitution.

~~118~~154. In conducting and approving the search, Defendants Woodard and Newbill acted intentionally, willfully, and wantonly, and in heedless and reckless disregard of I.B.'s right to be free from an unreasonable search.

~~119~~155. I.B. suffered injuries and damages from violation of her rights.

Second Claim for Relief
Violation of I.B's rights under the Fourth Amendment of the U.S. Constitution to be free from unreasonable searches and to personal privacy by Defendants Rhodus and Bengtsson, in their individual capacities, and by Defendants Bengtsson and Bicha in their official capacities for prospective relief.

~~120~~156. Plaintiffs incorporate here by reference the allegations set forth above.

~~121~~157. Defendants Rhodus and Bengtsson are personally liable for the damages stemming from the unconstitutional search of I.B. by way of "supervisory liability" because (1) they ~~both~~possessed personal responsibility for allowing the local unwritten policy and custom ~~of~~at El Paso County DHS~~, and for the failure~~ described in the preceding paragraphs to thrive; or (2)

they failed to train and supervise Defendants Woodard and Newbill~~, by virtue of their job descriptions and~~ on constitutional limits of strip searching children during the ~~personal responsibility thereof as stated in the preceding paragraphs~~ course of a child abuse investigation.

158. Defendants Rhodus and Bengtsson have provided no policy guidance outlining constitutional limitations on how El Paso County DHS interprets and implements section 19-3-306.

~~122~~159. As stated above, interpretation of state law section 19-3-306, statewide policy guidance embodying that interpretation, and ~~local~~the policy and custom in El Paso County, encourages strip searching children whenever injuries are alleged. ~~DHS~~Defendants Bengtsson and Rhodus have also not complied with C.R.S. § 19-3-306, because they do not limit such searches to social workers ~~view and photograph areas of children's bodies normally covered by clothing, without consent by parents or a court order, and often even without notification.~~

~~34. These policies and custom also permit the photographs to be later stored in an unlocked file room at El Paso County DHS, with access to the photographs available to anyone who works for DHS.~~

~~123~~160. The continued application of the ~~policies and customs~~wide-spread practice and custom of strip searching and photographing children over which Defendants Rhodus and Bengtsson possessed personal responsibility caused the search of I.B. to take place in the unreasonable manner described in the preceding paragraphs~~, and caused the photographs~~. The interpretation of ~~I.B. which were taken to be insufficiently~~

~~secured to protect her privacy Accordingly~~state law through the local policy and custom of El Paso County DHS, as directed by Defendants Rhodus and Bengtsson, was a direct cause of the deprivation of I.B.'s constitutional rights.

~~124~~161. Defendants Rhodus and Bengtsson reasonably knew or should have known that the ~~current~~ inadequate policies and customs would cause their ~~subordinates~~staff to inflict constitutional and related injuries. Defendants Rhodus and Bengtsson knew or should have known that this custom and policy was both unconstitutional and endangered children, because of clearly established law, and because of allegations in *Doe v. ~~McAfee~~McAfee* that stated these searches were occurring on a widespread basis in El Paso County.

~~125~~162. Based on this ~~information of which, upon information and belief~~previous case, Defendants Rhodus and Bengtsson ~~had actual knowledge, Defendents Rhodus and Bengtsson have been on notice for at least two years~~were on notice that a custom and policy had developed where caseworkers were strip searching and photographing children ~~without proper safeguards~~in a manner that was objectively unreasonable under the Fourth Amendment, and that there were both constitutional and safety problems with this custom and policy~~.~~, such that it could endanger children.

~~126~~163. Despite the unconstitutionality of ~~their policies~~this custom, and the risks to children inherent in such ~~policies~~customs, Defendants Rhodus and Bengtsson remained deliberately indifferent to the rights of I.B. by not only personally acquiescing in, being responsible for, and promulgating the local policy and custom permitting and encouraging such strip searches, but by providing no

reasonable limitations and safeguards to such strip searches. This left caseworkers to assume that strip searches should be done routinely, rather than carefully analyzed to see if they were justified at their inception and reasonably related in scope to the circumstances, including the circumstances of the trauma caused to the child as a result of the search.

~~Defendants~~ ***Failure to Train and Supervise***

164. Upon information and belief, Defendants Woodard and Newbill received no training from DHS on Fourth Amendment limitations on search and seizure, as applied to social workers. Defendants Rhodus and Bengtsson ~~also~~have not provided such training.

22. ~~127~~165. Defendants Rhodus and Bengtsson had personal responsibility either to train and supervise caseworkers directly on these issues, or to oversee and provide training and supervision for El Paso County DHS~~and the Children, Youth and Family Services Division~~.

~~35. The training program for protection of children from unconstitutional Fourth Amendment searches and from related trauma and possible sexual abuse was inadequate to train Defendants Woodard and Newbill to carry out their duties.~~

~~128~~166. Defendants Rhodus and Bengtsson did not train caseworkers on when and how to conduct an examination that does not have abusive overtones, and that would not provide opportunities or temptations for caseworkers who are, or could become, sexual offenders. They did not provide training on when a strip search was objectively reasonable under the Fourth Amendment, or

justified in its inception and reasonable in scope, or provide training on the significant risk of traumatic injuries to the child from a strip search. This left caseworkers and their supervisors to assume strip searches were justified at their sole discretion, including searches that were much broader than the alleged abuse.

~~36. The training program for protection of children from unconstitutional Fourth Amendment searches and from related trauma and possible sexual abuse was inadequate to train Defendants Woodard and Newbill to carry out their duties.~~

~~129~~167. Given the high probability of constitutional violations, the fact that constitutional violations in fact occurred, the shockingly high rate of child sexual abuse by public employees in public institutions, and the known and present danger of permitting public officials to examine children's private areas, the need for more training and supervision, or different training and supervision, was obvious.

~~37. Moreover, Defendants Rhodus and Bengtsson reasonably knew or should have known~~Despite the fact that ~~the current lack of training and supervision would cause their subordinates to inflict constitutional and related injuries, because of allegations of *Doe v. McAfee*, but choose to remain deliberately indifferent to the right of L.B.~~

~~130~~168. Defendants Rhodus and Bengtsson were on notice that ~~their inadequate~~ training and supervision ~~might lead to a child abuse or otherwise endanger children, because of allegations in Doe v. McAfee~~ yetwas needed, they ~~continued to act knowingly and with deliberate indifference~~were deliberately indifferent to

that fact and failed to provide guidance to caseworkers on how to perform a constitutionally compliant search.

~~38. Given that constitutional law, standard public policy,~~ In light of their deliberate indifference, in failing to provide criteria to caseworkers and supervisors on how to perform a reasonable ~~standard of care all hold that government workers and those who work with children should not do informal examination~~search during the course of ~~children's private areas, this failure to train exposed I.B. to severe danger.~~

~~131~~169. a child abuse investigation, Defendants Bengtsson and Rhodus acted intentionally, willfully, and ~~Bengtsson violated clearly established rights secured to I.B. by the Fourth Amendment of the United States Constitution, Defendants Rhodus~~wantonly, and ~~Bengtsson personally failed~~ in heedless and reckless disregard of I.B.'s right to ~~train and supervise Defendants Woodard and Newbill adequately, or possessed personal responsibility for~~be free from an ~~overall agency failure to inadequately train or supervise~~unreasonable search.

~~132~~170. The overly-broad interpretation of section 19-3-306, C.R.S. in the statewide policy~~,~~ guidance, and the embodiment of that interpretation as expressed in the local policy and custom of El Paso County DHS without adequate constitutional safeguards, and the failure to train and supervise Defendants Woodard and Newbill, were direct causes of the deprivation of I.B.'s constitutional rights and has caused her actual damages.

~~133~~171. ~~The~~Interpretation of section 19-3-306 by CDHS through its statewide policy, and local policy and custom of El Paso County DHS, are causing a continuing violation of I.B.'s constitutional rights in that she may

again be subjected to an unreasonable search, and that photographs of I.B. are insufficiently stored to protect her privacy.

~~134~~172. Because the continued implementation of the aforementioned policy and custom violate federal law under 42 U.S.C. § 1983 and the United States Constitution, Reggie Bicha on behalf of the state DHS, and (to the extent his agents are not otherwise enjoined~~,~~) Richard Bengtsson on behalf of El Paso County DHS, ~~is~~are liable in ~~his~~their official capacity for prospective relief to enforce federal law.

Third Claim for Relief
Violation of Jane Doe's and I.B.'s Fourteenth Amendment constitutional liberty interests and constitutional rights to familial privacy by Defendants Woodard and Newbill.

~~135~~173. Plaintiffs incorporate here by reference the allegations set forth above.

~~136~~174. Defendants acted at all times under color of state law.

~~137~~175. Jane Doe and I.B. both had clearly-established constitutional liberty interests in Jane Doe's care, custody, and control of I.B., and in familial association and privacy.

~~138~~176. Jane Doe and I.B. both had a reasonable expectation of privacy that their familial relationships would not be subject to unwarranted state intrusion.

~~139~~177. A parent's fundamental liberty interests include the care and management of her child. The child

in turn has fundamental liberty interests and a right to have her care directed by her mother.

~~140~~178. The right to family association includes the right to have medical decisions such as physical examination made by the parent, not the state. The parent has the right to make those decisions, and the child has a right to have these decisions made by her parent, not the state.

~~141~~179. Around November or December 2014, Woodard searched I.B. without prior notice to Jane Doe, and without consent from her. Woodard never even notified Jane Doe afterwards. It took Jane Doe weeks to track down the information, after I.B. informed her mother she had been searched.

~~142~~180. Defendant Newbill directed Defendant Woodard to perform the search.

~~143~~181. Defendants had no compelling interest in failing to request consent from Jane Doe prior to searching I.B., as Jane Doe was not alleged to have been responsible for any alleged abuse of I.B.

~~144~~182. Defendant Woodward's actions after the search also demonstrate that Defendants' interests in interfering with Plaintiffs' familial rights did not outweigh Jane Doe's right to make decisions for her child, and I.B.'s right to have those decisions made by her mother.

~~145~~183. When asked, Defendant Woodard initially lied to Jane Doe about the search, further violating her rights. She said that Jane Doe did not have a right even to know about the search, and that her rights as a parent had been voided by the (false) allegation of abuse. When Jane Doe found out the truth and said she was talking to

an attorney, Defendant Woodard retaliated by initiating a search of Jane Doe's son, I.B.'s little brother, the very next day.

~~146~~184. Defendants' conduct was willful and wanton, and done heedlessly and recklessly, without any regard for I.B.'s and Jane Doe's constitutional rights, their privacy, or their safety.

Fourth Claim for Relief
Violation of Jane Doe's and I.B.'s Fourteenth Amendment constitutional liberty interests and constitutional rights to familial privacy by Defendants Rhodus and Bengtsson in their individual capacities, and by Defendants Bengtsson and Bicha in their official capacities for prospective relief.

~~147~~185. Plaintiffs incorporate here by reference the allegations set forth above.

~~148~~186. Defendants Rhodus and Bengtsson are personally liable for the damages stemming from the unconstitutional search of I.B. by way of "supervisory liability" because they both possessed responsibility for the local policy and custom of El Paso County DHS, and for the failure to train and supervise Defendants Woodard and Newbill, by virtue of their job descriptions and the personal responsibility thereof as stated in the preceding paragraphs.

~~149~~187. As stated above, statewide policy, and local policy and custom encourages strip searching children whenever injuries are alleged, viewing and photographing areas of their bodies normally covered by clothing, without consent by parents or a court order, and often even without notification.

~~150~~188. These policies and custom also permit the photographs to be later stored in an unlocked file room at the El Paso County Department of Human Services, with access to the photographs available to anyone who works for the Department.

~~151~~189. The continued application of the policies and customs over which Defendants Rhodus and Bengtsson possessed responsibility caused the search of I.B. to take place in November or December 2014 without the consent or knowledge of her mother, Jane Doe. Accordingly, the statewide, and local policy and custom of El Paso County DHS was a direct cause of the deprivation of Plaintiffs' constitutional rights.

~~152~~190. Defendants Rhodus and Bengtsson reasonably knew or should have known that the current inadequate policies and customs would cause their subordinates to inflict constitutional and related injuries. Defendants knew or should have known that this custom and policy was both unconstitutional and endangered children, because of clearly established law, and because of allegations in *Doe v. McAfee*.

~~153~~191. Based on this information of which, upon information and belief, Defendants Rhodus and Bengtsson had actual knowledge, Defendants Rhodus and Bengtsson have been on notice for at least two years that a custom and policy had developed where caseworkers were strip searching and photographing children without proper safeguards, and that there were both constitutional and safety problems with this custom and policy.

~~154~~192. Despite the unconstitutionality of their policies, and the risks to children inherent in such policies, Defendants Rhodus and Bengtsson remained deliberately

indifferent to the rights of I.B. by not only personally acquiescing in, being responsible for, and promulgating the local policy and custom permitting and encouraging such strip searches, but providing no reasonable limitations and safeguards to such strip searches.

~~155~~193. Defendants Rhodus and Bengtsson also had personal responsibility either to train and supervise caseworkers directly or to oversee and provide training and supervision for El Paso County DHS and the Children, Youth and Family Services Division.

~~156~~194. The training program to protect families' liberty interests in the care, custody, and control of their children, and to give families adequate and complete information about DHS activity with respect to their children, was also inadequate.

~~157~~195. Defendants Rhodus and Bengtsson did not train caseworkers on the rights of parents to the care, custody, and control of their children, and children's reciprocal rights, during the strip searching and photographing process.

~~158~~196. Defendants Rhodus and Bengtsson reasonably knew or should have known that the current lack of training and supervision would cause their subordinates to inflict constitutional and related injuries, because of clearly-established law and allegations in *Doe v. McAfee*, but chose to remain deliberately indifferent to the rights of I.B.

~~159~~197. Defendants Rhodus and Bengtsson were on notice that their inadequate training and supervision might lead to violation of Plaintiffs' Fourteenth Amendment rights, because of allegations in *Doe v.*

McAfee, yet they continued to act knowingly and with deliberate indifference.

~~160~~198. Given that constitutional law, standard public policy, and a reasonable standard of care all hold that government workers and those who work with children should not do informal examinations of children's private areas, this failure to train exposed I.B. to severe danger.

~~161~~199. Defendants Rhodus and Bengtsson violated clearly-established liberty interests and familial privacy rights secured to Plaintiffs by the Fourteenth Amendment of the United States Constitution. Defendants Rhodus and Bengtsson personally failed to train and supervise Defendants Woodard and Newbill adequately, or possessed personal responsibility for an overall agency failure to inadequately train or supervise.

~~162~~200. The statewide policy, local policy and custom of El Paso County DHS, and the failure to train and supervise Defendants Woodard and Newbill, were direct causes of the deprivation of Plaintiffs' constitutional rights.

~~163~~201. The statewide policy, and local policy and custom of El Paso County DHS, are causing a continuing violation of Plaintiffs' constitutional rights in that I.B. may again be searched without Jane Doe's consent, and that photographs from I.B.'s search continue to be stored without regard to Plaintiffs' Fourteenth Amendment rights.

~~164~~202. Because the continued implementation of the aforementioned statewide and local policy and custom violate federal law under 42 U.S.C. § 1983 and the United States Constitution, Reggie Bicha on behalf of the state

DHS, and to the extent his agents are not otherwise enjoined, Richard Bengtsson on behalf of El Paso County DHS, is liable in his official capacity for prospective relief to enforce federal law.

Fifth Claim for Relief
***Monell* Claim against Defendant El Paso County Board of County Commissioners for violation of I.B.'s Fourth and Fourteenth Amendment rights and Jane Doe's Fourteenth Amendment rights**

~~165~~203. Plaintiffs incorporate here by reference the allegations set forth above.

~~166~~204. Defendant acted at all times under color of state law.

~~167~~205. BOCC is the policymaking body of El Paso County, and as such, is responsible for the custom and unwritten policies that developed at El Paso County DHS as municipal policy, and is the appropriate entity to be named for suit when municipal liability is alleged.

~~168~~206. Though El Paso County DHS is an agency and arm of the state, it is both funded in part and receives oversight provided by the DHS Advisory Commission, appointed by BOCC. Thus, BOCC has the power to approve or condemn El Paso County DHS local policies and custom.

~~169~~207. As stated above, local policy and custom encourages strip searching children whenever injuries are alleged, viewing and photographing areas of their bodies normally covered by clothing, without consent by parents or a court order, and often even without notification.

~~170~~208. These policies also permit the photographs to be later stored in an unlocked file room at the El Paso County DHS, with access to the photographs available to anyone who works for DHS.

~~171~~209. Based on the allegations in another lawsuit against Defendant, *Doe v. McAfee*, Defendants either knew or should have known of a clear and persistent pattern of illegal strip searches of children being performed in accordance with local unwritten policy and custom in El Paso County by El Paso County DHS agents each year.

~~172~~210. Despite having either actual or constructive notice of the widespread practice of strip searching and photographing children without parental consent or a court order, and that such policy and custom was violating constitutional rights, Defendants remained deliberately indifferent, continuing to fund El Paso County DHS, making no rules, and holding no discussion to change the local policy and custom. The Advisory Commission did not even discuss the issue.

~~173~~211. The El Paso BOCC has failed in its responsibilities to the children of El Paso County, not only approving and encouraging the violation of their constitutional rights but exposing them to trauma and the risk of sexual abuse.

~~174~~212. Among other things, this approval by the BOCC of the unconstitutional and dangerous local policy and custom of El Paso County DHS was a direct cause of the deprivation of I.B.'s Fourth and Fourteenth Amendment rights, and Jane Doe's Fourteenth Amendment rights.

~~175~~213. I.B. and Jane Doe suffered injuries and damages from violation of their rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court award them relief as follows:

Declare that the statewide policy and El Paso County DHS local policy and customs are unconstitutional in violation of the Fourth and Fourteenth Amendments;

Enter judgment on behalf of Plaintiffs and against all Defendants but Richard Bengtsson and Reggie Bicha in their official capacities, for special and general damages on their claims, to be determined at trial by a jury, including but not limited to expenses incurred, psychological damages and treatment, and pain and suffering;

Enter judgment for injunctive relief against Richard Bengtsson and Reggie Bicha in their official capacities that: (1) DHS may not apply its unconstitutional policies to I.B., and any searches or seizures of I.B. must be performed in compliance with the Fourth Amendment; (2) all photographs of I.B. in the possession of DHS must be destroyed or securely stored with limited access; and (3) El Paso County DHS must institute policies and training that will protect I.B.'s constitutional rights and her safety.

Enter judgment on behalf of Plaintiffs and against all individual Defendants acting in their individual capacities for exemplary, punitive and/or treble damages in an amount sufficient to deter similar misconduct, jointly and severally, to be determined at trial by a jury;

Enter judgment for reasonable attorneys' fees and costs incurred in bringing this action in accordance with 42 U.S.C. § 1988, including expert witness fees;

Enter judgment for pre- and post-judgment interest to the extent allowed by law; and Grant such other and further relief as it deems equitable and just.

JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.