IN THE

SUPREME COURT OF THE UNITED STATES

NO. __-____

Tonya Udoh, et al.,

Petitioners,

vs.

Minnesota Department of Human Services, et al.

Respondents.

APPENDIX

Page

Respectfully Submitted,

Tonya Udoh

Tonya Udoh,
Pro se Litigant,
P.O. Box 290264
Brooklyn Center, MN 55429

Respectfully Submitted,

Emem U. Udoh

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1000 Lake Shore Drive
Moose Lake, MN 55767

United States Court of Appeals
For the Eighth Circuit

No. 17-3256

Tonya Udoh; Emem Ufot Udoh, individually, and on behalf of their minor children, K.K.W. and K.C.W.

Plaintiffs - Appellants

v.

Minnesota Department of Human Services; Charles E. Johnson; Donothan R. Bartley; Ann Norton; Daniel Engstrom; Catrina Blair; City of Maple Grove; City of Maple Grove Police Department; Melissa Parker; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District No. 279; Joanne Wallen; Karen Wegerson; Ann Mock; Cornerhouse; Patricia Harmon; Bill Koncar; Grace W. Ray; Linda Thompson

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: August 20, 2018
Filed: August 30, 2018
[Unpublished]

Before WOLLMAN, GRUENDER, and GRASZ, Circuit Judges.

PER CURIAM.

In this civil rights action, Tonya Udoh and Emem Udoh (together, the Udohs) appeal after the district court[1] dismissed their complaint under Federal Rules of Civil Procedure 12(b)(6) and 12(c), and denied them leave to amend their complaint. In their original complaint, the Udohs asserted constitutional claims on behalf of their minor daughters. On behalf of themselves, they asserted procedural and substantive due process claims, claims of unconstitutional policies or customs, a federal conspiracy claim, and several state-law claims. They also sought declaratory relief regarding the constitutionality of two Minnesota statutes.

Having carefully reviewed the record and the parties' arguments on appeal, we find no basis for reversal. *See Kelly v. City of Omaha*, 813 F.3d 1070, 1075 (8th Cir. 2016) (providing for de novo review of grant of motion to dismiss for failure to state claim under Rule 12(b)(6)); *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009) (explaining judgment on the pleadings is considered under the same standard used for a Rule 12(b)(6) motion); *see also Plymouth Cty. v. Merscorp, Inc.*, 774 F.3d 1155, 1160 (8th Cir. 2014) (providing for de novo review of the underlying legal conclusion of whether a proposed amendment to complaint would be futile; explaining a party is not entitled to amend the complaint without first demonstrating that such amendment would be able to save an otherwise meritless claim); *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008) (explaining the court may deny a motion to amend when amendment would be futile).

We first conclude that the district court properly dismissed, without prejudice, the claims the Udohs attempted to assert on behalf of their minor daughters. *See Myers v. Loudoun Cty. Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005) (joining vast majority of circuit courts in holding that non-attorney parents generally may not

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[1]The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Steven E. Rau, United States Magistrate Judge for the District of Minnesota.

litigate claims of their minor children in federal court pro se); *cf. Alderman v. United States*, 394 U.S. 165, 174 (1969) (explaining that Fourth Amendment rights are personal rights which may not be vicariously asserted).

We further conclude that the federal claims the Udohs asserted on behalf of themselves were subject to dismissal, that it was proper for the court to decline to exercise jurisdiction over the state-law claims, that the Udohs failed to assert a viable basis for declaratory relief, and that leave to amend the complaint was appropriately denied on futility grounds. *See, e.g., Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811, 817-19 (8th Cir. 2011) (discussing requirements for violations of procedural due process and substantive due process); *Dornheim v. Sholes*, 430 F.3d 919, 925-26 (8th Cir. 2005) (explaining the right to family integrity does not include a right to be free from investigations of child abuse because the state has a strong interest in protecting the safety and welfare of minor children, particularly where protection is considered necessary as against the parents themselves); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1370-71 (8th Cir. 1996) (discussing qualified immunity for state officials in the context of child-abuse investigation); *R.S. v. State*, 459 N.W.2d 680, 690 (Minn. 1990) (upholding Minnesota statute as applied to permit interview of reported child-abuse victim without parental notice and consent when the alleged perpetrator is unknown); *see also* 28 U.S.C. § 1367(c)(3) (stating a district court may decline to exercise supplemental jurisdiction over state-law claims if "the district court has dismissed all claims over which it has original jurisdiction"); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) (plaintiff seeking to impose § 1983 liability on local government body must allege official policy or widespread custom or practice of unconstitutional conduct that caused deprivation of constitutional rights); *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670-71 (8th Cir. 2013) (this court may affirm on any basis supported by record); *Slusarchuk v. Hoff*, 346 F.3d 1178, 1183 (8th Cir. 2003) (explaining that absent constitutional violation, there is no actionable § 1985 conspiracy claim).

The judgment is affirmed. *See* 8th Cir. R. 47B.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3256

Tonya Udoh; Emem Ufot Udoh, individually, and on behalf of their minor children, K.K.W. and K.C.W.

Plaintiffs - Appellants

v.

Minnesota Department of Human Services; Charles E. Johnson; Donothan R. Bartley; Ann Norton; Daniel Engstrom; Catrina Blair; City of Maple Grove; City of Maple Grove Police Department; Melissa Parker; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District No. 279; Joanne Wallen; Karen Wegerson; Ann Mock; Cornerhouse; Patricia Harmon; Bill Koncar; Grace W. Ray; Linda Thompson

Defendants - Appellees

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:16-cv-03119-PJS)

JUDGMENT

Before WOLLMAN, GRUENDER and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 30, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

TONYA UDOH and EMEM UDOH, individually, and on behalf of their minor children, K.K.W. and K.C.W.,

Plaintiffs,

v.

MINNESOTA DEPARTMENT OF HUMAN SERVICES; CHARLES E. JOHNSON; DONOTHAN BARTLEY; ANN NORTON; DANIEL E. JOHNSON; CATRINA BLAIR; CITY OF MAPLE GROVE; CITY OF MAPLE GROVE POLICE DEPARTMENT; MELISSA PARKER; CITY OF PLYMOUTH; CITY OF PLYMOUTH POLICE DEPARTMENT; MOLLY LYNCH, KELVIN PREGLER; INDEPENDENT SCHOOL DISTRICT NO. 279; JOANNE WALLEN; KAREN WEGERSON; ANN MOCK; CORNERHOUSE; PATRICIA HARMON; BILL KONCAR; GRACE W. RAY; and LINDA THOMPSON,

Defendants.

Case No. 16-CV-3119 (PJS/SER)

ORDER

Tonya and Emem Udoh, pro se.

Frederick J. Argir, MINNESOTA ATTORNEY GENERAL'S OFFICE, for defendants Minnesota Department of Human Services and Charles E. Johnson.

Christiana M. Martenson and Daniel D. Kaczor, HENNEPIN COUNTY ATTORNEY'S OFFICE, for defendants Donothan Bartley, Ann Norton, Daniel E. Engstrom,[1] Catrina Blair, and Linda Thompson.

Nathan C. Midolo and Paul D. Reuvers, IVERSON REUVERS CONDON, for defendants City of Maple Grove, City of Maple Grove Police Department, Melissa Parker, City of Plymouth, City of Plymouth Police Department, Molly Lynch, and Kelvin Pregler.

John P. Edison and Michael J. Waldspurger, RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A., for defendants Independent School District No. 279, Joanne Wallen, Karen Wegerson, and Ann Mock.

John R. Marti and Lauren O. Roso, DORSEY & WHITNEY LLP, for defendants CornerHouse, Patricia Harmon, Bill Koncar, and Grace Ray.

Plaintiff Emem Udoh was convicted by a jury of sexually abusing his stepdaughters, K.K.W. and K.C.W. His conviction was upheld by the Minnesota Court of Appeals, and the Minnesota Supreme Court denied further review. *State v. Udoh*, No. A14-2181, 2016 WL 687328 (Minn. Ct. App. Feb. 22, 2016), *review denied* (Minn. Apr. 27, 2016). Udoh and his wife, plaintiff Tonya Udoh (the biological mother of K.K.W. and K.C.W.), then brought this lawsuit against just about every teacher, principal, social worker, police officer, forensic interviewer, and physician who was involved in investigating the sexual-abuse allegations against Udoh.

[1]The caption incorrectly lists Engstrom's last name as "Johnson."

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This matter is before the Court on the Udohs' objection to Magistrate Judge Steven E. Rau's July 26, 2017 Report and Recommendation ("R&R").[2] Judge Rau recommends granting the defendants' motions to dismiss and for judgment on the pleadings and denying the Udohs' motions to amend their complaint. The Court has conducted a de novo review. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Based on that review, the Court overrules the Udohs' objection and adopts Judge Rau's R&R, except as modified below.[3]

The Udohs' objection largely consists of unexplained string citations to inapposite cases. But the Court has reviewed their voluminous filings, and thus the Court is familiar with their arguments. Only a few matters merit comment:

First, because the Udohs are not attorneys, they "may not litigate the claims of their minor children in federal court." *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1300 (10th Cir. 2011) (citation omitted); *see also Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 401 (4th Cir. 2005) (collecting cases). The Udohs do not cite—and the Court has not

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[2]The R&R was signed on July 25 but entered on July 26.

[3]The Udohs certify that their objection contains 3500 words. *See* ECF No. 155-1. But to meet the word limit, the Udohs hyphenated entire sentences that are not typically hyphenated. *See, e.g.*, ECF No. 155 at 10 (describing *Troxel v. Granville* as holding that a statute was "unconstitutional-because-it-violates-fundamental-right-of-parents-to-make [parental-consent-or-decisions] concerning-the-care-custody-and-control-of-their-children"). This attempt to circumvent the word limit "violate[s] the spirit, if not the letter, of Local Rule 72.2." *Northbrook Digital, LLC v. Vendio Servs., Inc.*, 625 F. Supp. 2d 728, 733 (D. Minn. 2008).

found—any case carving out an exception to this rule for § 1983 claims or state tort claims. *Elustra v. Mineo*, 595 F.3d 699, 705 (7th Cir. 2010).[4] The Court therefore agrees with Judge Rau that any claims belonging to the Udohs' daughters should be dismissed. But contrary to Judge Rau's recommendation, the Court finds that the dismissal of the children's claims should be without prejudice. *See Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 62 (2d Cir. 1990) (remanding the case to allow for appointment of counsel or dismissal without prejudice).

Second, the Udohs claim that the defendants violated their constitutional rights by interviewing and removing their daughters without the Udohs' consent. Parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). But the state has a "compelling" interest in protecting children from abuse. *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 607 (1982). In light of that compelling interest, the Eighth Circuit has "repeatedly held that . . . a state official [who] takes an action that would otherwise disrupt familial integrity . . . is entitled to qualified immunity if the action is properly founded upon a reasonable suspicion of child abuse." *K.D. v. Cty. of Crow Wing*, 434 F.3d 1051, 1056 (8th Cir. 2006).

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[4]The few cases that have recognized a limited exception to this rule have done so in the context of appeals from administrative denials of supplemental security income benefits. *See Adams ex rel. D.J.W.*, 659 F.3d at 1301; *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002); *Harris v. Apfel*, 209 F.3d 413, 417 (5th Cir. 2000).

Here, the defendants did not act on the basis of something akin to a "'six-fold hearsay report by an anonymous informant.'" *Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 170 (3d Cir. 2016) (quoting *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997)). Rather, K.K.W. was initially interviewed after one of her friends told a teacher that K.K.W. had been sexually abused. Compl. ¶ 57. During that interview—and during all subsequent interviews—K.K.W. herself told various defendants that Emem had sexually abused her and her younger sister. *See, e.g.*, Compl. Ex. A. at 5. Only after being told on multiple occasions by K.K.W. that she and her sister had been sexually abused did the defendants remove the girls from their home and place them with their biological father. Compl. ¶¶ 82-83; ECF No. 59-13 at 3-4. Under these circumstances, the defendants' actions in interviewing and removing both girls are clearly protected by qualified immunity.

Third, the Udohs claim that Donothan Bartley, a child protection services investigator, examined the "private bodies" of their daughters for signs of sexual abuse. Compl. ¶¶ 66, 72. The Court will assume that this allegation is true, although it appears farfetched, and although it is undermined by the transcripts that are attached to the Udohs' complaint. *Nelson v. Midland Credit Mgmt., Inc.*, 828 F.3d 749, 751 (8th Cir. 2016). But if this search actually occurred, the search would implicate K.K.W.'s and K.C.W.'s Fourth Amendment right to be free from unreasonable searches, not the Udohs'

Fourteenth Amendment right to family integrity. *Compare Michael C. v. Gresbach*, 526 F.3d 1008, 1013-18 (7th Cir. 2008) (analyzing an under-the-clothes examination of a private school student under the Fourth Amendment), *with Greene v. Camreta*, 588 F.3d 1011, 1036-37 (9th Cir. 2009), *vacated in part on other grounds*, 563 U.S. 692 (2011) (holding that the Fourteenth Amendment may be violated when a mother is not just excluded from the room where her daughters are being examined but forced to leave the premises altogether). As discussed above, the Udohs are not attorneys, and thus they may not litigate their daughters' Fourth Amendment claims for them.

Fourth, the Udohs claim that Bartley falsely reported that K.K.W. did not feel safe in her home. The Udohs have not, however, alleged any facts that would plausibly suggest that Bartley's report was willful or malicious; to the contrary, the facts alleged in the complaint suggest that Bartley's conclusion was well grounded in what K.K.W. reported. Therefore, any claim based on this allegedly false report is barred by qualified immunity. *Doe v. Hennepin Cty.*, 858 F.2d 1325, 1329-30 (8th Cir. 1988).

Finally, the Court agrees with the R&R that the *Rooker-Feldman* doctrine does not appear to bar the Udohs' claims. The R&R points out that Tonya was not a party to Emem's criminal proceedings. ECF No. 143 at 22, 27-28. But there is another reason why the *Rooker-Feldman* doctrine does not apply. Unlike the doctrines of claim and issue preclusion, the *Rooker-Feldman* doctrine does not "stop a district court from

exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005). This federal lawsuit does not seek to overturn Emem's criminal conviction.[5] Instead, this lawsuit challenges the manner in which the defendants went about their investigation of Emem's sexual abuse of his stepdaughters and seeks compensatory and injunctive relief for the defendants' alleged violations of federal and state law. In theory, this Court could award relief to the Udohs without in any way questioning the validity of Emem's conviction. Because this lawsuit does not "seek[] what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights," it is not barred by the *Rooker-Feldman* doctrine. *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994).

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, the Court OVERRULES the Udohs' objection [ECF No. 155] and ADOPTS Judge Rau's

[5]Emem filed a petition for a writ of habeas corpus to challenge his conviction. Judge Paul A. Magnuson denied the petition and declined to issue a certificate of appealability. *See Udoh v. Dooley*, No. 16-CV-4174 (PAM/HB), 2017 WL 2881126 (D. Minn. July 6, 2017). Emem is presently seeking a certificate of appealability from the Eighth Circuit.

July 26, 2017 R&R [ECF No. 143], except that any claims belonging to the Udohs' daughters are dismissed without prejudice. IT IS HEREBY ORDERED THAT:

1. The Hennepin County and CornerHouse Defendants' motion to dismiss [ECF No. 56] is GRANTED.

2. The School District Defendants' motion for judgment on the pleadings [ECF No. 65] is GRANTED.

3. Charles E. Johnson and the Minnesota Department of Human Services' motion for judgment on the pleadings [ECF No. 73] is GRANTED.

4. The City Defendants' motion to dismiss or for summary judgment [ECF No. 90] is GRANTED to the extent that it seeks dismissal and DENIED WITHOUT PREJUDICE to the extent that it seeks summary judgment.

5. The Udohs' motions to amend their complaint [ECF Nos. 99, 101, 102, 118] are DENIED AS MOOT.

6. The Udohs' motion to amend their complaint [ECF No. 131] is DENIED.

7. The claims against Ann Norton and Grace Ray, the state-law claims, and any claims belonging to the Udohs' daughters are DISMISSED WITHOUT PREJUDICE. The remaining claims are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 12, 2017

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tonya Udoh and Emem Udoh, individually, and on behalf of their minor children, K.K.W., and K.C.W.,

Plaintiffs,

v.

Minnesota Department of Human Services, Charles E. Johnson, Donothan Bartley, Ann Norton, Daniel E. Johnson, Catrina Blair, City of Maple Grove, City of Maple Grove Police Department, Melissa Parker, City of Plymouth, City of Plymouth Police Department, Molly Lynch, Kelvin Pregler, Independent School District No. 279, Joanne Wallen, Karen Wegerson, Ann Mock, CornerHouse, Patricia Harmon, Bill Koncar, Grace W. Ray, and Linda Thompson,

Defendants.

Case No. 16-cv-3119 (PJS/SER)

REPORT AND RECOMMENDATION

Tonya Udoh, pro se, Brooklyn Center, Minnesota.

Emem Udoh, pro se, Moose Lake, Minnesota.

Frederic J. Argir, Esq., Minnesota Attorney General's Office, St. Paul, Minnesota, for Defendants Minnesota Department of Human Services and Charles E. Johnson.

Christiana Martenson, Esq., Hennepin County Attorney's Office, Minneapolis, Minnesota, for Defendants Donothan Bartley, Ann Norton, Daniel E. Engstrom,[1] Catrina Blair, and Linda Thompson.

Nathan Midolo, Esq., Iverson Reuvers Condon, Bloomington, Minnesota, for Defendants City of Maple Grove, City of Maple Grove Police Department, Melissa Parker, City of Plymouth, City of Plymouth Police Department, Molly Lynch, and Kelvin Pregler.

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[1] The case caption incorrectly identifies Engstrom's last name as Johnson.

John P. Edison, Esq., Rupp, Anderson, Squires & Waldspurger, Minneapolis, Minnesota, for Defendants Independent School District No. 279, Joanne Wallen, Karen Wegerson, and Ann Mock.

John R. Marti and Lauren Olivia Roso, Esqs., Dorsey & Whitney LLP, Minneapolis, Minnesota, for Defendants CornerHouse, Patricia Harmon, Bill Koncar, and Grace W. Ray.

STEVEN E. RAU, United States Magistrate Judge

The above-captioned case comes before the undersigned on nine motions: the Hennepin County Defendants'[2] and the CornerHouse Defendants'[3] Motion to Dismiss [Doc. No. 56]; the School District Defendants'[4] Motion for Judgment on the Pleadings [Doc. No. 65]; Charles E. Johnson ("Johnson") and the Minnesota Department of Human Services' (collectively, the "State Defendants") Motion for Judgment on the Pleadings [Doc. No. 73]; the City Defendants'[5] Motion to Dismiss/Motion for Summary Judgment ("City Defendants' Motion to Dismiss") [Doc. No. 90];[6] and Plaintiff Emem Udoh and Tonya Udoh's (collectively, the "Udohs") Motions to Amend the Complaint [Doc. Nos. 99, 101, 102, 118, 131]. This matter has been

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[2] The "Hennepin County Defendants" refers to employees of Hennepin County named as defendants: Donothan Bartley, Ann Norton, Daniel E. Engstrom, Catrina Blair, and Linda Thompson. The Hennepin County and CornerHouse Defendants state that some of these defendants were misidentified, either by name or organization, and the Court defers their corrected names and affiliations. *See* (Hennepin County Defs.' & CornerHouse Defs.' Mem. of Law in Supp. of Mot. to Dismiss, "Hennepin County & CornerHouse Defs.' Mem. in Supp.") [Doc. No. 58 at 4–5].

[3] The "CornerHouse Defendants" refers to Defendant CornerHouse, as well as its employees named as defendants: Patricia Harmon, Bill Koncar, and Grace W. Ray. (Hennepin County & CornerHouse Defs.' Mem. in Supp. at 5.)

[4] The "School District Defendants" refers to Defendants Independent School District No. 279 (the "School District"), as well as its employees named as defendants: Ann Mock, Joanne Wallen, and Karen Wegerson. (School Dist. Defs.' Mot. for J. on the Pleadings) [Doc. No. 65 at 1].

[5] The "City Defendants" refers to the following Defendant cities and their employees: City of Maple Grove, City of Maple Grove Police Department, City of Plymouth, City of Plymouth Police Department, Molly Lynch, Melissa Parker, and Kelvin Pregler. (City Defendants' Mot. to Dismiss/Mot. for Summ. J.) [Doc. No. 90 at 1].

[6] The Court refers to these motions as "the dispositive motions."

referred for the resolution of pretrial matters pursuant to 28 U.S.C. § 636(b)(1) and District of Minnesota Local Rule 72.1. (Order of Reference) [Doc. No. 51]. For the reasons stated below, the Court recommends granting the dispositive motions and denying the Motions to Amend the Complaint.

I. BACKGROUND

Tonya Udoh ("Tonya") is the mother of two minor daughters, K.K.W. and K.C.W.; Emem Udoh ("Emem") is Tonya's husband and K.K.W.'s and K.C.W.'s stepfather. (Compl.) [Doc. No. 1 ¶¶ 49, 51]. Tonya was a social work student and a DHS-licensed certified nursing assistant. (*Id.* ¶ 49). The Udohs initiated this lawsuit on September 19, 2016, alleging several counts of constitutional violations under 42 U.S.C. § 1983 for violations of "the Fourth and Fourteenth Amendments in the context of [a] child abuse investigation" and several counts under state common law. *See generally* (Compl.); (*id.* ¶ 114). In short, the allegations in the Complaint arise out events that were undoubtedly troubling for all involved: Emem's abuse of K.K.W. and K.C.W. *See generally* (Compl.). A jury ultimately found Emem "guilty of both first-degree and second-degree criminal sexual conduct toward K.K.W. and of second-degree criminal sexual conduct toward K.C.W."[7] *State v. Udoh*, No. A14-2181, 2016 WL 687328, at *2 (Minn. Ct. App. Feb. 22, 2016). The lengthy Complaint is supplemented by 145 pages of exhibits.[8] Although the Court must grant reasonable inferences in favor of the Udohs at this stage, the Complaint and exhibits appear to conflict at times. The relevant allegations in the Complaint and the facts described in the exhibits are described below.

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[7] The Minnesota Court of Appeals remanded the case to the district court "to vacate the judgment on the second-degree offense against K.K.W.," but otherwise upheld the convictions. *See State v. Udoh*, No. A14-2181, 2016 WL 687328, at *4 (Minn. Ct. App. Feb. 22, 2016).

[8] The Court will refer to these exhibits by their sequential letters and the page numbers assigned by CM/ECF.

On or around February 19, 2013, an unknown student reported to a teacher that K.K.W. was the victim of abuse. (Compl. ¶ 57). The teacher reported the allegations to Defendant Joanne Wallen ("Wallen"), a social worker at K.K.W.'s school. (*Id.* ¶¶ 32, 57). Wallen removed K.K.W. from her classroom and "interrogated" her. (*Id.* ¶ 57). Wallen then called Melissa Parker ("Parker"), a police officer with the City of Maple Grove, who then also "interrogated" K.K.W. (*Id.* ¶ 58). Parker concluded that "the alleged abuse had not happened since . . . summer 2012 and there was no indication that K.K.W. was in immediate danger staying at her home." (*Id.* ¶ 59); *see also* (Ex. A, Attached to Compl.) [Doc. No. 1-1 at 4]. Parker informed Tonya about the allegations, and "[t]he matter was referred to the City of Plymouth Police Department" and Child Protection Services ("CPS") at Hennepin County. (Compl. ¶¶ 59, 61).

On February 21, 2013, Defendant Donothan Bartley ("Bartley"), a CPS social worker, went to K.K.W.'s school and asked to speak with K.K.W. (*Id.* ¶ 65). Defendant Karen Wegerson ("Wegerson"), the "principal secretary" at K.K.W.'s school, removed K.K.W. from her classroom to speak with Bartley. (*Id.*). Bartley "conducted a custodial interrogation" of K.K.W. at the school, where he "physically observed and examined K.K.W.'s private bodies" and found no physical signs of sexual abuse. (*Id.* ¶ 66). Bartley recorded the interview. (*Id.*). During the interview, K.K.W. reported that Emem sexually abused her (Ex. B, Attached to Compl.) [Doc. No. 1-2 at 5–7].

Bartley then went to K.C.W.'s school. (Compl. ¶ 70). At Bartley's request, Defendant Ann Mock, the principal at K.C.W.'s school, removed K.C.W. from her classroom. (*Id.* ¶¶ 70–71). Bartley then "conducted a custodial interrogation" of K.C.W. at the school, where he "physically observed and examined K.C.W.'s private bodies" and found no physical signs of

sexual abuse. (*Id.* ¶ 72). Bartley recorded the interview. (*Id.*). K.C.W. denied that Emem abused her. (Ex. C, Attached to Compl.) [Doc. No. 1-3 at 3–11].

That day, Bartley reported that K.K.W. said that she did not feel safe at home to the following people: Defendants Molly Lynch ("Lynch") and Kevin Pregler ("Pregler"), Plymouth police officers; Parker; Wallen; and Ann Norton ("Norton"), a CPS social worker supervisor. (Compl. ¶ 80). The Udohs allege that the information was false, and that this group of Defendants knew that: K.K.W. had made a false allegation of assault by a student; Bartley and Lynch could not corroborate K.K.W.'s allegations of abuse; and Bartley had found no signs of sexual abuse. (*Id.* ¶¶ 79–81). Based on information Bartley and Lynch provided, K.K.W. and K.C.W. were removed from their home that day for 72-hour holding period.[9] (*Id.* ¶ 82); *see also* (Ex. D, Attached to Compl.) [Doc. No. 1-4 at 5]. Lynch signed the hold. (Ex. E, Attached to Compl.) [Doc. No. 1-5 at 9].

On February 25, 2013, Bartley took K.K.W. and K.C.W. to CornerHouse for "custodial interrogation[s]." (Compl. ¶ 94). Defendant Grace Ray ("Ray"), a forensic interviewer at CornerHouse, "interrogated" K.K.W., which Bartley, Lynch, and Grace Song ("Song"), a Hennepin County prosecutor, observed and provided questions. (*Id.* ¶ 95). Defendant Bill Koncar ("Koncar"), another forensic interviewer, "interrogated" K.C.W. on the same day. (*Id.* ¶ 96). As with K.K.W., Bartley, Lynch, and Song observed the interview and provided questions. (*Id.* ¶¶ 95–96). The Udohs allege K.K.W. and K.C.W. were not permitted to leave their interviews until they "made a statement that Defendants could interpret as a crime committed" by their stepfather, Emem. (*Id.* ¶ 98). During their respective interviews, both K.K.W. and K.C.W. reported that Emem sexually abused them. (Ex. F, Attached to Compl.) [Doc. No. 1-6 at 14];

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9 K.K.W. and K.C.W. were later placed in foster care. (Compl. ¶ 82).

(Ex. G, Attached to Compl.) [Doc. No. 1-7 at 31]. Information from the CornerHouse interviews was presented to state court as justification for continued removal of K.K.W. and K.C.W. from the Udohs' custody. (Compl. ¶ 100).

On March 6, 2013, Defendant Catrina Blair ("Blair"), a Hennepin County social worker, took K.K.W. and K.C.W. to CornerHouse for "custodial interrogation[s] and intrusive physical examination[s]" with Defendant Linda Thompson ("Dr. Thompson"), a CornerHouse physician. (*Id.* ¶¶ 104–05, 107). The Udohs allege that Dr. Thompson did not find any physical evidence of sexual abuse with respect to K.K.W. or K.C.W. (*Id.* ¶¶ 105, 107). Dr. Thompson's reports with respect to both children stated that the "[a]bsence of physical findings generally neither confirms nor discounts a child's clear disclosure of sexual abuse." (Ex. H, Attached to Compl.) [Doc. No. 1-8 at 8]; (Ex. I, Attached to Compl.) [Doc. No. 1-9 at 7].

On March 22, 2013, "Emem was charged [with] four counts of sex abuse, two counts against K.K.W. and two counts against K.C.W." (Compl. ¶ 112). The Udohs allege that "Emem was wrongfully found guilty [in] August 2014." (*Id.*)

The Udohs allege that Defendants deprived them of constitutional rights in violation of 42 U.S.C. § 1983. Although there is some variation with respect to causes of action against certain Defendants—which the Court will discuss in the context of the dispositive motions—the Udohs' central claims are that Defendants violated their right to care for their children in violation of their Fourteenth Amendment rights, as well as their rights under Article 1, sections 7 and 10 of the Minnesota Constitution, and that K.K.W. and K.C.W. were deprived of their rights to receive their parents' care. *See* (Compl. ¶¶ 115–87). The Udohs also allege that Defendants violated K.K.W.'s and K.C.W.'s rights to be free from unreasonable search and seizure under the Fourth and Fourteenth Amendment of the U.S. constitution and Article 1, sections 7 and 10 of

the Minnesota Constitution. (*Id.*). The Udohs seek various forms of injunctive relief and monetary damages. *See* (*id.* ¶ 230).

Defendants fall into five groups: the Hennepin County Defendants, the CornerHouse Defendants, the School District Defendants, the State Defendants, and the City Defendants. Four dispositive motions were filed.[10] *See* [Doc. Nos. 56, 65, 73, 90]. Each of the Udohs' responses included a motion to amend the complaint. *See* [Doc. Nos. 99, 101, 102, 118]. The Udohs then filed a stand-alone Motion to Amend the Complaint. [Doc. No. 131].

Following oral argument, the motions are now ripe for consideration. *See* (Minute Entry Dated June 6, 2017) [Doc. No. 139].

II. DISCUSSION

A. Legal Standards

The motions before the Court relate to motions to dismiss, motions for judgment on the pleadings, and motions to amend. The following legal standards apply.

1. Motion to Dismiss and Motion for Judgment on the Pleadings

"Federal Rule of Civil Procedure 8(a)(2) requires only a short plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (omission in original) (citation and internal quotation marks omitted). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. The complaint must contain "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S.

[10] The Hennepin County and CornerHouse Defendants filed their motion jointly. *See* [Doc. No. 56].

at 570). Pro se pleadings must be construed liberally, but they "may not be merely conclusory: the complaint must allege facts, which if true, state a claim as a matter of law." *Martin v. Aubuchon*, 623 F.2d 1282, 1286 (8th Cir. 1980). A court accepts the facts alleged in the complaint as true, and grants "reasonable inferences in favor of the nonmoving party." *Lind v. Midland Funding, L.L.C.*, 688 F.3d 402, 405 (8th Cir. 2012). Legal conclusions "must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The factual allegations, however, "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). A court "may consider some materials that are part of the public record . . . as well as materials that are necessarily embraced by the pleadings" when reviewing a Rule 12(b)(6) motion. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 (8th Cir. 2012) (internal quotation marks omitted). A court reviews a motion for judgment on the pleadings "under the same standard that governs a motion to dismiss under Rule 12(b)(6)." *NanoMech, Inc. v. Suresh*, 777 F.3d 1020, 1023 (8th Cir. 2015).

2. Motion to Amend

The Court should grant leave to amend a pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Unless there is a good reason for denial, such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment, leave to amend should be granted." *Becker v. Univ. of Neb. at Omaha*, 191 F.3d 904, 907–08 (8th Cir. 1999) (internal quotation marks omitted). "Denial of a motion for leave to amend on the basis of futility means

the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) (internal quotation marks omitted).

As noted above, the Udohs have filed several motions to amend. The motions to amend that are included in the Udohs' responses to the Defendants' dispositive motions correspond to a proposed amended complaint identified as Exhibit M. (Proposed Am. Compl., Ex. M) [Doc. No. 108-3]. The stand-alone motion to amend corresponds to a separate proposed amended complaint, labeled "Second Amended Civil Rights Complaint." [Doc. No. 131-1]. This later-filed proposed amended complaint incorporates proposed amendments from both proposed amended complaints. *Compare* (Ex. M), *with* (Second Am. Civil Rights Compl.). For ease of reference the Court will refer only to the later-filed proposed amended complaint (titled "Second Amended Civil Rights Complaint") as the Proposed Amended Complaint. Nonetheless, the Court will consider amendments from both proposed amended complaints. Correspondingly, the Court recommends denying the motions to amend that are part of the Udohs' responses to the dispositive motions [Doc. Nos. 99, 101, 102, 118] as moot because the proposed amendments are incorporated into the later-filed motion to amend. The Court discusses the Proposed Amended Complaint below in the context of whether the Proposed Amended Complaint serves to correct the deficiencies identified in the dispositive motions.

B. Common Deficiencies and Defenses

Substantively, the Udohs' federal claims allege violations of their rights to be free from unreasonable search and seizure and violations of their due process rights. These claims are deficient in multiple ways. The Udohs' voluminous Complaint and invocation of legal terms to characterize their allegations does not satisfy the central requirement that to survive the

dispositive motions, they must state facts that, if true, state a claim for relief. *See Iqbal*, 556 U.S. at 679.

The Court will first describe and analyze the overarching deficiencies in the Complaint and Proposed Amended Complaint, as well as legal defenses asserted by various defendants. The Court will then address the remaining issues in each dispositive motion, followed by the remaining issues in the Proposed Amended Complaint. Finally, the Court will recommend declining to exercise supplemental jurisdiction over the Udohs' state law claims.

1. Minors

The Udohs purport to bring claims on behalf of their minor daughters, K.K.W. and K.C.W. *See generally* (Compl.). But the Udohs are not lawyers, and therefore, they cannot represent any one besides themselves. *See Knoefler v. United Bank of Bismark*, 20 F.3d 347–48 (8th Cir. 1994) ("A nonlawyer . . . has no right to represent another entity . . . in a court of the United States."). This is true even when an unrepresented parent seeks to bring claims on behalf of his or children. *See Bower v. Springfield R-12 Sch. Dist.*, 263 F. App'x 542, 542 (8th Cir. 2008) (per curiam) (stating that "the district court did not err in dismissing the claims of Bower's minor children, as Bower was unable to represent them pro se" (citing *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005))); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) (holding that "a non-attorney parent must be represented by

counsel in bringing an action on behalf of his or her child").[11] Thus, the Court recommends that any claims the Udohs make on behalf of their daughters K.K.W. and K.C.W. be dismissed.

In the Proposed Amended Complaint, the Udohs propose alleging claims on behalf of C.U. and C.U., who are minor children of Emem and Tonya. (Proposed Am. Compl. ¶¶ 7–8). For the same reasons the Udohs cannot bring claims on behalf of K.K.W. and K.C.W., the Udohs cannot, in the absence of representation of counsel, bring claims on behalf of C.U. and C.U. *See Bower*, 263 F. App'x at 542; *Knoefler*, 20 F.3d 347.Therefore, the Udohs' proposal to add claims on behalf of C.U. and C.U. is futile.

2. Fourth Amendment Rights

"Fourth Amendment rights are personal rights, which . . . may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). The Udohs' Fourth Amendment claims are based on alleged facts that various defendants "searched and seized" K.K.W. and K.C.W. during interviews regarding the alleged abuse. *See, e.g.*, (Compl. ¶¶ 89, 94, 97, 101, 102, 104).

To the extent the Udohs purport to make this claim on behalf of K.K.W. and K.C.W., they are not authorized, as litigants proceeding pro se, to represent K.K.W. and K.C.W. at this stage. To the extent the Udohs allege that the interviews comprising "search and seizure"

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[11] Even if the Udohs were represented, there are no allegations that Emem ever had legal custody of K.K.W. and K.C.W. and therefore, he may not have standing to assert claims on their behalf. *See Elk Grove Unified Sch. Dist. v. Newdow*, 541 U.S. 1, 17–18 (2004) (holding that a parent who did not have the authority under state law to make legal decisions for his minor child lacked prudential standing), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Further, at the time the Udohs filed their Complaint, Tonya no longer had physical or legal custody of K.K.W. and K.C.W., and therefore cannot assert claims on K.K.W.'s and K.C.W.'s behalf. *See* (Am. Findings of Fact & Order for Transfer of Legal & Phys. Custody, Ex. 13, Attached to Decl. of Daniel Kaczor, "Kaczor Decl.") [Doc. No. 59-13]; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.").

allegations violated their own Fourth Amendment rights, they have failed to state a claim. While it is at least arguable that a parent may have "Fourth Amendment standing to challenge a seizure involving a minor child," the Udohs do not allege a separate, Fourth Amendment injury related to K.K.W.'s and K.C.W.'s alleged seizures. *See J.B. v. Washington County*, 127 F.3d 919, 928 (10th Cir. 1997). Instead, the Udohs allege that the injury they suffered interfered with their interests in the custody and care of their children. This is, in substance, the same as their substantive due process claim discussed later in this Report and Recommendation. Therefore, the Court recommends that the Udohs' Fourth Amendment claims be dismissed.

The Court construes the Udohs' allegations regarding interference with their parental relationship as claims under substantive due process. *See J.B.*, 127 F.3d at 928 (finding that while a parent may be able to assert a Fourth Amendment challenge regarding seizure of a minor child, the Court need not reach the issue because the parent had "standing under the Fourteenth Amendment to assert a claim that would, if she were successful, result in full compensation for any harm suffered"); *Kia P. v. McIntyre*, 235 F.3d 749, 757–78 (2d Cir. 2000) ("Because [the parent's] claims cannot be analyzed under any other more specific constitutional provision, we must assess them in terms of the Fourteenth Amendment's substantive due-process guarantee."); *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999) (stating that because the parents do not have or have abandoned their Fourth Amendment claims based on their daughter's "examination and removal[,] . . . [i]t is therefore appropriate to analyze whether their claims are redressable as substantive due-process violations").

3. Due Process Rights

The Fourteenth Amendment's due process clause states that "[n]o State . . . shall deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV § 1. The Udohs allege violations of both their substantive and procedural due process rights.

a. Substantive Due Process

The due process clause "contains a 'substantive component' that 'protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.'" *Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811, 816 (8th Cir. 2011) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). "To establish a substantive due process violation, [a plaintiff] must demonstrate that a fundamental right was violated and that the conduct shocks the conscience." *Akins v. Epperly*, 588 F.3d 1178, 1183 (8th Cir. 2009) (footnote omitted). In other words, mere negligence does not constitute a substantive due process violation under § 1983. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Parents have an important substantive due process right in their care and custody of their children. *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005). This right is limited, however, because "the state has a potentially conflicting, compelling interest in the safety and welfare of children." *Id.* "The right to family integrity clearly does not include a constitutional right to be free from child abuse investigations, as the state has a strong interest in protecting the safety and welfare of minor children, particularly where protection is considered necessary as against the parents themselves." *Dornheim v. Sholes*, 430 F.3d 919, 925–26 (8th Cir. 2005) (internal quotation marks omitted). Thus, defining "substantive due process rights held by parents in the context of child abuse investigations" is somewhat problematic. *Manzano v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995). Nonetheless, the Eighth Circuit recognizes "the vital

importance of curbing overzealous suspicion and intervention on the part of health care professionals and government officials, particularly where such overzealousness may have the effect of discouraging parents or caretakers from communicating with doctors or seeking appropriate medical attention for children with real or potentially life-threatening conditions." *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1373 (8th Cir. 1996). Thus, in order to state a claim for a violation of substantive due process rights in the child-abuse context, a plaintiff must allege that the defendant's actions were not based on a reasonable suspicion of abuse and were disproportionate under the circumstances. *Id.* A substantive due process violation is extraordinary and egregious. *Schmidt*, 655 F.3d at 819. In contrast, an interpretation of what the law requires that is reasonable, but erroneous, does not constitute a substantive due process violation. *Id.*

The Udohs allege that two statutes are unconstitutional because they violate the Udohs' substantive due process rights.[12] (Compl. ¶ 91). One statute describes the duties of welfare and law enforcement agencies when they receive a report of child abuse. Minn. Stat. § 626.556, subdiv. 10 (2012).[13] The other statute permits a peace officer to take a child into immediate custody "when a child is found in surroundings or conditions which endanger the child's health or welfare or which such peace officer reasonably believes will endanger the child's health or welfare." Minn. Stat. § 260C.175, subdiv. 1(2)(ii).

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[12] Whether the Defendants violated the Udohs' substantive due process rights when acting consistent with these statutes is discussed below in the context of the Defendants' dispositive motions.

[13] The events in this case took place when the 2012 version of this statute was effective. Therefore, the Court cites to the 2012 version of this statute unless otherwise noted.

As a threshold matter, the Udohs have failed to adequately allege why these statutes are unconstitutional.[14] State statutes are presumed to be constitutional, and therefore, the party arguing otherwise has a "heavy burden" to demonstrate the unconstitutionality of the statute. *See Fitz v. Dolyak*, 712 F.2d 330, 333 (8th Cir. 1983). The Udohs allege that these statutes' "deficiencies and inadequacy constitutes deliberate indifference to account for parental fundamental rights protected by the Fourteenth Amendment is the casual [sic] link between Bartley and Lynch['s] actions and the deprivation of Plaintiffs['] federally protected rights." (Compl. ¶ 91). Merely alleging that a statute is unconstitutional does not give adequate notice to Defendants of **how** a statute is unconstitutional. *See Kalberer v. Palmer*, No. 13-cv-1665 (PJS/FLN), 2014 WL 4540326, at *2 (D. Minn. Sept. 11, 2014) (Schiltz, J.) ("Kalberer's amended complaint fails to give adequate notice of any way in which the [statute] is unconstitutional.").

This deficiency is especially problematic with respect to the Udohs' claims against the various government entities. *Cf. Slaven v. Engstrom*, 710 F.3d 772, 781 n.4 (8th Cir. 2013) ("Whether, and if so when, a municipality may be liable under § 1983 for its enforcement of state law has been the subject of extensive debate in the circuits."); *see also Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991) ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection

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[14] The Udohs allege that both statutes are unconstitutional in light of *Troxel v. Granville*, 530 U.S. 57, 65 (2000). (Compl. ¶¶ 76, 92). *Troxel* does not apply here. *Troxel* dealt with the visitation rights of grandparents and the page the Udohs cite merely affirms that parents have a liberty interest in the custody and care of their children. Reference to this case does not state a claim. The Udohs also refer to *Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in the judgment). (Compl. ¶¶ 76, 92). In *Morales*, Justice Breyer wrote that an ordinance was unconstitutional because the policeman applying it had too much discretion. 527 U.S. at 71. The Udohs fail to explain how this relates to their due process challenge to these statutes. *See* (Compl. ¶¶ 76, 92).

to the alleged violation is more attenuated, than the 'policy' of enforcing state law."); *Vives v. City of New York*, 524 F.3d 346, 353 (2d Cir. 2008) (holding that a municipality cannot be held liable under *Monell* for enforcing a state law).[15] But even if a municipality can be held liable for enforcing a state statute under 42 U.S.C. § 1983, a formulaic recitation that statutes are unconstitutional is insufficient to state a claim for relief. *See Twombly*, 550 U.S. at 555. This is especially true in this District because the Eighth Circuit has already determined that section 260C.175, subdivision 1 does not violate a parent's substantive due process rights where a custodial parent threatens a child's welfare. *K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 (8th Cir. 2006) ("In cases in which continued parental custody poses an imminent threat to the child's health or welfare, emergency removal of children without a court order is constitutionally permitted."). In other words, the Eighth Circuit has already determined that although this statute may technically interfere with a parent's relationship, such interference is not a violation of the constitution. *See id.* Here, K.K.W. reported that Emem abused her and K.C.W., and therefore, removing them from the home under section 260C.175, subdivision 1(2)(ii), where they lived with Emem does not rise to the level of a constitutional violation.

The Udohs also allege official capacity claims against the individual defendants.[16] The real parties in interest for these claims are the respective government entities for whom the defendants work. *See Dornheim*, 430 F.3d at 926 ("A suit against a governmental employee in his official capacity is treated as a suit against the municipality he serves."). In order to establish that a governmental entity committed a constitutional violation for the purpose of 42 U.S.C. § 1983, a plaintiff must allege that the violation was committed pursuant to the entity's policy or

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[15] In *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978), the United States Supreme Court held that a local government entity may be subject to § 1983 liability when its policy or custom causes a constitutional injury.

[16] The individual-capacity claims against the individual defendants are discussed below.

custom. *Monell*, 436 U.S. at 694. The Udohs allege that the various government entities have a policy, custom, and procedure, which violates their due process rights. To the extent their allegations are based on the specific facts of this case, an isolated instance is insufficient to establish a policy or custom. *See Ulrich v. Pope County*, 715 F.3d 1054, 1061 (8th Cir. 2013). With respect to the School District, the Udohs refer to "Procedure 414." (Compl. ¶ 75); *see* (Procedure 414, Ex. 4, Attached to Decl. of Margaret J. Westin) [Doc. No. 70].[17] But they fail to allege why the School District policy resulted in a deprivation of the Udohs' constitutional rights. To the extent they allege that the defendant entities actions are premised on its policy, the Udohs failed to allege any specific custom or policy of the other defendant entities that violates their due process rights. Further, to the extent the Udohs allege the government entities have a custom or policy of following state law, the claim fails for the reasons stated above. For these reasons, the Court recommends that substantive due process claims against the individual defendants in their official capacities and against the government entities be dismissed.

b. Procedural Due Process

"To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law." *Schmidt*, 655 F.3d at 817 (internal quotation marks omitted). "The requirements of due process are flexible and specific to each particular situation." *Senty-Haugen v. Goodno*, 462 F.3d 876, 887–88 (8th Cir. 2006) (internal quotation marks omitted). The "most important procedural mechanisms" for ensuring due process has been provided are notification of the factual basis of the deprivation

[17] This document is referenced in the Complaint. Therefore, even though the School District provided the document to the Court, the Court may consider it in this context. *See Miller*, 688 F.3d at 931.

and "a fair opportunity for rebuttal." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005). "The circumstances of the deprivation dictate what procedures are necessary to satisfy" procedural due process. *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005).

The Udohs allege that all Defendants violated their procedural due process rights by failing to provide them a hearing at various stages of the child abuse investigation.[18] (Compl. ¶¶ 91, 214). But more broadly, they allege that Defendants' application of Minnesota Statutes sections 626.556, subdivision 10 and section 260.165, subdivision 1(c)(2) deprived them of "their liberty interest in familial integrity without due process of law" in violation of the Fourteenth Amendment of the U.S. Constitution and sections 7 and 10 of the Minnesota Constitution. (Compl. ¶¶ 91, 214, 219–23).

The threshold deficiency in the Udohs' procedural-due-process claims is that the Udohs have failed to give adequate notice to defendants regarding the particular deficiencies the established procedures suffered. *See Kalberer*, 2014 WL 4540326, at *2. The Udohs do not allege that established procedures were not followed. To the contrary, they allege that the procedures established in the above-cited statutes deprive them of due process. Again, the mere allegation that a statute **is** unconstitutional, without explaining **why**, is insufficient to state a claim. In fact, the Eighth Circuit has already determined that the procedural process established in section 626.556 comports with procedural due process requirements. *See Bohn v. Dakota County*, 772 F.2d 1433, 1436 (8th Cir. 1985). In their Proposed Amended Compliant, the Udohs allege that Defendants "waited for more than four days after the children had been taken into custody" before initiating a hearing. (Proposed Am. Compl. ¶ 100). But K.K.W. and K.C.W.

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[18] Because the Udohs do not make any factual allegations that Defendants' specific actions constituted procedural due process violations, the Court only addresses the procedural due process in the context of the constitutionality of the statutes the Udohs identified.

were taken into protective custody on Thursday, February 21, 2013, around 2:00 p.m. and the 72-hour period excludes Saturdays, Sundays, and holidays. (Compl. ¶¶80–82); (Ex. D at 5, Attached to Compl.); (Ex. 2, Attached to Kaczor Decl.) [Doc. No. 59-2]; *see also* Minn. Stat. § 260C.176, subdiv. 2(b). A hearing was scheduled and took place on Tuesday, February 26, 2013, at 1:30 p.m. (Ex. D at 2, Attached to Compl.). Thus, it appears that a hearing was held within seventy-two hours, exclusive of weekends, of the issuance of the hold on K.K.W. and K.C.W. The Udohs' citation to *Whisman through Whisman v. Rinehart*, 119 F.3d 1303, 1311 (8th Cir. 1997), does not change the Court's analysis. *See* (Proposed Am. Compl. ¶ 91). In *Whisman*, the parent was deprived of her child for nearly a month without a hearing. 119 F.3d at 1310. Here, there is nothing that demonstrates that the Defendants' compliance with state statute constitutes a deprivation of due process. The Udohs also allege that Defendants did not offer a pre- or post-deprivation notice and hearing. (Proposed Am. Compl. ¶ 109). The documents the Udohs submitted with their Complaint, however, demonstrate that Tonya was notified of the hearing on February 26, 2013, and public records show that Emem and Tonya both attended the hearing. (Ex. D at 2, Attached to Compl.); *see also* (Ex. 2, Attached to Kaczor Decl.).

While this case is only at the pleading stage, the Udohs must still make factual allegations that "raise a right to relief above the speculative level. *See Twombly*, 550 U.S. at 555. Merely alleging that statutes are unconstitutional does not satisfy this burden. *See id.* Therefore, the Court recommends the Udohs' procedural due process claims against all defendants be dismissed.

4. Qualified Immunity

"Qualified immunity shields government officials from liability in their individual capacity so long as the official has not violated 'clearly established statutory or constitutional

rights of which a reasonable person would have known.'" *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In other words, the two prongs of the qualified immunity analysis are (1) whether a defendant deprived the plaintiff of a constitutional right, and (2) whether that right was "clearly established." *See id.* In order for a constitutional right to be considered clearly established, "'the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Manzano*, 60 F.3d at 509 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A court may discuss either prong of the analysis first. *Parrish*, 594 F.3d at 1001–02 (citing *Pearson v. Callahan*, 129 S. Ct. 808, 919 (2009)). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (internal quotation marks omitted). "In cases where the rights of the parent are balanced against the state's interest in protecting the child, the qualified immunity defense is difficult to overcome." *K.D.*, 434 F.3d at 1055. The availability of qualified immunity to the individual defendants is discussed below in the context of each dispositive motion.

5. *Rooker-Feldman* Doctrine and Collateral Estoppel

Several Defendants argue that the *Rooker-Feldman* doctrine, the doctrine of collateral estoppel, or both, bar the Udohs' claims against them based on the arguments Emem raised during the appeal of his criminal convictions. (Mem. Supporting Sch. District Defs.' Mot. for J. on the Pleadings) [Doc. No. 67 at 8–9]; (Hennepin County & CornerHouse Defs.' Mem. in Supp. at 17–19); (City Defs.' Mem. in Supp. of Mot. to Dismiss) [Doc. No. 93 at 16]; *see also Udoh*, 2016 WL 687328, at *5. Because the analysis is similar with respect to several Defendants, the Court addresses these principles here.

a. ***Rooker-Feldman***

The *Rooker-Feldman* doctrine states that federal courts lack subject-matter jurisdiction over some challenges to state-court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485–87 (1983); *see also* 28 U.S.C. § 1738 (stating that judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken"). "This jurisdictional bar extends not only to straightforward appeals but also to more indirect attempts by federal plaintiffs to undermine state court decisions." *Ballinger v. Culotta*, 322 F.3d 546, 548 (8th Cir. 2003) (internal quotation marks omitted). When a claim is "inextricably intertwined with specific claims already adjudicated in state court," a federal court lacks jurisdiction. *Id.* at 549 (internal quotation marks omitted). A claim is inextricably intertwined with claims already adjudicated in state court "if the federal claim succeeds only to the extent the state court wrongly decided the issue before it." *Id.* (internal quotation marks omitted).

In his appeal challenging his conviction, Emem argued that the CornerHouse interviews and Dr. Thompson's testimony regarding her interviews of K.K.W. and K.C.W. should not have been admitted into evidence "on various grounds," including that they were done without parental consent. *Udoh*, 2016 WL 687328, at *5. The Minnesota Court of Appeals concluded that "the interviews did not violate any constitutional rights that may be asserted by [Emem] Udoh." *Id.* at *6. As an initial matter, the Minnesota Court of Appeals's decision is limited to the CornerHouse interviews and Dr. Thompson's testimony. *See id.* at *5. Thus, any jurisdictional bar would only apply to those claims. The jurisdictional bar does not apply, however, to claims against the Hennepin County Defendants that are not related to the CornerHouse interviews are

excluded, or claims that the School District or the City Defendants violated Emem's constitutional rights. None of the parties asserting that *Rooker-Feldman* applies explain why the Court should expand the narrow scope of the Minnesota Court of Appeals's decision on the CornerHouse interviews and Dr. Thompson's testimony, and this Court declines to do so in the absence of briefing addressing this issue.

Second, the *Rooker-Feldman* doctrine "does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment." *Lance v. Dennis*, 546 U.S. 459, 466 (2006). Tonya was not a party to Emem's criminal proceedings. Thus, she appears to be able to allege claims that were addressed in Emem's criminal proceedings. Again, the Defendants do not address this issue and the Court declines to do so *sua sponte*.

Therefore, to the extent the School District and City Defendants seek dismissal on this ground, the Court recommends those portions of their motions be denied. The Court discusses the Hennepin County and CornerHouse Defendants' argument related to *Rooker-Feldman* below.

b. Collateral Estoppel

Collateral estoppel applies when the following conditions are met:

> (1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Hauschildt v. Beckingham, 686 N.W.2d 829, 837 (Minn. 2004) (internal quotation marks omitted). Here, the elements are not met because the issues in Emem's appeal are not identical to the claims against the School District and the City Defendants. Emem's arguments in his appeal do not allege that the School District Defendants or the City Defendants violated his constitutional rights. *See generally* (Exs. 11 & 12, Attached to Kaczor Decl.) [Doc. Nos. 59-11,

59-12]. To the extent Emem argued, on appeal of his criminal convictions, that any interviews at the school or CornerHouse should not have been admitted because they violated his constitutional rights, it appears that argument is that the interviews took place and were admitted into evidence, not that the School District Defendants or the City Defendants participated in the alleged constitutional violations. *See* (*Pro Se* Suppl. Br. at 11, Ex. 11).

The Minnesota Court of Appeals also viewed the argument as limited to the interviews themselves, instead of reaching the allegedly unconstitutional behavior of the School District Defendants and City Defendants. The Minnesota Court of Appeals stated that "the interviews did not violate any constitutional rights that may be asserted by [Emem] Udoh." *Udoh*, 2016 WL 687328, at *6. Thus, the Court cannot conclude that the issues raised in Emem's criminal conviction appeal are identical to the claims raised against the School District Defendants and City Defendants in this case, as required for the application of collateral estoppel. *See Hauschildt*, 686 N.W.2d at 837. Therefore, the Court recommends that the School District Defendants' and the City Defendants' motions be denied to the extent they rely on collateral estoppel.

C. School District Defendants

The Udohs allege the individual School District Defendants—Wallen, Wegerson, and Mock—violated their constitutional rights by removing K.K.W. and K.C.W. from their classrooms for interviews regarding the abuse allegations. (Compl. ¶¶ 57, 65, 70–71). Because Wallen, Wegerson, and Mock are entitled to qualified immunity, the Court recommends that the individual-capacity claims against them be dismissed.

Given the difficulty in defining the scope of the Udohs' substantive due process rights in the context of a child abuse investigation, the Udohs have not plausibly alleged that the

individual School District Defendants violated the Udohs' rights merely by removing K.K.W. and K.C.W. from their classrooms to further investigate abuse. *See Schmidt*, 655 F.3d at 819 ("It is not clear that a parent's fundamental liberty interest in the care, custody, and management of her children includes unfettered access to the children during a school day."). The interviews were short and the Udohs fail to allege facts that, if true, demonstrate that such a brief interruption of the K.K.W.'s and K.C.W.'s education violates their substantive due process rights, especially in the context of a child abuse allegation or investigation. *See* (Exs. B & C, Attached to Compl.).

Even if such a substantive due process right existed and was violated, Wallen, Wegerson, and Mock are entitled to qualified immunity because the Udohs have failed to allege facts that establish Wallen, Wegerson, or Mock should have understood that their actions violated the Udohs' rights. The Eighth Circuit has held that "when a state official pursuing a child abuse investigation takes an action which would otherwise unconstitutionally disrupt familial integrity, he or she is entitled to qualified immunity, if such an action is properly founded upon a reasonable suspicion of child abuse." *Manzano*, 60 F.3d at 511.

Wallen is a social worker, and because of her position, she must make a report to an appropriate agency if she "knows or has reason to believe a child is being neglected or physically or sexually abused." Minn. Stat. § 626.556, subdiv. 3. In this instance, Wallen received information that K.K.W. was the victim of abuse. (Compl. ¶ 57). In pursuit of her duty to report this information, she removed K.K.W. from class to get further information. *See* (*id.*). Nothing in the Complaint suggests that Wallen's suspicion of child abuse was unreasonable.

Bartley, a CPS social worker, asked Wegerson to remove K.K.W. from class and asked Mock to remove K.C.W. from class. (Compl. ¶¶ 65, 70–71). To the extent these actions

constituted a substantive due process violation, Wegerson and Mock are entitled to qualified immunity because they had no reason to believe that their actions would violate the Udohs' constitutional rights. State law requires school officials to cooperate with abuse investigations, which demonstrates that Wegerson's and Mock's actions to facilitate such interviews were reasonable.[19] *See* Minn. Stat. § 626.556, subdiv. 10(d) (describing interaction between investigating agencies and schools); *see also Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 933 (8th Cir. 2016) ("[R]eliance on an official policy that explicitly sanctioned the conduct in question is a relevant factor in considering the objective legal reasonableness of an official's action" (alternations, quotations, and omissions omitted)).

In 1990, the Minnesota Supreme Court determined that under state law, "an interview of a reported victim of child abuse without parental notice and consent when the alleged perpetrator is unknown does not violate the parent's right to familial privacy." *R.S. v. State*, 459 N.W.2d 680, 690 (Minn. 1990). This holding further demonstrates that Wallen, Wegerson, and Mock had no reason to think that interviewing K.K.W. and K.C.W. would interfere with the Udohs' parental rights.

Thus, the Court concludes that Wallen, Wegerson, and Mock are entitled to qualified immunity with respect to claims against them in their individual capacities.

In conclusion, the Court finds the Udohs have failed to state a claim against Wallen, Wegerson, and Mock in their individual capacities. And based on the Court's previous discussion, the Udohs have also failed to state a claim against the School District and against Wallen, Wegerson, and Mock in their official capacities. Therefore, the Court recommends the School District's Motion for Judgment on the Pleadings be granted.

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[19] The Udohs allege that Bartley, who interviewed K.K.W. and K.C.W. at their respective schools complied with state law. (Compl. ¶¶ 64, 70).

D. Hennepin County and CornerHouse Defendants

With respect to the Hennepin County and CornerHouse Defendants, the Udohs make the following allegations. Norton, a CPS supervisor, assigned Bartley to interview K.K.W. and K.C.W. on February 21, 2013. (Compl. ¶¶ 64); *see also* (*id.* ¶ 69). Blair, a social worker, brought K.K.W. and K.C.W. from their foster home to CornerHouse for interviews and examinations with Dr. Thompson. (Compl. ¶ 104). Dr. Thompson interviewed and examined K.K.W. and K.C.W. (*Id.* ¶¶ 105, 107). Daniel Engstrom ("Engstrom") is the director of CPS. (*Id.* ¶ 10). On February 25, 2013, Ray interviewed K.K.W. and Koncar interviewed K.C.W. (*Id.* ¶¶ 95–96). Patricia Harmon ("Harmon") is CornerHouse's executive director. (*Id.* ¶ 43).

1. Defendants Norton and Ray

The Hennepin County and CornerHouse Defendants argue that Norton and Ray have not been served, which is likewise reflected in documents the Udohs submitted to the Court. *See* (Hennepin County & CornerHouse Defs.' Mem. in Supp. at 33); (Summons Returned Unexecuted) [Doc. No. 42].

A court must dismiss an action against a defendant who has not been served within ninety days after the plaintiff filed the complaint, unless the plaintiff "shows good cause for the failure." Fed. R. Civ. P. 4(m). The summonses for Norton and Ray were returned unexecuted, and nothing on the docket reflects further attempts to serve Norton and Ray, although they have appeared through counsel. *See* (Summonses Returned Unexecuted at 2, 4). The Court concludes that the Udohs have not served Norton and Ray within the applicable time period. Furthermore, the record does not show that the Udohs have "good cause" for their failure to serve Norton and

Ray.[20] *See* Fed. R. Civ. P. 4(m). Therefore, the Court recommends that all claims against Norton and Ray be dismissed without prejudice. Nonetheless, in light of the fact that the claims against them overlap with the claims against the other Hennepin County and CornerHouse Defendants, they remain part of the Court's discussion below.

2. *Rooker-Feldman* Doctrine

The Hennepin County and CornerHouse Defendants argue that the *Rooker-Feldman* doctrine bars the claims against them. (Hennepin County & CornerHouse Defs.' Mem. in Supp. at 17–19). The Court agrees with respect to Emem's claims only. As stated above, in his criminal appeal, Emem challenged the constitutionality of the interviews that took place at the school, in which Bartley participated, and at CornerHouse. *Udoh*, 2016 WL 687328, at *5. Emem challenged these interviews under both the U.S. and Minnesota constitutions. *See, e.g.*, (Ex. 11 at 11, Attached to Kaczor Decl.); (Ex. 12 at 12, Attached to Kaczor Decl.). Thus, the Minnesota Court of Appeals's determination that "the interviews did not violate any constitutional rights that may be asserted by [Emem] Udoh" bars Emem's claims against the Hennepin County and CornerHouse Defendants with respect to the interviews. *See Udoh*, 2016 WL 687328, at *6.

The parties did not brief, however, the impact of Emem's arguments during the appeal of his criminal conviction on Tonya's claims in this case. *See Lance*, 546 U.S. at 466. Tonya, who was not a party to Emem's criminal proceedings, is not automatically foreclosed from making claims that overlap with those addressed in Emem's criminal proceedings. Thus, the Court's determination that it lacks subject matter jurisdiction over constitutional claims raised against the

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[20] The Udohs seek leave "to amend any deficiencies in the complaint and in their service of process," but this conclusory statement does not provide good cause with respect to why Norton and Ray were not served. *See* (Reply Mem. to Hennepin County Defs.' & CornerHouse Defs.' Mot. to Dismiss) [Doc. No. 99 at 40]. Further, the Udohs knew as early as January 28, 2017, that Norton and Ray had not been served and did not take any action. *See* (Summonses Returned Unexecuted).

Hennepin County and CornerHouse Defendants for their participation in interviews of K.K.W. and K.C.W. is limited to Emem's claims only; whether Tonya has adequately alleged claims against these defendants requires further analysis.[21]

3. Individual Capacity Claims

The Court has already determined that the Udohs have failed to state claims against the Hennepin County and CornerHouse individual defendants in their official capacities. Similarly, the Udohs have not plausibly alleged that the Hennepin County and CornerHouse Defendants, in their individual capacities, violated the Udohs' substantive due process rights as parents.

Bartley interviewed K.K.W. for ten minutes and interviewed K.C.W. for fifteen minutes. (Ex. B at 3–7, Attached to Compl.); (Ex. C at 3–11, Attached to Compl.). The Udohs allege that these interviews were conducted in an incompetent manner and "did not comply with any minimally acceptable techniques for interrogating children about abuse." *See* (Compl. ¶¶ 67, 73). Given the short duration of these interviews, the Udohs fail to allege that the mere interviews violated their substantive due process rights in the context of a child abuse investigation. The manner of interview does also does not rise to the level of a constitutional violation and the Udohs' specific allegations are belied by the transcripts submitted. Nothing in the transcripts suggest that, as the Udohs allege, Bartley repeatedly asked the same questions or refused to let either child leave the room until they made certain statements. *Cf.* (Compl. ¶¶ 67, 73); (Exs. B & C, Attached to Compl.).

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[21] The Court's analysis here applies equally to the argument that the Hennepin County and CornerHouse Defendants make in passing that collateral estoppel applies. *See* (Hennepin County & CornerHouse Defs.' Mem. in Supp. at 19 n.13). The parties do not brief whether and to what extent privity applies to estop Tonya's claims and the Court declines to consider the issue *sua sponte*.

One part of the Complaint merits further discussion. The Udohs allege that Bartley "physically observed and examined [K.K.W.'s and K.C.W.'s] private bodies."[22] (Compl. ¶¶ 66, 72). On its face, these allegations seem inconsistent with Bartley's role as a social worker, the fact that he is not a physician, and the context of the interview taking place in a school. The Udohs are entitled to have the facts alleged to be considered true at this stage. *Lind*, 688 F.3d at 405. But this particular fact seems to be inconsistent with the documentation the Udohs themselves provided to the Court, namely, the transcripts of Bartley's interviews. The Udohs do not allege that the transcripts are incomplete or manipulated. The transcripts do not reflect any type of physical exam, or that some portions of the interviews were not recorded. Although the Udohs allege that Bartley concluded "he found no physical signs of sexual abuse" as the result of either interview, his report states that there are no "**obvious** signs of abuse or neglect." *Compare* (Compl. ¶¶ 66, 72) *with* (Ex. D at 6–7, Attached to Compl.) (emphasis added). Thus, these factual allegations do not appear sufficiently well-pleaded, in light of the inconsistent transcripts, to plausibly give rise to relief. *See Iqbal*, 556 U.S. at 679. The Udohs also allege that Bartley falsely reported that K.K.W. did not feel safe in her home. (Compl. ¶ 80); *see also* (Ex. D at 7, Attached to Compl.). It is true that Bartley did not ask this exact question, but K.K.W. did report abuse during Bartley's interview. *See* (Ex. B at 6, Attached to Compl.). Thus, the Court cannot conclude that Bartley's erroneous report rises to the level of a deprivation of due process. The Udohs also allege that Bartley transported K.K.W. and K.C.W. from their foster home to CornerHouse for interviews in violation of their due process rights. Nothing about this procedure "shocks the conscious" in light of K.K.W.'s abuse report to Bartley on February 21, 2013.

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[22] In their Proposed Amended Complaint, the Udohs compare this action to a "strip search" and "akin to sexual abuse." (Proposed Am. Compl. ¶ 111) (citing *Tenenbaum v. Williams*, 862 F. Supp. 962, 973 (E.D.N.Y. 1994), *aff'd in part & vacated in part*, 193 F.3d 581 (2d Cir. 1999)).

Further, in light of K.K.W.'s report of abuse to Bartley, the Court cannot conclude that his participation in K.K.W.'s and K.C.W.'s removal from their home constituted a violation of the Udohs' due process rights when K.K.W. clearly identified Emem, with whom she lived, as the perpetrator of the abuse, and said that he engaged in the same conduct with K.C.W. *See* (Ex. B at 7, Attached to Compl.).

Because Udohs have not established that Bartley violated their constitutional rights, the Court correspondingly recommends that their malicious prosecution claim against Bartley be dismissed. *See* (Compl. ¶ 174). A malicious prosecution claim may only be maintained "if the defendants' conduct also infringes some provision of the Constitution or federal law." *Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990). Because the Udohs have failed to state such a claim with respect to Bartley, the malicious prosecution claim fails as well.

The Udohs allege no specific acts that Norton, a CPS supervisor; Engstrom, the CPS director; or Harmon, CornerHouse's executive director, directly took that violated the Udohs' substantive due process rights. Because there is no vicarious liability in claims brought under 42 U.S.C. § 1983, a plaintiff must allege that a government official directly participated in the constitutional violation, or "his failure to train or supervise the offending actor caused the deprivation." *Parrish*, 594 F.3d at 1001. Because the Udohs do not allege that Norton, Engstrom, or Harmon directly participated in a constitutional violation, or that their failure in training or supervision caused a deprivation, the Udohs have failed to state substantive-due-process claims against Norton, Engstrom, and Harmon.

The Udohs have also failed to allege that Blair or Dr. Thompson violated their substantive due process rights. At the time Blair transported K.K.W. and K.C.W. to CornerHouse for an exam with Dr. Thompson on March 6, 2013, K.K.W. and K.C.W. were in foster care. At

this point, both K.K.W. and K.C.W. had reported that Emem had sexually abused them during interviews at CornerHouse. *See, e.g.* (Ex. F at 14, Attached to Compl.); (Ex. G at 31, Attached to Compl.). Thus, in the context of child abuse investigations, the Udohs have failed to allege that Blair or Dr. Thompson violated their substantive due process rights in comparison to the government's interest in protecting children. Similarly, the Udohs have failed to allege that Ray and Koncar, who interviewed K.K.W. and K.C.W., respectively, violated their due process rights by interviewing K.K.W. and K.C.W. during the course of the child abuse investigation. *See Fitzgerald v. Williamson*, 787 F.2d 403, 408 (8th Cir. 1986) ("[I]t does not shock our conscience or otherwise offend our judicial notions of fairness to hear that caseworkers responsible for an allegedly abused child arranged for the child to be examined by a psychologist and, after receiving confirmation of child abuse, reduced the parents' visitation rights and permitted the child to remain with her foster parent when the foster parent moved out of the parents' geographical area.").

Even if the individual Hennepin County and CornerHouse Defendants violated the Udohs' substantive due process rights, they are entitled to qualified immunity. At the point of these Defendants' involvement, K.K.W. had reported, on at least two separate occasions, that Emem abused her. The Udohs make much of the fact that K.K.W. had previously reported that a student assaulted her, and that report was ultimately determined to be false. *See, e.g.*, (Compl. ¶¶ 58, 79). The Udohs do not explain why K.K.W.'s past report should have put any Defendant on notice that her report regarding Emem was false. As time progressed, K.K.W.'s reports remained consistent, and K.C.W. ultimately ended up reporting abuse after initially denying it. There is nothing on the face of the Complaint that suggests that Defendants' suspicion of child abuse was unreasonable, or that any action they took was disproportionate to the circumstances.

This conclusion is further supported by the Udohs' allegations that some of these Defendants were following state law and by the *R.S.* case, which demonstrates that investigations under the statute do not violate a parents' substantive due process rights. In other words, the individual Hennepin County and CornerHouse Defendants are entitled to qualified immunity. *See Stanton*, 134 S. Ct. at 5.

In the Proposed Amended Complaint, the Udohs also allege that Bartley came to their home to obtain K.K.W.'s medications and insisted on seeing C.U. and C.U. over Tonya's objections. (Proposed Am. Compl. ¶ 84). Tonya relented when Bartley "informed [her] that any refusal will subject . . . C.U. and C.U. to removal from [the] home." (*Id.*). Tonya eventually relented, and while there, "Bartley undressed both children from their blankets and swaddles to observe for any signs of abuse or neglect while the children were asleep." (*Id.*). Threating to take C.U. and C.U. away from the Udohs does not rise to the level of a constitutional violation because it is not, as pleaded here, "so brutal or wantonly cruel as to shock the conscience." *See King v. Olmstead County*, 117 F.3d 1065, 1067 (8th Cir. 1997). Even if Bartley violated the Udohs' substantive due process rights during this visit, he is entitled to qualified immunity because at this point, K.K.W. and K.C.W. had reported that Emem abused them. Thus, the suspicion of child abuse was reasonable in light of the fact that Emem lived with two other children – C.U. and C.U. – and Bartley's observation of C.U. and C.U. to look for obvious signs of abuse were, while perhaps unconventional, not disproportionate to the circumstances.

Based on the foregoing analysis, the Court concludes that the Udohs have failed to state a claim that the individual Hennepin County and CornerHouse Defendants, in their individual capacities, violated their substantive due process rights. Even if such claims had been adequately

alleged, the individual Hennepin County and CornerHouse Defendants are entitled to qualified immunity in their individual capacities.

Because the Court concludes that the Udohs have failed to state a claim against the Hennepin County and CornerHouse Defendants in their individual capacities, and because the Court previously determined that the Udohs' official capacity claims and claims against government entities fail, the Court recommends that their Motion to Dismiss be granted.

E. State Defendants

The Udohs named State Defendants DHS and Johnson, DHS's deputy commissioner, as Defendants.[23] (Compl. ¶¶ 10, 14). The Udohs' claims against Johnson are that Johnson "put in place" unidentified regulations, policies, and customs of DHS, which various defendants used to violate the Udohs' constitutional rights. (*Id.* ¶¶ 64, 69, 76, 83, 85, 90, 104, 111). The Udohs allege that DHS's laws or statute permit removal of children from parental custody without a warrant, court order, probable cause, or parental consent, which interferes with their parental rights. (*Id.* ¶¶ 90, 101, 111).

The Udohs do not allege that Johnson took any direct action that resulted in a constitutional violation, nor do they allege that he failed to train or supervise DHS employees that caused constitutional violations. Therefore, any claims against him in his individual capacity must be dismissed. *See Parrish*, 594 F.3d at 1001.

Because the Court concludes that the Udohs have failed to state a claim against Johnson in his individual capacity, and the Court's previous discussion concluded the Udohs' official-

[23] The Udohs allege Engstrom, Bartley, Norton and Blair are DHS officers. (Compl. ¶ 15). Even if they were, which the State Defendants and the Hennepin County Defendants dispute, the claims against Engstrom, Bartley, Norton, and Blair should be dismissed for the reasons identified above.

capacity claims and claims against government entities fail, the Court recommends that the State Defendants' Motion for Judgment on the Pleadings be granted.

F. The City Defendants

The Udohs allege claims against three City Defendants in their individual capacities: Parker, Lynch, and Pregler. Parker was the law enforcement officer who spoke to K.K.W. with Bartley at her school. (Compl. ¶ 58). Lynch signed the 72-hour hold and observed K.K.W.'s and K.C.W.'s interviews at CornerHouse, and Lynch, Pregler, and Bartley discussed Bartley's interviews with K.K.W. and K.C.W. (*Id.* ¶¶ 80, 95–96); (Ex. E at 9, Attached to Compl.).

The Udohs have failed to allege that the City Defendants, in their individual capacities, violated their substantive due process rights. Parker's involvement in interviewing K.K.W. was brief, and was done in the context of a child abuse investigation. The Udohs fail to allege that investigating a child abuse investigation in this manner is so egregious that it shocks the conscious. Further, Lynch, signed the 72-hour hold under a Minnesota statute. There is nothing in the Complaint that suggests that this was improper in light of Bartley's interviews where K.K.W. stated that Emem had abused her and K.C.W. *See* (Ex. B at 7, Attached to Compl.); *K.D.*, 434 F.3d at 1056 ("In cases in which continued parental custody poses an imminent threat to the child's health or welfare, emergency removal of children without a court order is constitutionally permitted."). Finally, the Udohs fail to allege facts that demonstrate that Lynch and Pregler's mere participation in a discussion regarding Bartley's interviews, and Lynch's observation of the CornerHouse interviews, violated their substantive due process rights.

Even if the Udohs had alleged a violation of their substantive due process rights, Parker, Lynch, and Pregler would be entitled to qualified immunity. K.K.W. and K.C.W. reported abuse, and they took action consistent with those reports. There is nothing in the Complaint that

suggests that their suspicions of abuse were unreasonable, or that their actions were disproportionate to the circumstances. The Udohs allege that law enforcement officers were acting in pursuit of law enforcement goals rather than in K.K.W.'s and K.C.W.'s best interests. *See e.g.*, (Compl. ¶¶ 58, 62–63, 75–76, 82–83, 89–90, 95–96, 102, 104–05, 107, 177, 205). But the Court must examine "whether a reasonable officer could believe the removal of [the children] to be lawful in light of the information they possessed," not the officers' subjective intent. *K.D.*, 434 F.3d at 1056 n.7 (citing *Harlow*, 457 U.S. at 817–19). As stated above, this conclusion is supported by the Udohs' allegations that Parker, Lynch, and Pregler acted according to state law, and the fact that Minnesota case law that states that child abuse investigations do not violate due process rights. *See R.S.*, 459 N.W.3d at 690. Therefore, the Court concludes that the Udohs have failed to state a claim upon which relief can be granted against Parker, Lynch, and Pregler.

In the Proposed Amended Complaint, the Udohs allege that Lynch did not conduct his own investigation prior to authorizing removal of the children under section 260C.175 of the Minnesota Statutes. (Proposed Am. Compl. ¶ 82). Nothing in that statute requires the officer authorizing the removal to personally conduct an investigation, and the Udohs do not further explain why this requirement must exist to protect their constitutional rights. They allege that "[t]here was no indication or report suggesting that the children['s] home was unhygienic and potential[ly] unsuitable for the children to live," but that is contradicted by the exhibits the Udohs provided. (*Id.*) Specifically, based on the Udohs' own allegations, Lynch and Bartley spoke after Bartley interviewed K.K.W. and K.C.W. at school, and K.K.W. alleged that Emem abused both K.K.W. and K.C.W. (Ex. B at 6–7). Thus, this additional allegation regarding Lynch does not change the Court's previous conclusion that the Udohs have failed to allege that Lynch violated their constitutional rights, and even if she did, she is entitled to qualified immunity.

Based on the foregoing analysis, and the Court's previous analysis with respect to official-capacity claims and claims against government entities, the Court recommends that the City Defendants' Motion to Dismiss be granted.[24]

G. Conspiracy Claims

The Udohs allege that various defendants conspired to deprive them of their constitutional rights in violation of 42 U.S.C. § 1983 and § 1985. (Compl. ¶¶ 195–207). Section 1985 states in part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).[25] This Section does not provide any substantive right. *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 833 (1983). Instead, "[t]he rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere . . . ."

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[24] Because the Court does not rely on evidence outside the pleadings in its analysis, it declines to convert the City Defendants' motion into one for summary judgment. *See* Fed. R. Civ. P. 12(d).

[25] The two other provisions of § 1985 deal with preventing an officer from performing duties; obstructing justice; and intimidating a party, witness, or juror. 42 U.S.C. § 1985(1)–(2). Because there are no facts before the Court dealing with any of these issues, the Court construes the Udohs' conspiracy claim as alleged under § 1985(3).

Id. Here, the Udohs' claims are based on the Fourth Amendment and due process, but, as discussed above, they have failed to allege sufficient facts supporting these claims. Further, the Udohs' allegations of conspiracy merely assert legal conclusions that Defendants "conspired" and do not allege any supporting facts. *See, e.g.*, (Compl. ¶¶ 78, 80, 95, 96, 196–207). Therefore, the Udohs fail to allege a conspiracy claim against Defendants.

In their Proposed Amended Complaint, the Udohs also attempt to shore up their conspiracy claim by adding allegations that defendants met with each other and "conspired." (Proposed Am. Compl. ¶¶ 65, 70, 78, 80, 95, 96). But because they have failed to adequately allege that Defendants violated their constitutional rights, they correspondingly have failed to allege conspiracy claims, regardless of the proposed amendments.

In their Proposed Amended Complaint, the Udohs also appear to attempt to add a claim that the Defendants conspired to deprive them of their right to equal protection under the law. (*Id.* ¶ 204). Specifically, the Udohs allege that Defendants "treat[ed] the fundamental rights of children and parent[s] suspected of abuse differently than those children and parent[s] suspected of other crime[s]." (*Id.*). They also allege that they were treated differently based on "race, gender, culture and nationality as Asians or Africans." (*Id.*). This proposed amendment fails to state a conspiracy claim because it fails to allege plausible facts that Defendants met and conspired with the goal of depriving the Udohs of their rights to equal protection. Further, the Udohs do not allege why treating them differently as the parents of children who may be the victims of abuse violates their equal protection rights. Nor do they allege how they were treated differently compared to members of different races who were in the same position.

H. Amended Complaint

The Udohs propose adding several claims that are not addressed in Defendants' dispositive motions; the Court addresses them here.

1. *Miranda* and Tennessen Warning Claims

The Udohs propose adding claims that Defendants violated the Udohs', K.K.W.'s, and K.C.W.'s Miranda rights and failed to give the Udohs, K.K.W., or K.C.W. a "Tennessen Warning," as required by Minnesota Statute sections 626.556, subdivision 11 and section 13.04, subdivision 2.[26] *See, e.g.*, (Proposed Am. Compl. ¶¶ 60, 63, 67, 72–73, 75, 78, 94–96, 98, 101–02, 104–08). Based on the cited statutes, the Court understands the Udohs' claim to be that the records and data related the investigation were not public, and Defendants failed to advise them, K.K.W., and K.C.W. of certain required information prior to interviews.

To the extent that the Udohs allege their Fifth Amendment rights were violated because neither they nor K.K.W. or K.C.W. received a *Miranda* warning, they have failed to state a claim. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case

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[26] Subdivision 11 of section 626.556 states that "records concerning individuals maintained by a local welfare agency or agency responsible for assessing or investigating the report under this section . . . shall be private data on individuals"; "[a]ll records concerning determinations of maltreatment by a facility are nonpublic data"; and "[a]ll records concerning determinations of maltreatment by a facility are nonpublic data." These determinations are subject to various exceptions. *See* Minn. Stat. § 626.556, subdiv. 11(a). Subdivision 2 of section 13.04 addresses Tennessen warnings:

> An individual asked to supply private or confidential data concerning the individual shall be informed of: (a) the purpose and intended use of the requested data within the collecting government entity; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data. This requirement shall not apply when an individual is asked to supply investigative data, pursuant to section 13.82, subdivision 7, to a law enforcement officer.

to be a witness against himself . . . ." U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966), the Supreme Court adopted measures to ensure that a suspect is advised of their Fifth Amendment rights before interrogation. Nevertheless, law enforcement officers "are not required to administer *Miranda* warnings to everyone whom they question." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). *Miranda*'s requirements are applicable only where a person has been "'taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *Miranda*, 384 U.S. at 444). As stated above, the Udohs cannot bring claims on behalf of K.K.W. and K.C.W. To the extent they allege that their own Fifth Amendment rights were violated, they have failed to allege that they were the subject of a custodial interrogation. Therefore, this claim is futile.

The Udohs have failed to allege sufficient facts that demonstrate a violation of the Tennessen Warning provision of Minnesota Statutes rises to a constitutional violation. Construed liberally, their allegations are that Defendants were required to provide the Udohs, K.K.W., and K.C.W. with a Tennessen Warning, and because they failed to do so, the Udohs', K.K.W.'s, and K.C.W.'s constitutional rights were violated. This is insufficient. Merely alleging a violation of state law is insufficient to state a claim under 42 U.S.C. § 1983. *Collins v. Bellinghausen*, 153 F.3d 591, 596 (8th Cir. 1998).

2. Recordings

The Udohs have alleged that recording various interviews violated their constitutional rights, but audio-video recordings with alleged victims of sexual abuse "must be used whenever possible when collecting information." Minn. Stat. § 626.556, subdiv. 10(j); *see, e.g.* (Proposed Am. Compl. ¶ 102). As stated above, merely acting in compliance with a state statute is insufficient to state a claim.

3. Policy and Training Allegations

The Udohs add additional allegations that nearly all defendants have policies or failed to train their employees. (Proposed Am. Compl. ¶ 112). These allegations are conclusory allegations describing what the Udohs believe Defendants should have done, rather than specific factual allegations that, if true, establish that Defendants' policies or training directly lead to the deprivation of the Udohs' constitutional rights. Therefore, the these amendments are futile.

I. State Law Claims

The Udohs allege that, in the same manner Defendants violated their due process rights and their right to be free from unreasonable search and seizure under the U.S. constitution, Defendants violated the similar corresponding provisions under the Minnesota constitution. *See generally* (Compl.). They also allege claims for false arrest and imprisonment, and intentional infliction of emotional distress. (Compl. ¶¶ 224–29). The Court declines to exercise supplemental jurisdiction over these claims and recommends that they be dismissed without prejudice.

A court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). The Court has supplemental jurisdiction over the Udohs' state law claims arising under state law and under the Minnesota Constitution because they are part of the same case and controversy as the Udohs' federal constitutional claims. *See id.*

A court may, however, decline to exercise supplemental jurisdiction if, *inter alia*, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Whether to dismiss supplemental state law claims when all federal claims have been dismissed is within a court's discretion. *Gibson v. Weber*, 431 F.3d 339, 342 (8th Cir.

2005). "'[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.'" *Barstad v. Murray County*, 420 F.3d 880, 888 (8th Cir. 2005) (alteration in original) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Here, the Court recommends dismissal of the Udohs' federal claims and the Udohs assert no independent jurisdictional basis for their state law claims. (Compl. ¶ 5). In consideration of the relevant factors, the Court finds that declining to exercise supplemental jurisdiction is appropriate and recommends dismissal of the Udohs' state law claims against Defendants on this ground.

J. Conclusion

Based on the foregoing analysis, the Court concludes that the Udohs failed to state a claim upon which relief can be granted, and that the Proposed Amended Compliant fails to resolve these deficiencies. Therefore, the Court recommends that the dispositive motions be granted, the Motion to Amend be denied.[27]

Further, the Court recommends that the majority of the Complaint be dismissed with prejudice. The Udohs failed to state a claim upon which relief may be granted in their Complaint, and their attempts to amend the Complaint do not correct these deficiencies. Therefore, the Court concludes that dismissing the Complaint with prejudice is appropriate in this case. *See, e.g.*, *Luther v. Am. Nat'l Bank of Minn.*, No. 13-cv-184 (LIB), 2013 WL 12073798, at *8 (D. Minn. Aug. 21, 2013) (Brisbois, Mag. J.) ("Under a Rule 12(b)(6) analysis, which as noted is also

[27] The Udohs propose making minor technical adjustments, such as correcting Engstrom's name and correctly identifying the affiliations of certain Defendants. Because there is no other reason to amend the Complaint, these amendments are likewise futile.

applied in a Rule 12(c) context, a with prejudice dismissal is within the Court's discretion, particularly where a plaintiff has not shown what facts might save the Complaint from dismissal."). Because the claims against Norton and Ray are based on service issues, and because the state claims are based on the Court's recommendation to decline to exercise supplemental jurisdiction, however, the Court recommends those claims be dismissed without prejudice.

III. RECOMMENDATION

Based on the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Hennepin County Defendants' and CornerHouse Defendants' Motion to Dismiss [Doc. No. 56] be **GRANTED**;
2. The School District Defendants' Motion for Judgment on the Pleadings [Doc. No. 65] be **GRANTED**;
3. Charles E. Johnson and the Minnesota Department of Human Services' Motion for Judgment on the Pleadings [Doc. No. 73] be **GRANTED**;
4. The City Defendants' Motion to Dismiss/Motion for Summary Judgment [Doc. No. 90] be **GRANTED** to the extent it seeks dismissal and **DENIED** to the extent it seeks summary judgment;
5. Plaintiff Emem Udoh and Tonya Udoh's (collectively, the "Udohs") Motions to Amend the Complaint [Doc. Nos. 99, 101, 102, 118] be **DENIED as moot**;
6. The Udohs' Motion to Amend the Complaint [Doc. No. 131] be **DENIED**; and
7. The claims against Ann Norton and Grace Ray, as well as the state law claims be **DISMISSED without prejudice**; and
8. The remaining claims be **DISMISSED with prejudice**.

Dated: July 25, 2017

s/Steven E. Rau
STEVEN E. RAU
United States Magistrate Judge

Notice

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore, not appealable directly to the Eighth Circuit Court of Appeals.

Under D. Minn. LR 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed findings and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in LR 72.2(c).

Additional material from this filing is available in the Clerk's Office.