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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0066p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-4179

[Filed: March 3, 2020]

JOSEPH SIEFERT; MELISSA SIEFERT, *Plaintiffs-Appellants*,

v.

HAMILTON COUNTY; BOARD OF HAMILTON COUNTY COMMISSIONERS; HAMILTON COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES; MOIRA WEIR; ERIC YOUNG; RACHEL BUTLER; CINCINNATI CHILDREN'S HOSPITAL MEDICAL CENTER; JENNIFER BOWDEN, M.D.; KIMBERLEY STEPHENS, LISW; ANKITA ZUTSHI, M.D.; DANIEL ALMEIDA, M.D.; SUZANNE SAMPANG, M.D.; LAUREN HEENEY, *Defendants-Appellees*.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:17-cv-00511—Timothy S. Black, District Judge.

Argued: June 27, 2019

Decided and Filed: March 3, 2020

Before: SILER, BATCHELDER, and DONALD,
Circuit Judges.

COUNSEL

ARGUED: Ted L. Wills, Cincinnati, Ohio, for Appellants. Andrea B. Neuwirth, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Hamilton County Appellees. Jason R. Goldschmidt, DINSMORE & SHOHL, LLP, Cincinnati, Ohio, for Cincinnati Children's Hospital Appellees. **ON BRIEF:** Ted L. Wills, Cincinnati, Ohio, for Appellants. Andrea B. Neuwirth, Jerome A. Kunkel, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Hamilton County Appellees. Jason R. Goldschmidt, J. David Brittingham, DINSMORE & SHOHL, LLP, Cincinnati, Ohio, for Cincinnati Children's Hospital Appellees.

SILER, J., delivered the opinion of the court in which BATCHELDER, J., joined, and DONALD, J., joined in part. DONALD, J. (pp. 19–20), delivered a separate opinion dissenting in part.

OPINION

SILER, Circuit Judge. When Joseph and Melissa Siefert's child started experiencing suicidal thoughts, anxiety, and depression, they sought help. After first trying medication, they took their teenage child—known here as "Minor Siefert"—to Children's Hospital just outside of Cincinnati. Eventually, Minor Siefert ended up at a Children's psychiatry facility, and after about a week, the Sieferts' insurance company determined that Minor Siefert had no medical problems, so it denied further coverage.

Coverage terminated, the Sieferts decided to bring their child home. But they ran into a problem: doctors and social workers had none of it. Over the next four weeks, the Sieferts wrangled with the hospital and county about getting their child back. Only after the Sieferts signed a voluntary safety plan did the child leave the facility. The Sieferts sued the county and its employees, as well as the hospital and its doctors, alleging a violation of the Fourteenth Amendment Due Process Clause's procedural and substantive components. The district court dismissed the hospital defendants because they were not state actors, and it dismissed the county defendants because it said the Sieferts failed to overcome qualified immunity.

But "[e]ven a temporary deprivation of physical custody requires a hearing within a reasonable time." *Eidson v. Tenn. Dept. of Children's Servs.*, 510 F.3d 631, 635 (6th Cir. 2007). And at litigation's starting

line, the Sieferts only had to plausibly allege a due process violation and that the hospital may be considered a state actor for purposes of this litigation. Today we decide only these narrow questions, and we side with the Sieferts on some and the defendants on others. Whether Defendants ultimately prevail on all claims—at summary judgment or at trial—is best left for another day. We affirm in part, reverse in part, and remand.

I.

We take the facts only from the complaint, accepting them as true as we must do in reviewing a Rule 12(b)(6) motion. Fed. R. Civ. P. 12(b)(6). The Sieferts have five children, one of whom is the center of this case. Minor Siefert was born a girl but identifies now as a transgender boy. Minor Siefert began taking medication and going through therapy in November 2015 after reporting problems with depression, anxiety, and suicidal thoughts. After telling his parents about his transgender identity, Minor Siefert emailed Hamilton County Job and Family Services claiming his parents were not supportive and that their conduct amounted to abuse.

That is when county officials stepped in. Rachel Butler, a Job and Family Services employee, came to the Sieferts' home to talk on the same day of Minor Siefert's email. Three days later, acting at the behest of their pediatrician, the Sieferts took their child to Children's Hospital in Liberty Township, Ohio. The next day, Minor Siefert was sent to the Children's College Hill psychiatry facility where the Sieferts

consulted with Job and Family Services employees about Minor Siefert's treatment.

During a meeting with the Sieferts, Butler explained that Children's would not send Minor Siefert home without Job and Family Services' approval. And that would not occur, Butler told the Sieferts, until social workers were satisfied they found the right place for Minor Siefert to go. After a week or so, Children's employees arranged a new discharge meeting for November 22, 2016. During that meeting, Kimberly Stephens, a Children's employee, told the Sieferts that nothing could be done at that time because Butler did not attend the meeting. Stephens said they would have to reschedule and told the Sieferts to leave.

That same day, Dr. Ankita Zutshi presented Minor Siefert's case to a doctor with Humana Behavioral Health, which was covering Minor Siefert's treatment. The Humana board-certified psychiatrist concluded that Minor Siefert had "no acute symptoms that require 24 hour care," and that Minor Siefert was not a danger to himself or others, was not aggressive, was medically stable and was not manic. So, Humana denied additional coverage.

The next day, Mr. Siefert began calling Children's staff members and leaving voice messages to "exercise his parental right to custody and association with Minor Siefert." During this time, Job and Family Services was actively pursuing the case, but did not attempt to obtain a court order for custody or provide the Sieferts with a hearing. In his calls to Children's employees, Mr. Siefert sought "to have Minor Siefert discharged from Children's to the parents." Mr. Siefert

also called Butler, and two of her supervisors at Job and Family Services, in an attempt to have his child discharged, but no one returned his calls. At the same time, Dr. Zutshi ordered that Minor Siefert was "not to be discharged AMA [against medical advice] on request of parents."

All the while, Butler and Stephens had their own telephone calls. Butler told Stephens that the "parents could not take [Minor Siefert] back home." Then, Stephens spoke with Mr. Siefert by phone. And when Mr. Siefert told Stephens he wanted Minor Siefert discharged, Stephens said the child could not go home and that Mr. Siefert would have to contact Job and Family Services to get Minor Siefert out of the hospital. During this same time, Dr. Daniel Almeida (at Children's) wrote that "JFS gave clear recommendations to not allow patient to be discharged to parents."

Then came the November 28 meeting. It included Mr. and Mrs. Siefert and Stephens; Butler participated by telephone. When Mr. Siefert asked how to get his child discharged, Butler responded, "It does not work that way," and that when the Sieferts cannot care for their child the county must "step in." Butler hung up the phone a short while later, and the Sieferts "demanded to Ms. Stephens that Minor Siefert be discharged." But when Mr. Siefert said he could go down the hall and take the child home, Stephens responded that the Sieferts were not allowed to do so. At that point, Lauren Heeney, with Children's, joined the meeting and told the Sieferts that they could not even visit their child.

Unsatisfied with the meeting, Mr. Siefert decided to email Hamilton County Administrator Jeff Aluotto the next day. This led to another meeting—this time at the Job and Family Services building in Cincinnati; Butler, the Sieferts and Eric Young (with Job and Family Services) attended. Young explained that Job and Family Services had to investigate and would prevent parents from having custody or association with their child when doctors or social workers did not approve the child's release. Young put it succinctly: "we have to go by what the doctors say."

And the doctors had made it clear. Dr. Almeida ordered that Minor Siefert should not be discharged on the Sieferts' request and that if Mr. and Mrs. Siefert came around "security also needs to be called." More than a week later, Minor Siefert remained hospitalized, and county representatives Young and Butler told Stephens of Children's that the child "could not go home." Dr. Jennifer Bowden ordered on December 9 that Children's staff continue "collaboration with JFS" to deny the Sieferts custody and association with Minor Siefert. Three days later, Stephens told the Sieferts that "JFS holds the key in determining where [the] patient goes at this time."

Finally, Minor Siefert left Children's on December 20, 2016—nearly a month after entering. The release occurred after the county and the Sieferts entered a voluntary safety plan requiring Minor Siefert to stay with his grandparents. The Sieferts filed this lawsuit under 42 U.S.C. § 1983, alleging that the county, Children's, and their employees violated the Sieferts' procedural and substantive due process rights under

the Fourteenth Amendment. The district court dismissed the case on a Rule 12(b)(6) motion to dismiss. This appeal followed.

II.

Our review of a 12(b)(6) dismissal includes no deference to the district court. *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015). This de novo review puts us in the same position as the lower court and requires us to examine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausible allegations exist "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The factual allegations need not be overly detailed, but nor can they merely recite the elements of a cause of action and make a "the-defendant-did-it" allegation. *See id.*

III.

Defendants fall into two categories: (1) the county defendants, and (2) the hospital defendants. The former argue that qualified immunity blocks this suit, and the hospital employees say that constitutional claims do not apply to them because they are not state actors. We begin with state action.

State Action and Hospital Defendants. The Fourteenth Amendment, like most of the Constitution, places limits on government behavior and has little to say about what private parties must do. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 923-24 (1982).

After all, "the Due Process Clause protects individuals only from governmental and not from private action," *id.* at 930, "no matter how unfair that conduct may be." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). But, like many things in law, this principle comes with exceptions. Sometimes, non-government actors must comply with constitutional commands. *See Lugar*, 457 U.S. at 937.

When does this occur? Courts have highlighted several "tests," but it all comes down to "whether 'there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.'" *Brent v. Wayne Cty. Dept. of Human Servs.*, 901 F.3d 656, 676 (6th Cir. 2018) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)).

The district court held that no such relationship existed here because (1) Children's was "simply performing medical treatment and complying with Ohio reporting statutes," and (2) Children's had no contract with the state, did not perform a state function, and the state did not approve Children's policies in advance.

But Children's did far more than what the district court acknowledged. According to the complaint, which we take as true, Children's and Hamilton County worked in tandem. Often collaborating and communicating about Minor Siefert's situation, they depended on each other to block Minor Siefert's release. Children's admitted it needed the county's permission to send Minor Siefert home. Meetings at Children's

often included the Sieferts, Children's employees, and county officials together. Children's employees told the Sieferts they could not discharge Minor Siefert without talking to Hamilton County employees. Indeed, when the Sieferts demanded that Children's discharge Minor Siefert, Stephens (of Children's) "told Mr. Siefert that he would have to contact HCJFS to attempt to obtain Minor Siefert's discharge," because discharge "was being blocked by JFS." County defendants had, according to the complaint, "told Ms. Stephens that Minor Siefert 'could not go home.'" Stephens relayed that message to the Sieferts, telling them "JFS holds the key in determining where patient goes."And in his notes, Dr. Almeida wrote that Children's could not release Minor Siefert because "JFS gave clear recommendations to not allow patient to be discharged to parents."

What is more, county employees told the Sieferts they had to "go by what the doctors say." The doctors had said "that Minor Siefert was not to be discharged 'on request of parents,'" but the county had told the hospital that the "parents could not take [Minor Siefert] home." And both county and Children's employees agreed to discuss placing Minor Siefert in a foster home.

These facts plausibly establish Children's state-actor status because the conduct was "fairly attributable to the state." *Filarsky v. Delia*, 566 U.S. 377, 383 (2012). This "close nexus" developed as Children's and the county remained in constant contact, relied on each other for keeping Minor Siefert at the hospital, and at various times gave the Sieferts

conflicting statements about who would make the ultimate decision to discharge Minor Siefert. In telling Children's it could not discharge Minor Siefert without its consent, county defendants also gave "significant encouragement, either overt or covert" to Children's actions. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Plus, Children's cooperation with Hamilton County shows it was a "willful participant in joint activity with the State or its agents." *Brentwood Acad.*, 531 U.S. at 296 (quoting *Lugar*, 457 U.S. at 941).

It is of course true "that the mere fact that a hospital is licensed by the state is insufficient to transform it into a state actor." *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). And the district court was correct that hospitals and doctors do not become state actors merely because they comply with state statutes. *See Ellison v. Garbarino*, 48 F.3d 192, 195-96 (6th Cir. 1995). So if that were all Children's had done—or all the Sieferts had alleged in their Complaint—then Children's could prevail at the 12(b)(6) stage. But the Sieferts present specific factual allegations, detailing a deep and symbiotic relationship between Children's and the county. From the Sieferts' perspective, it would have been hard to know who could discharge Minor Siefert—Hamilton County or Children's. And when the distinction between the state and private party breaks down to that degree, a private party becomes a state actor in § 1983 cases. *See Brentwood Acad.*, 531 U.S. at 296-97.

All this means today is that the Sieferts have alleged enough facts to keep Children's in this lawsuit. *Iqbal*, 556 U.S. at 678. But a "plaintiff['s] ability to

survive a motion to dismiss with respect to the state-actor question does not necessarily mean that they could survive summary judgment." *Brent*, 901 F.3d at 677. The Sieferts have unlocked the door to discovery, not to liability. And in the end, Children's may show that it was not a state actor. But at this point, it is too soon to know.

We **REVERSE** the district court's holding that the Sieferts failed to plausibly allege that Children's and its employees were state actors.

Constitutional Violations and Qualified Immunity. Qualified immunity, pleading requirements, and Rule 12(b)(6) have a complicated relationship. At times, we have said that courts should refrain from using qualified immunity at the motion-to-dismiss stage. *See Wesley*, 779 F.3d at 433. After all, qualified immunity is an affirmative defense, not an element of a cause of action. *See Crawford-El v. Britton*, 523 U.S. 574, 586-87 (1998). And Federal Rule of Civil Procedure 8(a) requires only that a plaintiff *state* a claim, not that a plaintiff show that he can overcome an affirmative defense. *See Jones v. Bock*, 549 U.S. 199, 212 (2007); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012).

We have also said that the fact-intensive nature of qualified immunity makes it often a bad fit for Rule 12(b)(6). *See Guertin v. State*, 912 F.3d 907, 917 (6th Cir. 2019). That's because, at this point in the case, "the precise factual basis for the plaintiff's claim or claims may be hard to identify," meaning "the court's task can be difficult." *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2017) (quoting *Pearson v. Callahan*,

555 U.S. 223, 238-39 (2009)). Without more than the complaint to go on, the court "cannot fairly tell whether a case is 'obvious' or 'squarely governed' by precedent," making qualified immunity inappropriate. *Guertin*, 912 F.3d at 917 (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring)). So one might say that "Rule 12(b)6) is a mismatch for immunity and almost always a bad ground of dismissal."*Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring); *see also Reed v. Palmer*, 906 F.3d 540, 548-49 (7th Cir. 2018) (explaining that qualified immunity usually will rarely be the basis for a 12(b)(6) dismissal); *Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018) (same). Like in our sister circuits, here it is "generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (quoting *Wesley*, 779 F.3d at 433).

But this is only a "general preference," not an absolute one. *Guertin*, 912 F.3d at 917. Defendants may raise the qualified immunity defense in response to a 12(b)(6) motion because it is "an immunity from suit rather than a mere defense to liability." *Pearson*, 555 U.S. at 231 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). That is why some claims must "be resolved *prior to discovery*." *Id.* at 231-32 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (emphasis added)).

Thus, despite the general preference to save qualified immunity for summary judgment, sometimes

it's best resolved in a motion to dismiss. This happens when the *complaint* establishes the defense. *Peatross v. City of Memphis*, 818 F.3d 233, 240 (6th Cir. 2016); *see also Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). So we ask whether the complaint plausibly alleges "that an official's acts violated the plaintiff's clearly established constitutional right." *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 563 (6th Cir. 2011). If, taking all the facts as true and reading all inferences in the plaintiff's favor, the plaintiff has not plausibly showed a violation of his clearly established rights, then the officer-defendant is entitled to immunity from suit. *See Pearson*, 555 U.S. at 232.

Procedural Due Process. States cannot "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. To sue under this clause, the Sieferts must have a liberty or property interest that triggers the process requirement, and then they must show they received insufficient process.

The Sieferts argue that Defendants infringed on their rights to the care, custody, and control of Minor Siefert. And, the Sieferts claim, the Defendants did so without providing any process. That runs afoul of the Due Process Clause, the Sieferts claim, because the parent-child relationship enjoys deep and broad protections—and they got none.

When it comes to parents and their children, courts are in unison: the "relation gives rise to a liberty interest that a parent may not be deprived of absent due process of law." *Kottmyer*, 436 F.3d at 689. The Supreme Court has called parents' "care, custody, and control of their children . . . perhaps the oldest of the

fundamental liberty interests recognized by this Court." *Troxel v. Granville* 530 U.S. 57, 65 (2000) (plurality opinion). This right is "far more precious than [any] property right[]." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (editing mark omitted) (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)). "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Procedural safeguards also apply when the state engages in a "temporary deprivation of physical custody" of a child. *Eidson.*, 510 F.3d at 635.

But these rights are not absolute. They are "limited by an equal[ly] compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents." *Kottmyer*, 436 F.3d at 690. That's because states "have a 'traditional and transcendent interest' in protecting children within their jurisdiction from abuse." *Id.* (quoting *Maryland v. Craig*, 497 U.S. 836, 855 (1990)).

Defendants argue that their interest in protecting Minor Siefert outweighs procedural protections the Sieferts would otherwise receive. They claim that the Sieferts' situation did not spark procedural requirements because (1) Defendants were investigating possible abuse, (2) Defendants never took legal custody of Minor Siefert, (3) the Sieferts voluntarily consented to hospitalization, and (4) the Sieferts never physically tried to remove their child. And, at the very least, Defendants argue, the Sieferts'

due process rights were not clearly established, so qualified immunity blocks this lawsuit.

These consent-and-abuse-investigation rationales, however, clash with the procedural posture of the case. Yes, consent extinguishes constitutional procedural safeguards. *See Smith v. Williams-Ash (Williams-Ash II)*, 520 F.3d 596, 600 (6th Cir. 2008). That is because "hearings are required for deprivations taken over objection, not for steps authorized for consent." *Id.* (quoting *Dupuy v. Samuels*, 465 F.3d 757, 761-62 (7th Cir. 2006)). And, yes, factual development might ultimately show that the Sieferts consented to Minor Siefert's hospitalization. But now is not a time for examining competing facts—it is a time for accepting the complaint's facts as true and drawing all reasonable inferences in the plaintiffs' favor. Doing so does not establish the Sieferts' consent.

The complaint says that the Sieferts made numerous attempts to remove Minor Siefert from the hospital: voicemail messages, emails, and direct statements to hospital and county employees. Plus, several paragraphs describe how Defendants told the Sieferts that their child could not go home. A reasonable inference in the Sieferts' favor is that Defendants continued to explain that Minor Siefert could not go home because the parents *wanted* their child home. The district court's recognition that the Sieferts "did not allege . . . that they made written demands for [Minor Siefert's] release," does not establish consent. The Sieferts did not have to so plead because showing a lack of consent is not an element of the claim. Instead, whether the Sieferts consented is a

fact-based question reserved for summary judgment or later in the case.

Nor does *Williams-Ash II* help Defendants. *See* 520 F.3d at 600. There, Hamilton County Job and Family Services removed the plaintiffs' children from the home without a hearing. *Id.* at 597-98. We held that the parents had consented because they entered a voluntary safety plan, so the parents were due no process. *Id.* at 600. But that decision occurred *at summary judgment*. *Id.* at 599. And, in fact, when the case had previously come before us at the motion-to-dismiss stage, we focused solely on the complaint in holding that the plaintiffs had adequately pleaded a procedural due process violation because "plaintiffs were not allowed to recover their children after the Safety Plan had been initiated despite their best efforts to do so." *Smith v. Williams-Ash (Williams-Ash I)* 173 F. App' 363, 366 (6th Cir. 2005) (per curiam). The defendants argued that the Safety Plan showed the plaintiffs' consent, but we held that "*the complaint* alleges that the continued deprivation of the [plaintiffs'] children was involuntary, and that they were effectively denied a prompt hearing." *Id.* (emphasis added). Only *after* factual development did it become clear—in *Williams-Ash II*—that plaintiffs had consented, and defendants were entitled to summary judgment. *See Williams-Ash II*, 520 F.3d at 599-600.

Here, too, the district court should have judged the *complaint only*. *Id.* Just as in *Williams-Ash II* consent may become clear at summary judgment. But reading the complaint's facts in the light favorable to the

Sieferts, we can draw a reasonable inference that the Sieferts did not consent, given the number of times they allege they demanded that Minor Siefert be discharged.

A similar complaint-focused analysis impedes Defendants' abuse investigation argument. Although, "[m]ere investigation by authorities into child abuse allegations without more . . . does not infringe upon a parent's right to custody or control of a child," *Kottmyer*, 436 F.3d at 691, the Sieferts' complaint does not allege "[m]ere investigation . . . without more." *Id.* Indeed, the complaint makes a single reference to abuse: Minor Siefert "alleged that [Mr. and Mrs. Siefert] were not supportive and that their conduct towards her amounted to abuse." And then the complaint alleges more—specifically that Defendants refused to discharge Minor Siefert for nearly a month while the Sieferts sought to have access to their child. This is in stark contrast to *Kottmyer*, where the plaintiffs only allegation was that the defendants "initiated an investigation" into abuse allegations. *Id.* In that case there was "no allegation that [the child] was removed from her parents' [] custody, either temporarily or permanently, or that the [defendant] or Hamilton County in any way interfered with the Kottmyers' [] right to custody, control and companionship of their daughter." *Id. Kottmyer* teaches that an abuse investigation, *standing alone*, does not interfere with parental rights in a way that requires due process. *Id.* But if the parents were not "permitted to remove [their child] from the hospital until [defendants] allowed" that could "in some circumstances . . . interfere with parental custody of a

child." *Id.* at 691 n.2. That is this case: The Sieferts took Minor Siefert to the hospital but later demanded discharge. Thus, reading the complaint in the light most favorable to the Sieferts, they have alleged a plausible claim that Defendants interfered with their parental rights and they received no process.

Even so, could this all be "clearly established" to get around qualified immunity? This standard extends broadly to "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A plaintiff can clear this high hurdle only when every reasonable official would know his conduct was unlawful as established by "'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *Id.* at 589-90 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011)). And the unlawfulness must be obvious "in the particular circumstances before" the official. *Id.* at 590. General statements of the law and abstract rules fail to provide the high-level of specificity necessary to create clearly established law. *Id.*

So it must be clear that Defendants' actions in this particular circumstance—as alleged in the complaint—violated the Sieferts' due process rights. Plausibly, they did. In case after case, the Supreme Court has emphasized the parent-child relationship's special place in our society. *See, e.g.*, *Troxel*, 530 U.S. at 65-66 (collecting cases). The right's importance means that "[e]ven a temporary deprivation of physical custody requires a hearing within a reasonable time." *Eidson* 510 F.3d at 635. A hearing is necessary when "a

child's removal is . . . sustained over the parent's objections." *Young v. Vega*, 574 F. App' 684, 691 n.6 (6th Cir. 2014). And when state officials do not allow parents to remove a child from the hospital until the defendants say so, that can "be construed to interfere with parental custody of a child." *Kottmyer*, 436 F.3d at 691 n.2; *see also Williams-Ash II*, 520 F.3d at 600-01 (concluding if a parent revokes consent to a safety plan, the state must provide due process); *Kottmyer*, 436 F.3d at at 691 ("[P]arents will not be separated from their children without due process of law except in emergencies." (quoting *Mabe v. San Bernardino Cty. Dep' of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2001)); *Williams-Ash I*, 173 F. App'x at 366 (explaining "temporary deprivation of physical custody requires a hearing within a reasonable time"); *Doe v. Staples*, 706 F.2d 985, 988 (6th Cir. 1983) (noting "it is axiomatic that a parent has a liberty interest in the freedom of personal choice in matters of family life in which the state cannot interfere"). Out-of-circuit cases—so-called "persuasive authority"—reinforce the point. *See, e.g.*, *Keates*, 883 F.3d at 1238-39 (holding aren't plausibly pled constitutional violation where social worker held a parent's daughter at the hospital and did not allow mother to take the child home); *Phifer v. City of New York*, 289 F.3d 49, 61 (2d Cir. 2002) ("[W]here a parent voluntarily grants temporary custody to the government or a third party, which then refuses to release the child, 'the State has the duty to initiate a prompt post-deprivation hearing after the child has been removed from the custody of his or her parents.'" (quoting *Kia P. v. McIntyre*, 235 F.3d 749, 760 (2d Cir. 2000))).

In short, when Minor Siefert was hospitalized, "existing precedent . . . placed the . . . constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. At least, that is, according to the *complaint*. Defendants argue that the Sieferts cannot overcome qualified immunity because no case says that parents deserve due process when they voluntarily hospitalize their child, the state investigates allegations of abuse, and the parents consent to the ongoing hospitalization. But characterizing the case this way puts the cart before the horse. The *complaint* does not establish the depth of abuse allegations or that the Sieferts consented to Minor Siefert's ongoing hospitalization. The complaint says the Sieferts routinely demanded that Minor Siefert be discharged. And the complaint alleges that the Sieferts' insurance company had a psychiatrist determine that Minor Siefert was no harm to anyone and was medically stable.

We **REVERSE** the district court's holding that the Sieferts failed to adequately plead a violation of their procedural due process rights.

Substantive Due Process. We cannot say the same regarding the Sieferts' substantive due process claim. Under this doctrine, the government may not deprive individuals of certain rights, regardless of the procedures used. *Guertin*, 912 F.3d at 918. Sometimes, this court has said that this component of the Fourteenth Amendment comes in two varieties: "(1) deprivations of a particular constitutional guarantee; and (2) actions that 'shock the conscience.'" *Pittman v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 640 F.3d 716, 728 (6th Cir. 2011) (quoting *Valot*

v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1228 (6th Cir. 1997)). And other times, the court has suggested both prongs are required. *See Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 688 (6th Cir. 2011); *see also Guertin*, 912 F.3d at 922.

Most recently, however, we have held that when we review a substantive due process claim, we first ask whether the plaintiff has shown "a deprivation of a constitutionally protected liberty interest"and then ask whether "the government's discretionary conduct that deprived that interest was constitutionally repugnant." *Id.* (citing *Am. Express Travel Related Servs. Co.*, 641 F.3d at 688). "Thus, a plaintiff must show as a predicate the deprivation of a liberty or property interest," as well as "conscience-shocking conduct." *Id.*

The Sieferts adequately allege that they were deprived of the "fundamental liberty interest in the care, custody, control, companionship, and management of [Minor Siefert.]" The question therefore—not addressed by the district court—is whether the Sieferts adequately pleaded that the Defendants engaged in conscience-shocking behavior. Otherwise, they have failed to state a substantive due process claim.

What counts as "conscience shocking" is not always so clear. *See County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) ("[T]he measure of what is conscience shocking is no calibrated yard stick."). But "abuse of power" serves as the North Star in the analysis. *Guertin*, 912 F.3d at 923. We view the behavior "on a spectrum," with negligence on one end, and intentional

harm on the other. *Id.* Those cases are easy: negligent behavior fails to shock the conscience, but intentional harm does. *Id.* "[I]n the middle," there is "something more than negligence but less than intentional conduct, such as recklessness or gross negligence," which presents more difficult cases. *Id.* (quoting *Lewis*, 523 U.S. at 849). But always, courts should "prevent transforming run-of-the-mill tort claims into violations of constitutional guarantees," *id.*, because "the Fourteenth Amendment is not a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Lewis*, 523 U.S. at 848 (quotation marks omitted).

The Sieferts never argue that Defendants intended to inflict harm. And the complaint alleges nothing of the sort. Thus, the Sieferts can prevail only by showing that Defendants acted with deliberate indifference under the more-than-negligence-but-less-than-intentional standard. And context informs whether such a claim shocks the conscience. *Guertin*, 912 F.3d at 923. That's because the court's "concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850.

We must consider "whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Guertin*, 912 F.3d at 924 (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002)). Deliberation time alone does not always mean actions rise to the conscience-shocking level. *Id.* It is one factor in a "focus . . . upon

the entirety of the situation—'the type of harm, the level of risk of the harm occurring, and the time available to consider the risk of harm are all necessary factors in determining whether an official was deliberately indifferent.'" *Id.* (quoting *Range v. Douglas*, 763 F.3d 573, 591 (6th Cir. 2014)). Consideration of both the "nature of the relationship between the government and the plaintiff, and whether a legitimate government purpose motivated the official's act," also helps courts decide whether the official's act amounted to deliberate indifference. *Id.* Indeed, a defendant's action in support of legitimate governmental purpose will often not lay the groundwork for a substantive due process claim even if the defendant acted "despite a subjective awareness of substantial risk of serious injury." *Id.*

The Sieferts' allegations do not rise to the "high" bar of deliberately indifferent, conscience-shocking behavior. *Range*, 763 F.3d at 589. First, the Sieferts never allege in their complaint that the Defendants acted without any governmental purpose. And courts have long recognized a "compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents." *Kottmyer*, 436 F.3d at 690. The Sieferts do say that Defendants had nearly a month to deliberate, but they do not allege that during that time the Defendants acted with indifference toward the Sieferts' fundamental liberty interest in family integrity. *Guertin*, 912 F.3d at 926. "Deliberate indifference in the constitutional sense requires that the officials *knew* of facts from which they could infer a 'substantial risk of serious harm,' that they *did* infer it, and that they

acted with indifference 'toward the individual' rights.'" *Range*, 763 F.3d at 591 (emphases added). Hence, the Sieferts' complaint alleges that the defendants acted with only a "subjective recklessness" toward a "substantial risk of serious injury."*Guertin*, 912 F.3d at 926.

The Sieferts moreover fail to allege that the Defendants acted with deliberately indifferent conduct that shocks the conscience. Again, the relevant inquiry is "whether [a] government actor was pursuing a legitimate governmental purpose[,]" *Range*, 763 F.3d at 590, and whether that interest outweighed the deprivation of the parental liberty interest in this instance. *See Kottmeyer*, 436 F.3d at 690 ("The [fundamental liberty interest in family integrity] is limited by an equal[ly] compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents."). Based on the facts as alleged in the complaint, these Defendants were between a rock and a hard place: they could either ensure that the parents were not deprived of their fundamental liberty interest and risk failing to protect the child if the allegations of abuse were legitimate, or they could ensure that the minor child was protected from alleged abuse and risk depriving the parents of their liberty interest. Even if we disagree with the choice the Defendants made, we cannot say that when faced with that choice, the Defendants' opting to err on the side of protecting the child at the expense of depriving the parents of their parental rights for a period of a month is conduct that shocks the conscience. Thus, the complaint fails to establish behavior that shocks the conscience, so we

AFFIRM he district court's holding that the Sieferts failed to state a claim under substantive due process.

Monnell *Claims*. The Sieferts' claims against the county entities must fail under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). The Sieferts point to no official policy or custom by the county, and they fail to show the county ratified any unconstitutional behavior. *See Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). Nor do the Sieferts allege facts that the county failed to train or was deliberately indifferent. *Id.* Under the failure-to-train theory, the Sieferts had to plead "(1) a clear and persistent pattern of illegal activity, (2) which the [county] knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the [county's] custom was the cause of the deprivation of [the Sieferts' constitutional rights." *Bickerstaff v. Lucarelli*, 830 F.3d 388, 402 (6th Cir. 2016). The Sieferts allege none of that, and so their *Monell* claims fail.

Conspiracy Claims. A § 1983 civil conspiracy claim requires "(1) a 'single plan' existed, (2) [defendants] 'shared in the general conspiratorial objective' to deprive [plaintiffs] of [their] constitutional . . . rights, and (3) 'an overt act was committed in furtherance of the conspiracy that caused injury' to [plaintiffs]." *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011) (quoting *Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985)). But there are no facts in the complaint alleging that any such agreement existed. And no facts suggest that the parties had an objective to deprive the Sieferts of their

constitutional rights. *Id.* Yes, county employees and doctors from Children's worked together, but nowhere do the Sieferts allege that the Defendants agreed to do anything—let alone agreed to violate constitutional rights. *Id.* Even if the Sieferts make a plausible procedural due process claim, there are no factual allegations that the parties "agreed to the general conspiratorial objective of violating [the Sieferts'] constitutional rights." *Id.* at 603. And "it is well-settled that conspiracy claims must be pled with some degree of specificity." *Heyne*, 655 F.3d at 563 (editing mark omitted). None is alleged here.

The same is true of the state law conspiracy claim, which requires "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995) (quoting *LeFort v. Century 21-Maitland Realty Co.*, 512 .E.2d 640, 645 (Ohio 1987)). A combination is "malicious" only if one acts with a "state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *Chesher v. Neyer*, 477 F.3d 784, 805 (6th Cir. 2007) (quoting *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 868 (Ohio 1998)). As in the federal claims, there are no specific factual allegations suggesting that the Defendants ever entered into an agreement—let alone one with malicious intent. So, the Sieferts fail to plausibly allege civil conspiracy under state law.

IV.

State intervention in family life—even if for a short period—typically requires due process of law. Of course, sometimes the state need not provide process, such as when parents give consent. That may be this case. But at the pleading stage, the Sieferts are entitled to all reasonable inferences. That goes for their claim that the Children's defendants are state actors, too. So this case should continue on procedural due process grounds, and "the district court can consider both the state actor and § 1983 issues at summary judgment." *Brent*, 901 F.3d at 678. We **AFFIRM** in part, **REVERSE** in part, and **REMAND**.

DISSENTING IN PART

BERNICE BOUIE DONALD, Circuit Judge, dissenting in part. While I agree with most of the majority's analysis, I would reverse the district court's holding that the Sieferts failed to state a claim under substantive due process.

As the majority points out, there are two categories of substantive due process claims: those alleging a "deprivation of a particular constitutional guarantee" and those alleging actions that "shock the conscience." Op. at 16 (citing *Pittman v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 640 F.3d 716, 728 (6th Cir. 2011)). In *Pittman*, however, we clarified that we apply different standards to those two types of claims. *Id.* Where the plaintiff *does not* assert the deprivation of a

particular constitutional guarantee, we review the claim under the shock the conscience standard. *Id.* at 728 n.6. In contrast, where a plaintiff *does* assert a deprivation of a particular constitutional guarantee—such as that alleged here, deprivation of familial association—we analyze whether "the [challenged] action [was] necessary and animated by a compelling purpose."*Id.* at 728-29 (quoting *Bartell v. Lohiser*, 215 F.3d 550, 557-58 (6th Cir. 2000)).

I believe the district court correctly determined that the Sieferts premise their substantive due process claim on the deprivation of their right to familial association. *See* Appellant's Br. at 24 ("HCJFS and Children's continued to prohibit the Sieferts from custody and association with Minor Siefert."); *Id.* at 23 ("Ms. Heeney, accordingly, prohibited the Sieferts from obtaining custody and association with Minor Siefert."); *Id.* at 33 ("In this case, the Sieferts have already established that the Sieferts suffered a deprivation of a constitutional right based on the denial of their liberty interest in family integrity."). Because the Sieferts' claim is based on the deprivation of their right to familial association, I believe we must analyze it under the standard applicable to particular-constitutional-guarantee claims. That the Sieferts argue an erroneous legal standard in their briefing does not mean that this Court should not analyze their claim under the correct one.

The Sieferts allege that the defendants interfered with their right to associate with their child for over four weeks. Under the particular-constitutional-guarantee standard, we have suggested that similar

conduct could constitute a substantive due process violation. *See e.g.*, *Kottmyer v. Maas* 436 F.3d 684, 691 (6th Cir. 2006) (suggesting that an "allegation that [a child] was removed from her parents' [sic] custody, either temporarily or permanently, or that the [the government] in any way interfered with the [parents'] right to custody, control and companionship of their [child]" could constitute a violation of the parents' right to familial association (footnote omitted)). Therefore, contrary to the majority, I would reverse the district court with respect to this claim as well.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:17-cv-511

Judge Timothy S. Black

[Filed: November 15, 2018]

JOSEPH SIEFERT, *et al.*,	)
	)
Plaintiff,	)
	)
vs.	)
	)
HAMILTON COUNTY	)
BOARD OF COMMISSIONERS, *et al.*,	)
	)
Defendants.	)
	)

ORDER LIFTING THE STAY AND GRANTING COUNTY DEFENDANTS' MOTION TO DISMISS

This civil action is before the Court upon the County Defendants'[1] motion to dismiss Plaintiff's complaint

[1] The "County Defendants" are Hamilton County, Hamilton County Board of Commissioners, Hamilton County Job and Family Services ("HCJFS"), Moira Weir, Eric Young, and Rachel Butler.

(Doc. 12) and the parties' responsive memoranda (Docs. 19 and 22).

On August 2, 2018, the Court issued an Order granting the Children's Defendants'[2] motion to dismiss and granting the County Defendants' motion to stay proceedings. (Doc. 32). Plaintiffs and County Defendants have informed the Court that the state proceedings requiring abstention under *Younger* are completed. (*See* Docs. 33 and 34). Accordingly, the Court hereby lifts the stay and will now examine County Defendants' pending motion to dismiss.

I. FACTS AS ALLEGED BY THE PLAINTIFF

For purposes of this motion to dismiss, the Court must: (1) view the complaint in the light most favorable to Plaintiffs; and (2) take all well-pleaded factual allegations as true. *Tackett v. M&G Polymers*, 561 F.3d 478, 488 (6th Cir. 2009).

Plaintiffs Joseph and Melissa Siefert are residents of Ohio and the parents of Minor Siefert.[3] (*Id.* at ¶ 4).

The Court notes that, under Ohio law, HCJFS and Hamilton County are not *sui juris* and therefore cannot be sued. *Estate of Glenara Bates v. Hamilton Cty. Dep't of Job & Family Servs.*, No. 1:15-cv-798, 2017 WL 106871, at *1 n.1 (S.D. Ohio Jan. 11, 2017).

[2] The "Children's Defendants," who have been terminated as defendants, are Cincinnati Children's Hospital Medical Center ("Children's"), Jennifer Bowden, M.D., Kimberly Stephens, LISW, Ankita Zutshi, M.D., Daniel Almeida, M.D., Suzanne Sampang, M.D., and Lauren Heeney.

[3] Due to privacy concerns regarding the child at issue, Plaintiffs' child will be referred to as "Minor Siefert."

Plaintiffs allege that from November 23, 2016 to December 20, 2016, they were denied their fundamental liberty interest in the care, custody, control, companionship, and management of Minor Siefert, as guaranteed by the Fourteenth Amendment. (*Id.* at ¶¶ 96, 127).

In November 2015, the Plaintiffs learned that Minor Siefert was suffering from depression, anxiety, and suicidal ideations. (*Id.* at ¶ 24). The Plaintiffs had their longtime pediatrician treat Minor Siefert with medication and therapy. (*Id.* at ¶¶ 24, 29). On August 11, 2016, Minor Siefert informed Plaintiffs that Minor Siefert considered themselves to be a transgender child. (*Id.* at ¶ 25). Minor Siefert emailed HCJFS on November 11, 2016 and informed HCJFS that they were experiencing transgender thoughts and that Plaintiffs were unsupportive and abusive. (*Id.* at ¶ 26). On that same day, Defendant Butler of HCJFS visited Plaintiffs' home and asked Mrs. Siefert questions regarding conditions in the home. (*Id.* at ¶ 28). On November 13, Plaintiffs took Minor Siefert to Children's Liberty Township location for psychological evaluation regarding suicidal ideations. (*Id.* at ¶ 30). Minor Siefert was ultimately transferred to Children's psychiatry facility at the College Hill location. Plaintiffs went to visit Minor Siefert at Children's College Hill facility on November 15, and received a welcome package that included information regarding Children's policies and guidelines. (*Id.* at ¶¶ 36–37). The Children's hospital policy provided to Plaintiffs includes a grievance process for handling disagreements with the hospital regarding issues of treatment and discharge. (Doc. 12, Ex. B – Children's

Hospital Policy).[4] Plaintiffs allege that the welcome packet did not include a nineteen-page document titled "Psychiatry Impatient Admission, A Family Guide," which stated that Children's could tell parents that they were not to take their child home if Children's found it unsafe for the child. (*Id.* at ¶¶ 38–39). Plaintiffs allege that they were not told of this policy at the time Minor Siefert was admitted. (*Id.* at ¶ 40).

Over the next few weeks, Plaintiffs consulted with HCJFS regarding Minor Siefert's treatment. (*Id.* at ¶41). At Plaintiffs' first conference with Defendant Butler, she allegedly explained to Plaintiffs that Children's would not send Minor Siefert home without permission from HCJFS, and if Plaintiffs could not take care of Minor Siefert, HCJFS "would step in and do it."(*Id.* at ¶ 42). Plaintiffs claim they did not "agree to allow [Children's] and HCJFS to keep Minor Siefert at Children's without their consent." (*Id.* at ¶ 47).

On November 22, a Children's doctor met with a doctor from Humana Behavioral Health ("Humana"),

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[4] In determining the sufficiency of the complaint, the Court's review is confined to "the pleadings, exhibits attached to or addressed in the complaint, documents included with a motion to dismiss if referenced in the complaint, and public records." *Vandenheede v. Vecchio,* 541 F. App'x 577, 579 (6th Cir. 2013) (citing *Rondigo, LLC. v. Twp. of Richmond,* 641 F.3d 673, 680– 81 (6th Cir. 2011)). The Court may consider documents integral to or attached to the pleadings when ruling on a Rule 12 motion to dismiss without converting the motion to one for summary judgment. *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.,* 508 F.3d 327, 336 (6th Cir. 2007). The Court will consider the Children's Hospital Policy because it is referenced by Plaintiffs in the complaint and is integral to this motion to dismiss.

the insurance provider for Minor Siefert's treatment, to discuss Minor Siefert's case. (*Id.* at ¶¶ 46, 51). Based on the meeting with the doctor, Humana determined that Minor Siefert "had no acute symptoms that require 24 hour care (sic) . . . [Minor Siefert] is not a danger to [Minor Siefert] or others. [Minor Siefert] is not aggressive. [Minor Siefert] is medically stable. [Minor Siefert] is not manic." Based on this finding, Humana denied coverage for further treatment of Minor Siefert by Children's. (*Id.* at ¶ 52).

On that same day, Plaintiffs met with Children's regarding Minor Siefert's discharge. Plaintiffs allege that Butler and Minor Siefert were supposed to attend the meeting, however Children's told Plaintiffs that Butler would not be available until November 28. (*Id.* at ¶¶ 53–54). Plaintiffs complain that Butler was available and was in regular telephone contact with Children's and met with Minor Siefert on November 23. (*Id.* at ¶¶ 55–57).

Plaintiffs contend that starting November 23, Mr. Siefert began leaving voicemail messages with Children's and left calls with HCJFS attempting to have Minor Siefert discharged from Children's to the Plaintiffs. (*Id.* at ¶¶ 60, 61). Eventually, Kimberly Stephens of Children's spoke with Mr. Siefert by telephone and informed him that Minor Siefert could not be discharged because Minor Siefert was not "medically cleared" and that Mr. Siefert would have to contact HCJFS to obtain Minor Siefert's discharge. (*Id.* ¶¶ 64–65). Plaintiffs allege that on that same day, Children's doctor wrote in his notes that HCJFS "gave clear recommendations to not allow patient to be

discharged to parents." (*Id.* at ¶ 67). While HCJFS allegedly told Plaintiffs that it was "actively pursuing" the case throughout the relevant time period, HCJFS never attempted to obtain a court order of custody. (*Id.* at ¶ 59).

On November 28, Plaintiffs, HCJFS, and Children's held another meeting to discuss Minor Siefert's discharge. (*Id.* at ¶¶ 69–77). During this meeting, Mr. Siefert asked what the Plaintiffs had to do to have Minor Siefert discharged, and Butler responded, "[i]t does not work that way," and that when Plaintiffs cannot take care of their child, HCJFS has to "step in."(*Id.* at ¶¶ 71–72). In response, Mr. Siefert allegedly demanded that Minor Siefert be discharged and argued that he could go down the hall and take Minor Siefert home, but Children's informed the Plaintiffs that that was not allowed. (*Id.* at ¶ 74).

Plaintiffs had another meeting with Butler and Young of HCJFS on November 30. (*Id.* at ¶¶ 87–91). Young allegedly explained HCJFS's policy preventing parents from having custody or association with their children when Children's or HCJFS does not approve of releasing the child to the parents, even without the parents' consent or a court order, and that HCJFS has to "go by what the doctors say." (*Id.* at ¶ 90). Ultimately, Minor Siefert did not leave Children's until December 20, 2016 when HCFJS and Plaintiffs entered into a voluntary "Safety Plan" releasing Minor Siefert to the child's maternal grandparents. (*Id.* at ¶ 96).

Plaintiffs claim that the County Defendants violated their procedural and substantive due process rights and violated federal and state civil conspiracy laws. Plaintiffs seek compensatory and punitive damages, as well as injunctive relief.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) operates to test the sufficiency of the complaint and permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." To show grounds for relief, Fed. R. Civ. P. 8(a) requires that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief."

While Fed. R. Civ. P. 8 "does not require 'detailed factual allegations,'. . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Pleadings offering mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (citing *Twombly*, 550 U.S. at 555). In fact, in determining a motion to dismiss, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation[.]'" *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265 (1986)). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.*

Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" *Iqbal*, 556 U.S. at 678. A claim is plausible where a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the leader is entitled to relief,'" and the case shall be dismissed. *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

III. ANALYSIS

Plaintiffs assert five causes of action, claiming that the County Defendants: (1) violated 42 U.S.C. § 1983 by depriving Plaintiffs of their Fourteenth Amendment procedural due process rights (Count I); (2) violated 42 U.S.C. § 1983 by depriving Plaintiffs of their Fourteenth Amendment procedural substantive due process rights (Count II); (3) committed federal civil conspiracy (Count III); (4) committed Ohio civil conspiracy (Count IV); and (5) violated Plaintiffs' Fourteenth Amendment Due Process Clause and should be enjoined from any further such conduct (Count V). The County Defendants have moved to dismiss all claims.

1. § 1983 Claims

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a

person acting under color of state law." *Gray v. City of Detroit,* 399 F.3d 612, 615 (6th Cir. 2005). Here, there is no dispute that the County Defendants were acting under color of state law, only whether Plaintiffs' were deprived of their rights to procedural and substantive due process.

a. Qualified Immunity

County Defendants argue that Defendants Moria Weir, Eric Young, and Rachel Butler are entitled to qualified immunity in their individual capacities.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a 'mistake of law, mistake of fact, or a mistake based on mixed questions of law and fact.'" *Id.*

Plaintiffs bear the burden of showing both that (1) County Defendants violated Plaintiffs constitutional right and (2) the right was clearly established at the time of the violation. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). District courts may exercise discretion in

deciding which of the two prongs should be addressed first in a qualified immunity analysis. *See Pearson*, 555 U.S. at 236.

In order to defeat qualified immunity, "a plaintiff must identify a case with a similar fact pattern that would have given "fair and clear warning to officers" about what the law requires." *White v. Pauly*, —— U.S. ——, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (quotation omitted). Ultimately, Plaintiffs fail to plead that County Defendants violated their clearly established procedural or substantive due process rights.

b. Procedural Due Process

To establish a violation of their procedural due process rights, Plaintiffs must how "(1) that [they] was deprived of a protected liberty or property interest, and (2) that such deprivation occurred without the requisite due process of law." *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.,* 470 F.3d 286, 296 (6th Cir. 2006) (citing *Thomas v. Cohen,* 304 F.3d 563, 576 (6th Cir. 2002)). "[D]ue process requires that when a State seeks to terminate [a protected] interest ..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Bell v. Burson,* 402 U.S. 535, 542 (1971) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950)).

Plaintiffs claim the County Defendants violated their right to familial association in violation of procedural due process. "There is no doubt that under the constitution, the parent-child relation gives rise to

a liberty interest that a parent may not be deprived of absent due process of law." *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006). The Supreme Court has found that a parent has a constitutional right to maintenance of a parent-child relationship as a parent's "desire for and right to the companionship, care, custody and management of his or her children is an interest far more precious than any property right." *Lassiter v. Department of Social Services,* 452 U.S. 18, 27 (1981). However, a parent's right to maintenance of a parent-child relationship is limited by "an equaling compelling governmental interest in the protection of children, particularly where the children need to be protected from their own parents." *Kottmyer*, 436 F.3d at 690. Therefore, "although parents enjoy a constitutionally protected interest in their family integrity, this interest is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is necessary as against the parents themselves." *Id*. (quoting *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999)).

Here, the County Defendants argue that dismissal of Plaintiffs claim is appropriate because (1) the government's interest in Minor Siefert's safety outweighed the Plaintiff's liberty interest and (2) the Plaintiffs' provided implied consent to the continued hospitalization of Minor Siefert.

"A parent is necessarily deprived of his or her right to custody and control of their child, either permanently or temporarily, when a child is removed from the home." *Kottmyer*, 436 F.3d at 691. "Notice and

an opportunity to be heard are necessary before parental rights can be terminated." *Anh v. Levi*, 586 F.2d 625, 632 (6th Cir. 1978). "Mere investigation by authorities into child abuse allegations without more, however, does not infringe upon a parent's right to custody or control of a child." Kottmyer, 436 F.3d at 691.

The Court considers three factors in determining whether County Defendants have violated Plaintiffs' procedural due process rights: (1) "the private interest that will be affected by the official action;"(2) "the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Under the first *Mathews* factor, the Court must consider the private interests of Plaintiffs affected by the hospitalization of Minor Siefert. Although Plaintiffs have a strong interest in maintaining familial association with Minor Siefert, Plaintiffs did not lose custody over Minor Siefert during the relevant time period, Plaintiffs voluntarily took Minor Siefert to Children's at their pediatricians' urging, and Children's allowed Plaintiffs to visit Minor Siefert if the child consented.

Regarding the third *Mathews* factor, the government clearly has a strong interest in protecting children who are at risk. Here, it is undisputed that

Minor Siefert reported to HCJFS that Minor Siefert was being abused by the Plaintiffs; that Minor Siefert suffered from depression, anxiety, and suicidal ideation; and that Children's doctors had found that Minor Siefert was not "medically cleared" to be discharged. (Doc. 1 at ¶¶ 24, 26, 65). Therefore, County Defendants had a strong interest in protecting Minor Siefert.

Under the second *Mathews* factor, the Court must consider the risk of erroneous deprivation through the procedures used. "[T]he state must provide clear and effective procedures in ensuring that a parent's interest in their children is not unduly obstructed." *Smith v. Williams-Ash*, 2006 WL 3716782, *5 (S.D. Ohio Dec. 14, 2006).

There is no dispute that Minor Siefert was voluntarily admitted to Children's on November 13, 2016. (Doc. 1 at ¶¶ 30–32). Plaintiffs do not allege that County Defendants had legal custody or attempted to obtain legal custody of Minor Siefert during the time in question. However, Plaintiffs contend that they were prevented from having Minor Siefert discharged from Children's starting on November 23, 2016 until December 20, 2016 when the Plaintiffs and HCJFS entered into a voluntary safety plan giving Minor Siefert's grandparents custody of the child. (*Id.* at ¶ 96). Plaintiffs were allegedly told that Minor Siefert could not be discharged because she was not medically cleared and HCJFS recommended against discharge to the parents.

County Defendants note that, although Plaintiffs allege they communicated with HCJFS and Children's

throughout the relevant time period that they wanted Minor Siefert discharged, they do not allege that they actually tried to remove Minor Siefert, that they made written demands for her release, or that they filed a grievance under the hospital policies that they received upon Minor Siefert's admission to Children's, (*Id.* at ¶ 37; Doc. 12, Ex. B – Children's Hospital Policy), or made a written request for Release of Voluntary Patients pursuant to O.R.C. § 5122.03. (Doc. 12 at 8–9). County Defendants contend that if any of these steps had been taken by the Plaintiffs, HCJFS would have requested an emergency order from Hamilton County Juvenile Court, but, pursuant to Ohio Juv. R. 6, HCJFS was not allowed to seek an emergency order while Minor Siefert as hospitalized at Children's. Thus, County Defendants argue that Plaintiffs inaction amounts to implied consent to Minor Siefert continuing to reside at Children's, especially because Plaintiffs placed Minor Siefert at Children's out of concern for her safety.

The Sixth Circuit's decision in *Smith v. Williams-Ash*, 520 F.3d 596 (6th Cir. 2008) is instructive here. In that case, the defendant, an HCJFS employee, removed the Smiths' children from their home without affording the Smiths a hearing. The defendant argued that the Smiths consented, through a safety plan, to removal of their children. The Sixth Circuit cited favorably to Judge Posner's reasoning in *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006) in finding that "hearings are required for deprivations taken over objection, not for steps authorized by consent." *Id.* at 761–62.

Although *Smith v. Williams-Ash* differs in important ways from this action – in particular, in that case, the parents and HCJFS actually entered into a voluntary safety plan, which did not occur here until approximately four weeks after Plaintiffs sought Minor Siefert's discharge from Children's – it is the precedent with the most similar fact pattern to this matter. In both cases, the parents' initial action to relinquish control of their children was voluntary, both set of parents were provided with information necessary to challenge the policies that deprived them of their parental rights, both set of parents retained custody of their children throughout the relevant time period, and a hearing did not occur in either case.[5] The Sixth Circuit ultimately found that, because the Smiths voluntarily consented to enter into the safety plan and did not utilize the safety plan's clear mechanisms for rescinding the plan, the defendant provided the Smiths with the process they were due. In that case, the court did not even reach the issue of qualified immunity because the appellate court found that the defendant had not violated the Smiths' procedural due process rights.

Here, Plaintiffs are unable to meet their burden of demonstrating that the County Defendants violated a clearly established constitutional right. The Plaintiffs

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[5] Regarding the fact that a hearing never took place here, the Court finds persuasive the County Defendants' argument that, pursuant to Ohio Juv. R. 6, HCJFS was not permitted to seek an emergency custody order while Minor Siefert was safe at Children's. Plaintiffs have not challenged the constitutionality of Ohio. Juv. R. 6.

fail to cite any case law supporting their theory that a social worker violates a parents' procedural due process rights (1) by not seeking a court custody order to prevent parents from removing a child from the hospital or (2) by investigating child abuse allegations while a child is hospitalized. Considering the Sixth Circuit's finding in *Smith v. Williams-Ash*, this Court cannot conclude that County Defendants have violated a clearly established procedural due process right. The County Defendants therefore are entitled to qualified immunity on this claim.

c. Substantive Due Process

"Substantive due process ... serves the goal of preventing governmental power from being used for purposes of oppression, regardless of the fairness of the procedures used." *Howard v. Grinage,* 82 F.3d 1343, 1349 (6th Cir. 1996) (internal quotation marks omitted). Substantive due process claims come in two varieties: "(1) deprivations of a particular constitutional guarantee; and (2) actions that 'shock the conscience.'" *Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.,* 640 F.3d 716, 728 (6th Cir. 2011) (internal quotation marks omitted).

Plaintiffs premise their substantive due process claim on the deprivation of their right to familial association, as discussed *supra*, so their claim is of the first type. *See Pittman*, 640 F.3d 716, 728 n.6 ("where the plaintiff, as here, alleges a violation of a recognized liberty interest, in this case family integrity, the Court applies a different substantive due process test, which requires a compelling government interest and narrowly tailored conduct.")

The Sixth Circuit has instructed courts to be cognizant of the difficult choices that social workers face in determining whether to interfere with the custody rights of parents. "If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights." *Farley v. Farley*, 225 F.3d 658 (6th Cir. 2000) (quoting *Van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 866 (2d Cir. 1990). The Eighth Circuit provides a helpful explanation for considering qualified immunity for social workers accused of substantive due process violations: "The need to continually subject the assertion of this abstract substantive due process right to a balancing test which weighs the interest of the parent against the interests of the child and the state makes the qualified immunity defense difficult to overcome." *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996).

Moreover, other circuits have noted that the contours of the substantive due process right to familial association is not clearly defined. *See, e.g., Kiser v. Garrett,* 67 F.3d 1166, 1173 (5th Cir.1995) ("[A]lthough a substantive due process right to family integrity has been recognized, the contours of that right are not well-defined, and continue to be nebulous, especially in the context of the state's taking temporary custody of a child during an investigation of possible parental abuse."); *Frazier v. Bailey,* 957 F.2d 920, 931 (1st Cir.1992) ("We agree with other courts that while there may be a due process right of 'familial integrity' of

some dimensions, the dimensions of this right have yet to be clearly established.").

Here, it is clear that the County Defendants had a compelling interest in the safety of Minor Siefert. As discussed earlier, County Defendants were presented with allegations that Plaintiffs had abused Minor Siefert, that Minor Siefert was potentially suicidal, and that doctors at Children's had not medically cleared Minor Siefert for discharge. Minor Siefert's continued stay at Children's, with the Plaintiffs being allowed to visit Minor Siefert at the direction of doctors, was a narrowly tailored means of ensuring the safety of the child. *See Thomason*, 85 F.3d at 1373 (finding no substantive due process violation and explaining that "[w]here a treating physician has clearly expressed his or her reasonable suspicion that life-threatening abuse is occurring in the home, the interest of the child (as shared by the state as *parens patriæ*) in being removed from that home setting to a safe and neutral environment outweighs the parents' private interest in familial integrity as a matter of law.").

As discussed *supra*, the fact pattern here is similar to that in *Smith v. Williams-Ash*. In that case, the Sixth Circuit found that the HCJFS defendant was entitled to qualified immunity because plaintiffs failed to allege a violation of their substantive due process claims. *Smith v. Williams-Ash*, 173 Fed. Appx. 363, 367 (6th Cir. 2005). Here, Plaintiffs fail to point to any case where social workers were found to have violated parents' substantive due process rights for telling parents that a child should remain hospitalized at a doctor's recommendation. Plaintiffs cannot meet their

burden of establishing a clearly established substantive due process right that the County Defendants have violated. Accordingly, keeping in mind the difficult choices that social workers face, and the government's strong interest in the safety of Minor Siefert, the Court finds that the County Defendants are entitled to qualified immunity on Plaintiffs' substantive due process claim.

Because Plaintiffs fail to adequately allege a constitutional violation by any of the HCJFS employees, Plaintiffs claims against all of the County Defendants, including the Hamilton County Board of Commissioners, are dismissed. *Grabow v. Cty. of Macomb*, 580 F. App'x 300, 312 (6th Cir. 2014) ("Absent an underlying constitutional violation, [plaintiff's] claim against the county under § 1983 must also fail."); *Wilson v. Morgan,* 477 F.3d 326, 340 (6th Cir. 2007) ("There can be no *Monell* municipal liability under § 1983 unless there is an underlying unconstitutional act.").

2. Federal and State Conspiracy Claims

Plaintiffs state that their federal conspiracy claim is based on their constitutional interest in family integrity on violations of procedural and substantive due process pursuant to §1983. (Doc. 19 at 27). As already discussed, Plaintiffs' procedural and substantive due process claims fail. Accordingly, their federal conspiracy claim also fails.

Additionally, Plaintiffs cannot prevail on their civil-conspiracy claim under Ohio law, which requires that they allege (1) a malicious combination, (2) of two or

more persons, (3) that caused injury to a person or property, and (4) the existence of an underlying wrongful act that is independent of the conspiracy. *Woodward Const., Inc. v. For 1031 Summit Woods, L.L.C.*, 2015-Ohio-975, ¶ 21, 30 N.E.3d 237, 242 (Ohio 1st. Dist. 2015). Here, the alleged underlying wrongful acts are Plaintiffs' dismissed procedural and substantive due process claims. Because there is no cause of action for civil conspiracy without an underlying unlawful action, *see Bradley v. Miller*, 96 F. Supp. 3d 753, 767 (S.D. Ohio 2015) ("[a]n underlying unlawful act is required before a civil conspiracy claim can succeed."), Plaintiffs' state conspiracy claim fails.

IV. CONCLUSION

Wherefore, for the reasons stated here:

1) The August 2, 2018 stay (Doc. 32) is hereby **LIFTED**;

2) The County Defendants' motion to dismiss (Doc. 12) is **GRANTED**;

3) Plaintiffs' motion to alter judgment (Doc. 33) is **DENIED** as moot.

The Clerk shall enter judgment accordingly, whereupon this case is **TERMINATED** in this Court.

IT IS SO ORDERED.

Date: 11/15/18

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Case No. 1:17-CV-511

[Filed: November 15, 2018]

JOSEPH SIEFERT, *et al.*,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
HAMILTON COUNTY	)
BOARD OF COMMISSIONERS, *et al.*,	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

Jury Verdict.

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court.

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The August 2, 2018 stay (Doc. 32) is hereby **LIFTED**. The County Defendants' motion to dismiss (Doc. 12) is **GRANTED.** Plaintiffs' motion to alter judgment (Doc. 33) is **DENIED** as moot. This case is TERMINATED.

Date: November 15, 2018

RICHARD W. NAGEL, CLERK
By:s/Emily Hiltz
Emily Hiltz, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:17-cv-511

Judge Timothy S. Black

[Filed: August 2, 2018]

JOSEPH SIEFERT, *et al.*,

Plaintiff,

vs.

HAMILTON COUNTY BOARD OF COMMISSIONERS, *et al.*,

Defendants.

ORDER GRANTING COUNTY DEFENDANTS' MOTION TO STAY PROCEEDINGS, GRANTING CHILDREN'S DEFENDANTS' MOTION TO DISMISS, AND DENYING PLAINTIFFS' MOTIONS TO FILE SUPPLEMENTAL MEMORANDA

This civil action is before the Court upon the "County Defendants'"[1] motion to dismiss Plaintiffs' complaint or, in the alternative, stay proceedings (Doc. 12), the "Children's Defendants'"[2] motion to dismiss Plaintiffs' complaint (Doc. 13), the parties' responsive memoranda (Docs. 19, 20, 22, 26), Plaintiffs' motions to file supplemental memoranda (Docs. 24 and 27), and the parties' responsive memoranda (Docs. 25, 26, 28, 29, 30).

I. FACTS AS ALLEGED BY THE PLAINTIFF

For purposes of this motion to dismiss, the Court must: (1) view the complaint in the light most favorable to Plaintiffs; and (2) take all well-pleaded factual allegations as true. *Tackett v. M&G Polymers*, 561 F.3d 478, 488 (6th Cir. 2009).

This is a civil action for compensatory and punitive damages, as well as injunctive relief. (Doc. 1, at 32). Plaintiffs Joseph and Melissa Siefert ("Plaintiffs") are

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[1] The "County Defendants" are Hamilton County, Hamilton County Board of Commissioners ("BOCC"), Hamilton County Job and Family Services ("HCJFS"), Moira Weir, Eric Young, and Rachel Butler.

The Court notes that, under Ohio law, HCJFS and Hamilton County are not *sui juris* and therefore cannot be sued. *Estate of Glenara Bates v. Hamilton Cty. Dep't of Job & Family Servs.*, No. 1:15-cv-798, 2017 WL 106871, at *1 n.1 (S.D. Ohio Jan. 11, 2017).

[2] The "Children's Defendants" are Cincinnati Children's Hospital Medical Center ("Children's"), Jennifer Bowden, M.D., Kimberly Stephens, LISW, Ankita Zutshi, M.D., Daniel Almeida, M.D., Suzanne Sampang, M.D., and Lauren Heeney.

residents of Ohio and the parents of Minor Siefert.[3] (*Id.* at ¶ 4). Plaintiffs allege that from November 23, 2016 to December 20, 2016, they were denied their fundamental liberty interest in the care, custody, control, companionship, and management of Minor Siefert, as guaranteed by the Fourteenth Amendment. (*Id.* at ¶¶ 96, 127).

In November 2015, the Plaintiffs learned that Minor Siefert was suffering from depression, anxiety, and suicidal ideations. (*Id.* at ¶ 24). The Plaintiffs had Minor Siefert treated with therapy and medication from their long-time pediatrician. (*Id.* at ¶¶ 24, 29). On August 11, 2016, Minor Siefert informed Plaintiffs that Minor Siefert considered Minor Seifert to be a transgender child. (*Id.* at ¶ 25). Minor Siefert emailed HCJFS on November 11, 2016 and informed HCJFS that Minor Seifert was experiencing transgender thoughts and that Plaintiffs were unsupportive and abusive. (*Id.* at ¶ 26). On that same day, Defendant Butler of HCJFS visited Plaintiffs' home and asked Mrs. Siefert questions regarding conditions in the home. (*Id.* at ¶ 28). On November 13, Plaintiffs took Minor Siefert to Children's Liberty Township location for psychological evaluation regarding suicidal ideations. (*Id.* at ¶ 30). Minor Siefert was ultimately transferred to Children's psychiatry facility at the College Hill location. Plaintiffs went to visit Minor Siefert at Children's College Hill facility on November 15, and received a welcome package that included information regarding Children's policies and

[3] Due to privacy concerns regarding the child at issue, Plaintiffs' child will be referred to as "Minor Siefert."

guidelines. (*Id.* at ¶¶ 36–37). Plaintiffs allege that the welcome packet did not include a nineteen-page document titled "Psychiatry Impatient Admission, A Family Guide," which stated that Children's could tell parents that they were not to take their child home if Children's found it unsafe for the child. (*Id.* at ¶¶ 38–39). Plaintiffs allege that they were not told of this policy at the time Minor Siefert was admitted. (*Id.* at ¶ 40).

Over the next few weeks, Plaintiffs consulted with HCJFS regarding Minor Siefert's treatment. (*Id.* at ¶ 41). At Plaintiffs' first conference with Defendant Butler, she explained to Plaintiffs that Children's would not send Minor Siefert home without permission from HCJFS, and if Plaintiffs could not take care of Minor Siefert, HCJFS "would step in and do it." (*Id.* at ¶ 42). Plaintiffs claim they did not "agree to allow [Children's] and HCJFS to keep Minor Siefert at Children's without their consent. (*Id.* at ¶ 47).

On November 22, Defendant Dr. Zutshi met with a doctor from Humana Behavioral Health ("Humana"), the insurance provider for Minor Siefert's treatment, to present Minor Siefert's case. (*Id.* at ¶¶ 46, 51). Based on the meeting with Dr. Zutshi, Humana determined that Minor Siefert "had no acute symptoms that require 24 hour care (sic) . . . [Minor Siefert] is not a danger to [Minor Seifert] or others. [Minor Siefert] is not aggressive. [Minor Siefert] is medically stable. [Minor Siefert] is not manic." Based on this finding, Humana denied coverage for further treatment of Minor Seifert by Children's. (*Id.* at ¶ 52).

On that same day, Plaintiffs met with Defendant Stephens of Children's regarding Minor Siefert's discharge. Plaintiffs allege that Butler and Minor Siefert were supposed to attend the meeting, however Stephens told Plaintiffs that Butler would not be available until November 28. (*Id.* at ¶¶ 53–54). Plaintiffs complain that Butler was available in fact and was in regular telephone contact with Stephens and met with Minor Siefert on November 23. (*Id.* at ¶¶ 55–57).

Plaintiffs contend that starting November 23, Mr. Siefert began leaving voicemail messages with Children's and left calls with HCJFS attempting to have Minor Siefert discharged from Children's to the Plaintiffs. (*Id.* at ¶¶ 60, 61). Eventually, Stephens allegedly spoke with Mr. Siefert by telephone and informed him that Minor Siefert could not be discharged because Minor Siefert was not "medically cleared" and that Mr. Siefert would have to contact HCJFS to obtain Minor Siefert's discharge. (*Id.* ¶¶ 64–65). Plaintiffs allege that on that same day, a Children's doctor wrote in his notes that "JFS gave clear recommendations to not allow patient to be discharged to parents." (*Id.* at ¶ 67). While HCJFS allegedly told Plaintiffs that it was "actively pursuing" the case throughout the relevant time period, HCJFS never attempted to obtain a court order of custody. (*Id.* at ¶ 59).

On November 28, Plaintiffs, HCJFS, and Children's held another meeting to discuss Minor Siefert's discharge. (*Id.* at ¶¶ 69–77). During this meeting, Mr. Siefert asked what the Plaintiffs had to do to have

Minor Siefert discharged, and Butler responded, "[i]t does not work that way," and that when Plaintiffs cannot take care of their child, HCJFS has to "step in." (*Id.* at ¶¶ 71–72). In response, Mr. Siefert allegedly demanded that Minor Siefert be discharged and argued that he could go down the hall and take Minor Siefert home, but Stephens informed the Plaintiffs that was not allowed. (*Id.* at ¶ 74).

Plaintiffs had another meeting with Butler and Young of HCJFS on November 30. (*Id.* at ¶¶ 87–91). Young explained HCJFS's policy preventing parents from having custody or association with their children when Children's or HCJFS does not approve of releasing the child to the parents, even without the parents' consent or a court order, and that HCJFS has to "go by what the doctors say." (*Id.* at ¶ 90). Ultimately, Minor Siefert did not leave Children's until December 20, 2016 when HCJFS and Plaintiffs entered into a voluntary "Safety Plan" releasing Minor Siefert to their maternal grandparents. (*Id.* at ¶ 96).

II. PLAINTIFFS' MOTIONS TO FILE SUPPLEMENTAL MEMORANDA

First, the Court must determine if it will consider Plaintiffs' supplemental memoranda (Docs. 24-1, 27-1) in considering Defendants' motions to dismiss. (Docs. 12, 13).

Plaintiffs have filed two motions to file supplemental memoranda in opposition to Defendants' motions to dismiss, with the proposed supplemental memoranda attached. The Local Rules of the Southern District of Ohio prohibit the filing of additional

memoranda beyond the standard motion, response, and reply unless the movant shows good cause. S.D. Ohio Civ. R. 7.2. Good cause exists "to permit a party to file a sur-reply to address an issue raised for the first time in a reply brief." *Geiger v. Pfizer, Inc.*, 271 F.R.D. 577, 580 (S.D. Ohio 2010).

Plaintiffs argue there is good cause to supplement the record because Defendants purportedly raised four new legal arguments in their motion to dismiss reply memoranda: (1) the County Defendants argued that Plaintiffs did not use certain pleading terms; (2) the County Defendants raised new arguments related to the Younger abstention; (3) the Children's Defendants argued that they are entitled to qualified immunity; and (4) the Children's Defendants raised new arguments related to state-actor status for private defendants. (Doc. 24, at 2). But Plaintiffs' argument is without merit. The Defendants' reply briefs (Docs. 20, 22) simply distinguish case law and respond to arguments made by Plaintiffs in their opposition brief (Doc. 19) to the motions to dismiss.

Accordingly, Plaintiffs have failed to demonstrate the existence of good cause to support their motions to file supplemental memoranda. Plaintiffs' motions (Docs. 24, 27) are, therefore, **DENIED**.

III. STANDARD OF REVIEW

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) operates to test the sufficiency of the complaint and permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." To show grounds for relief, Fed. R. Civ. P. 8(a) requires

that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief."

While Fed. R. Civ. P. 8 "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Pleadings offering mere "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (citing *Twombly*, 550 U.S. at 555). In fact, in determining a motion to dismiss, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation[.]'" *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265 (1986)). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.*

Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. A claim is plausible where a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief,'" and the case shall be dismissed. *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

When faced with a threshold question of whether to apply the *Younger* abstention doctrine as raised by the County Defendants, a court must first address the abstention issue before engaging in analysis on the merits of the case. *Tenet v. Doe*, 544 U.S. 1, 6, n.4 (2005); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 100, n. 3 (1998).

IV. ANALYSIS

Plaintiffs assert five causes of action, claiming Defendants: (1) violated 42 U.S.C. § 1983 by depriving Plaintiffs of their Fourteenth Amendment procedural due process rights (Count I); (2) violated 42 U.S.C. § 1983 by depriving Plaintiffs of their Fourteenth Amendment procedural substantive due process rights (Count II); (3) committed federal civil conspiracy (Count III); (4) committed Ohio civil conspiracy (Count IV); and (5) violated Plaintiffs' Fourteenth Amendment Due Process Clause and should be enjoined from any further such conduct (Count V). The County Defendants have moved to dismiss Plaintiffs' complaint or, in the alternative, to stay the proceedings. The Children's Defendants have moved to dismiss Plaintiffs' complaint. The Court will analyze each motion in turn.

A. **County Defendants' motion to dismiss or, in the alternative, stay proceedings**

The County Defendants move to dismiss all claims, or seek a stay of the proceedings under the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). The Court must first consider abstention under

Younger to determine if it is appropriate to analyze the merits of the County Defendants' motion to dismiss.

The *Younger* abstention doctrine restricts federal district courts from deciding a claim that falls within the jurisdiction of the state courts where there is no evidence that "a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim[.]" *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 501 (1941). Although *Younger* abstention initially pertained to federal courts interfering with state criminal prosecutions, the Supreme Court clarified that abstention may also be warranted in civil enforcements, including family law cases. *See Moore v. Sims,* 442 U.S. 415, 434–35 (1979).

In the Sixth Circuit, abstention pursuant to the *Younger* doctrine is appropriate when a state proceeding "(1) is currently pending, (2) involves an important state interest, and (3) affords the plaintiff an adequate opportunity to raise constitutional claims." *Eidson v. State of Tenn. Dept. of Children's Services*, 510 F.3d 631, 639 (6th Cir. 2007) (quoting *Coles v. Granville,* 448 F.3d 853, 865 (6th Cir. 2006)). The Sixth Circuit recognizes exceptions to *Younger* in which abstention is not required "such as bad faith, harassment, or flagrant unconstitutionality." *Fieger v. Thomas*, 74 F.3d 740, 750 (6th Cir. 1996).

1. First *Younger* requirement: ongoing state judicial proceedings

The first *Younger* requirement is satisfied if a state proceeding is pending at the time the federal action is initiated. *Zalman v. Armstrong*, 802 F.2d 199, 202 (6th

Cir. 1986). Here, the state proceedings involving Plaintiffs and HCJFS[4] were filed on February 8, 2017, almost six months before the Plaintiffs filed the complaint in this action. (*See* Doc. 19, at 42; Doc. 22, at 16). As of the filing of the briefs at issue, there has been no resolution to the juvenile proceedings. Therefore, the first *Younger* requirement has been met.

2. Second *Younger* requirement: important state interest

The second *Younger* requirement is satisfied if the pending state proceedings implicate an important state interest. *Tindall v. Wayne Cty. Friend of Court*, 269 F.3d 533, 538 (6th Cir. 2001). The Sixth Circuit has found that family law matters implicate important state interests. *See Furr-Barry v. Underwood*, 59 Fed. Appx. 796, 796–97 (6th Cir. 2003) (requiring abstention where an ongoing custody action in juvenile court implicated important state interests); *Meyers v. Franklin Cty. Court of Common Pleas*, 23 Fed. Appx. 201, 204–05 (6th Cir. 2001) (finding second requirement for *Younger* abstention met because child welfare and protection is an important state interest). Here, there are proceedings related to the custody and medical treatment of Minor Siefert. (Doc. 12, at 16; Doc. 19, at 45). Important state interests are

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[4] The County Defendants note that even though state court proceedings are between Plaintiffs and HCJFS, not the BOCC, HCJFS is a division under the BOCC. Thus, suing HCJFS is the same as suing Defendant Weir or the BOCC in their official capacities. (Doc. 22, at 18 (citing *Lambert v. Clancy*, 125 Ohio St. 3d 231, 927 N.E.2d 585 (2010))).

implicated in those proceedings. Therefore, the second *Younger* requirement has been met.

3. Third *Younger* requirement: adequate opportunity to raise constitutional challenges

The third *Younger* requirement is satisfied if the pending state proceeding provides the plaintiff with an adequate opportunity to raise federal constitutional claims. *Squire v. Coughlan*, 469 F.3d 551, 556 (6th Cir. 2006). "Abstention is appropriate unless state law clearly bars the interposition of the constitutional claims. The plaintiff bears the burden of showing that state law bar[s] presentation of his or her constitutional claim." *Id.* (citation and quotation marks omitted).

First, Plaintiffs argue that the juvenile proceedings do not offer an adequate opportunity to raise constitutional challenges because the federal constitutional claims are "collateral" to the to the state juvenile court proceedings. (Doc. 19, at 46–47). This argument is unavailing.

Plaintiffs rely on *Habich v. City of Dearborn*, 331 F.3d 524 (6th Cir. 2003), in which the plaintiff brought claims against the defendant for violating her constitutional rights by (1) refusing to sell plaintiff a vacant lot, while selling a similar lot to her neighbor and (2) padlocking plaintiff's home without warning. *Habich*, 331 F.3d at 527. The state proceedings between plaintiff and defendant, however, only related to whether plaintiff had improperly rented out her home. *Id.* at 530–31. The Sixth Circuit found that

Younger did not require abstention in this case because the constitutional issues raised by the plaintiff were "collateral" to the issues in the state proceeding. *Id.* The Court of Appeals found that *Younger* abstention was inapplicable because "the issues in [plaintiff's] federal suit could neither be proven as part of the state case-in-chief nor raised as an affirmative defense." *Id.* at 531.

Yet here, the custody of Minor Siefert is at the heart of both the federal claims and the state proceedings. Count IV of Plaintiffs' complaint asks the Court to declare Defendants' "conduct of denying parents their liberty interest" in Minor Siefert to be a Fourteenth Amendment Due Process violation and to "enjoin further such conduct." The custody issues being addressed by the juvenile court are in no way collateral to the claims before the Court. Thus, Plaintiffs' first argument that constitutional issues could not be addressed adequately in the state proceeding fails.

Second, Plaintiffs argue that they are procedurally barred from bringing constitutional issues in the juvenile court. (Doc. 19, at 47–48). In Ohio juvenile court, the Ohio Rules of Juvenile Procedure apply,[5]

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[5] Plaintiffs state, without any support, that none of the exceptions to the Ohio Rules of Juvenile Procedure, which would require applying the Ohio Rules of Civil Procedure, apply to this case. (Doc. 19, at 47 n.1). However, the Supreme Court of Ohio has discussed the applicability of the Ohio Rules of Civil Procedure in custody proceedings and stated that the Rules of Civil Procedure "apply to custody proceedings in juvenile court except when they are clearly inapplicable." *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, 868 N.E.2d 261, ¶ 11 (2007). Plaintiffs provide no argument

which only allow for a party to file a complaint or answer, Ohio R. Juv. P. 22(A), (C), purportedly making it impossible for Plaintiffs to raise constitutional issues. However, as the Sixth Circuit explained in *Habich*, a state proceeding is an inadequate forum to hear constitutional claims if a party cannot present their constitutional claims as a part of its case-in-chief or as an affirmative defense. 331 F.3d at 531. Here, Plaintiffs do not explain why they are unable to raise their constitutional claims as an affirmative defense. Plaintiffs have not met their burden to demonstrate that they cannot assert their constitutional claims in the juvenile court proceedings. Thus, Plaintiffs' second argument fails.

Moreover, the Supreme Court and Sixth Circuit have found that juvenile courts provide an adequate opportunity to raise constitutional issues. *See Moore,* 442 U.S. at 418–20 (requiring *Younger* abstention where parents had the opportunity to challenge the constitutionality of the Texas Family Code that permitted the removal of their children following allegations of child abuse in juvenile court); *Meyers*, 23 Fed. Appx. at 205–06 (finding that parents had an adequate opportunity to challenge the constitutionality of removing a child from the parents' home pending a merit hearing in juvenile court). The Sixth Circuit has

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why the Ohio Rules of Civil Procedure are clearly inapplicable in the state proceeding. Nevertheless, the Court need not examine whether the Ohio Rules of Juvenile Procedure or Ohio Rules of Civil Procedure apply in the state proceeding in order to determine that Plaintiffs can adequately raise constitutional claims in the state proceedings.

also noted that "Ohio has an 'open courts provision' found in Article 1, § 16 of the Ohio Constitution." *Kelm* v. *Hyatt*, 44 F.3d 415, 420 (6th Cir. 1995). An "'open court provision' provides that all courts shall be open, and remedies provided, to all injured persons." *Id.* Like in *Kelm*, the current state proceedings against the Plaintiffs have given this Court no reason to question their adequacy in addressing Plaintiffs' constitutional issues. Therefore, the third *Younger* requirement has been met.

4. *Younger* exceptions

Here, Plaintiffs do not allege the state court proceedings are being administered in bad faith, with harassment, or are flagrantly unconstitutional. *Fieger*, 74 F.3d at 750. Instead Plaintiffs state that the "juvenile court is providing a neutral decision-maker." (Doc. 19, at 43). Thus, none of the *Younger* exceptions are applicable.

All three elements necessary for abstention under Younger have been met. Because Plaintiffs seek declaratory relief, injunctive relief, and damages, it is appropriate for the Court to **STAY** proceedings pending the conclusion of the state court proceedings. *See Gray v. Bush,* 628 F.3d 779, 785 (6th Cir. 2010) ("In the context of a complaint seeking 'both equitable [relief] and money damages,' ... 'a federal court's discretion to abstain from exercising jurisdiction does not extend so far as to permit a court to dismiss or remand, as opposed to stay, an action at law.'")

B. Children's Defendants' motion to dismiss

Unlike the County Defendants, the Children's Defendants have not argued that the *Younger* abstention applies to Plaintiffs' claims and have only presented arguments related to their motion to dismiss. While *Younger* would require abstention if ruling on the motion to dismiss interfered with the state proceedings, the Court is able to analyze the Children's Defendants' motion to dismiss without considering the merits of the family law issues implicated in the state proceedings. *See Alexander v. Rosen*, 804 F.3d 1203, 1207 (6th Cir. 2015) ("[Plaintiff] raises federal questions that do not entangle us in the merits of the state child support proceedings, and accordingly we may answer them without treading on protected state interests.").

The Children's Defendants argue that Plaintiffs' complaint fails to set forth a claim under § 1983, and thus all five counts in the complaint fail. (Doc. 13, at 6, 14–15). In order to adequately plead a violation of § 1983, Plaintiffs must show that (1) a person acting under color of state law (2) deprived them of their rights secured by the United States Constitution or its laws. *Waters v. City of Morristown,* 242 F.3d 353, 358-59 (6th Cir. 2001). Here, the Court can examine whether the Children's Defendants acted under the color of state law without analyzing whether the Plaintiffs were deprived of their constitutional rights.

1. Children's Defendants were not acting under color of state law

Claims under § 1983 are not viable against private defendants unless they acted under color of state law, no matter how discriminatory or wrong their private conduct may have been. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)). "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992).

The Sixth Circuit uses three tests to determine whether the action of a private party is fairly attributable to the state: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test. *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir.1992). The public function test "requires that the private entity exercise powers which are traditionally exclusively reserved to the state." *Id.* The state compulsion test "requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Id.* Under the symbiotic relationship test, "the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* Plaintiffs bear the burden to prove the state action tests apply. *See Ellison v. Garbarino*, 48 F.3d 192, 196 (6th Cir. 1995)

The Plaintiffs argue that Children's actions are attributable to the state under the state compulsion test and the symbiotic relationship test.

a. State compulsion test

Plaintiffs argue that the actions of the Children's Defendants satisfy the state compulsion test because HCJFS "exercised such coercive power and/or provided such significant encouragement that the actions by [Children's Defendants] would be deemed to be that of the state." (Doc. 19, at 52–53). Plaintiffs allege that the County Defendants' coercive power over the Children's Defendants was demonstrated by (1) Children's informing Plaintiffs that Children's could not take any steps to discharge Minor Siefert without conferring with HCJFS (Doc. 1 ¶¶ 53–55, 66–67); (2) HCJFS and Children's discussing Minor Siefert's potential discharge over the telephone (*id.* at ¶ 63); (3) a Children's doctor ordering that Minor Siefert not be discharged, consistent with the policy that parents should be prevented custody when the Children's doctors or HCJFS officials do not approve of releasing the child do the parents (*id.* at ¶¶ 90–93); and (4) a Children's Defendant telling Plaintiffs that HCJFS "holds the key in determining where patient goes at this time." (*Id.* at ¶ 95).

Plaintiffs contend that the allegedly coercive power exerted over the Children's Defendants was similar to circumstances where the Sixth Circuit found that a private vehicle repossession became a state action when police officers were actively involved. *Hensley v. Gassman*, 693 F.3d 681 (6th Cir. 2012). However,

Hensley is not analogous to the facts alleged before this Court.

In *Hensley*, the Sixth Circuit found that when a police officer assists a private party repossess property with actions that go beyond peacekeeping, the repossession generally becomes a state action. *Id.* at 687–93. Applying *Hensley* to the case before this Court, HCJFS officials would need to be construed as equivalent to the police officers who were involved in the vehicle repossessions that the court considered a state action. However, whether HCJFS and the County Defendants were state actors is not at issue here; instead at issue is whether the Children's Defendants were state actors. In *Hensley*, the Sixth Circuit did not find that the private defendant involved in the vehicle repossession was a state actor due to police officer involvement. *Hensley* does not support the argument that the Children's Defendants were state actors under the state compulsion test.

In contrast, the Children's Defendants argue that they were not compelled by the County Defendants, but instead were simply performing medical treatment and complying with Ohio reporting statutes related to the child abuse that Minor Siefert alleged against the Plaintiffs. (Doc. 1 at ¶¶ 26–27, 30). That reporting statute provides:

> If a health care professional provides health care services in a hospital, children's advocacy center, or emergency medical facility to a child about whom a report has been made . . . the health care professional may take any steps that are reasonably necessary for release or discharge of

> the child to an appropriate environment. Before the child's release or discharge, the health care professional may obtain information, or consider information obtained, from other entities or individuals that have knowledge about the child.

R.C. § 2151.421(D)(3).

Generally, when private medical professionals comply with state statutes, it does not turn their actions into state actions. *See Ellison v. Garbarino*, 48 F.3d 192 (6th Cir. 1995) (finding that a private physician's decision to admit a patient pursuant to a state involuntary commitment statute was not made under color of state law); *Harville v. Vanderbilt University, Inc.*, 95 Fed. Appx. 719, 726 (6th Cir. 2003) (ruling that private physicians were not acting under color of state law in reporting to child welfare agency); *Blythe v. Schlievert*, 245 F. Supp. 3d 959, 968 (finding that private physicians did not become state actors by fulfilling duty to report suspected child abuse); *Haag v. Cuyahoga County*, 619 F. Supp. 262, 283 (N.D. Ohio 1985) (licensed psychologist who had mandatory duty under state statute to report child neglect and/or abuse was not a state actor), *aff'd*, 798 F.2d 1414 (6th Cir. 1986).

Plaintiffs neither allege plausible facts that the Children's Defendants were compelled or coerced by the County Defendants nor cite to case law where similarly situated defendants have been considered state actors under the state compulsion test. Instead, the alleged facts suggest the Children's Defendants were conforming their conduct to provide Minor Siefert with medical care and to comply with state statutes.

Plaintiffs fails to meet their burden to show that the state compulsion test is satisfied.

b. Symbiotic relationship test

Plaintiffs argue that "there was a sufficiently close nexus or pervasive entwinement between HCJFS and the Children's [Hospital] employees so that their conduct was fairly attributable to the state." (Doc. 19, at 54). Plaintiffs allege that Children's and HCJFS had a symbiotic relationship because (1) Children's had a written policy of not allowing parents to take their children home if that was deemed unsafe, and Plaintiffs allege that this was the same policy as HCJFS' (Doc. 1 at ¶ 39); (2) HCJFS told Plaintiffs that Children's would not release Minor Siefert without permission from HCJFS (*id.* at ¶ 42); (3) Children's said there was nothing it could do regarding Minor Siefert's discharge without HCJFS' agreement (*id.* at ¶¶ 55, 93); and (4) Children's collaborated with HCJFS to deny Plaintiffs custody of Minor Siefert. (*Id.* at ¶ 94).

Plaintiffs rely on *Norris v. Premier Integrity Sols. Inc.*, 641 F.3d 695 (6th Cir. 2011) to argue that Children's and HCJFS had a symbiotic relationship. However, *Norris* is easily distinguished from this case. In *Norris*, Premier, a private entity, conducted drug testing for criminal defendants participating in pretrial release. The Sixth Circuit found that, because Premier was contracted by the state, to perform actions traditionally performed by the state, and the state approved Premier's policies and methods before the testing, Premier was acting under color of state law. *Id.* at 697–98.

Unlike *Norris*, Children's actions were not done while contracted by the state, Children's did not perform actions traditionally performed by the state, and Children's policies and methods were not approved by the state in advance. Here, like in *Ellison*, the Children's Defendants are private physicians and a private hospital and "are in no way contractually bound to the state." 48 F.3d at 197 (affirming summary judgment because defendants were not state actors). In fact, the symbiotic relationship test is not even satisfied when private doctors have been contracted by the state to perform medical services as long as the doctors act independently. *Collyer v. Darling*, 98 F.3d 211, 232 (6th Cir. 1996). Plaintiffs allege no facts indicating that the Children's Defendants did not independently evaluate and treat Minor Siefert.

Plaintiffs cite no cases to support their proposition that private physicians and a private hospital become state actors under the symbiotic relationship test when they provide medical care to a minor patient reportedly suffering from child abuse and comply with state statutes regarding their medical treatment. Plaintiffs fail to meet their burden in regard to the symbiotic relationship test.

Plaintiffs have not satisfied any of the state actor tests. Thus, Plaintiffs' conclusory allegations that the Children's Defendants acted under color of state law are insufficient under *Iqbal* and *Twombly* to state a plausible basis for finding state action.

Because Plaintiffs do not adequately plead the first prong of a § 1983 violation, both Plaintiffs' procedural and substantive due process claims are **DISMISSED**

against the Children's Defendants. (Counts I, II, and V). Moreover, because there is no cause of action for civil conspiracy without an underlying unlawful action, *see Bradley v. Miller*, 96 F. Supp. 3d 753, 767 (S.D. Ohio 2015) ("An underlying unlawful act is required before a civil conspiracy claim can succeed."), Plaintiffs' federal and Ohio civil conspiracy claims (Counts III and IV) are also **DISMISSED.**

If, on any appeal, it is determined that the Children's Defendants were acting under color of state law, the Court finds that it would be appropriate to stay claims against the Children's Defendants under *Younger*. As discussed *supra*, all three *Younger* elements necessary for abstention have been met and allowing claims to proceed against the Children's Defendants would interfere with ongoing state proceedings.

V. CONCLUSION

Wherefore, for the reasons stated above, Plaintiffs' motions to supplement memoranda (Docs. 24 and 27) are **DENIED**. The Children's Defendants' motion to dismiss (Doc. 13) is **GRANTED**. As to the County Defendants' motion to dismiss or stay proceedings (Doc. 12), *Younger* abstention is proper in this case, and this Court hereby **STAYS** the current action and **ABSTAINS** from exercising jurisdiction at this time.

IT IS SO ORDERED.

Date: 8/2/18

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX E

No. 18-4179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: April 23, 2020]

JOSEPH SIEFERT; MELISSA SIEFERT,

Plaintiffs-Appellants,

v.

HAMILTON COUNTY;
BOARD OF HAMILTON COUNTY COMMISSIONERS;
HAMILTON COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES;
MOIRA WEIR; ERIC YOUNG;
RACHEL BUTLER;
CINCINNATI CHILDREN'S HOSPITAL MEDICAL CENTER;
JENNIFER BOWDEN, M.D.;
KIMBERLEY STEPHENS, LISW;
ANKITA ZUTSHI, M.D.;
DANIEL ALMEIDA, M.D.;
SUZANNE SAMPANG, M.D.;
LAUREN HEENEY,

Defendants-Appellees.

O R D E R

BEFORE: SILER, BATCHELDER, and DONALD, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk