

No. 17-

IN THE
Supreme Court of the United States

KELCEY PATTON,

Petitioner,

v.

T.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a social worker who was one member of team of professionals and relatives who collectively recommended the placement of a child with his biological father, which placement was ultimately determined by a juvenile court judge, entitled to qualified immunity from a 42 U.S.C. § 1983 claim that the placement violated the child's right to substantive due process under the danger creation theory of liability?

Does a single decision from a Circuit Court of Appeals create clearly established law for qualified immunity purposes?

Can the Tenth Circuit decision in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), create clearly established law when it is inconsistent with this Court's decision in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)?

Are the facts of this case sufficiently distinct from the facts of *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), such that the latter case would not alert the petitioner that her alleged actions violated the constitutional rights of the respondent?

LIST OF PARTIES TO THE PROCEEDING

1. T.D.,¹ respondent
2. Kelcey Patton, petitioner
3. Denver Department of Human Services – dismissed
by the District Court

1. Respondent was a minor at the time of the filing of the Complaint in the District Court below, and was therefore referenced by his initials. Although Respondent has since reached the age of majority, for ease of reference the parties have continued to refer to him as T.D.

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The decision of the United States Court of Appeals for the Tenth Circuit was published at 868 F.3d 1209 (10th Cir. 2017). [App. 1a]. The decision of the United States District Court for the District of Colorado was not published, and is available electronically at 2016 U.S. Dist. LEXIS 29505 (D. Colo. Mar. 8, 2016). [App. 73a].

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on August 28, 2017. [App. 1a]. The Tenth Circuit issued an Order denying Ms. Patton's Petition for Rehearing or for Rehearing *En Banc* on October 24, 2017. [App. 129a]. This Court has jurisdiction to entertain this petition for writ of certiorari pursuant to the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 42 U.S.C. § 1983, which provides in pertinent part:

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

In 2010, the Denver Department of Human Services (the “Department”) removed Plaintiff T.D. and his sister from the home of their mother, Regina Garcia, and filed a Petition in Dependency or Neglect based on concerns Ms. Garcia was unable to care for her children. [App. 7a]. Defendant Kelcey Patton, a social worker for the Department, prepared a report for the juvenile court indicating that T.D.’s father, Tiercel Duerson, had been incarcerated for two years for attempted sexual assault on a minor, and recommending the Department retain custody of T.D. [App. 7a-8a]. The juvenile court ordered the Department to place T.D. in a residential facility, where he lived and received treatment, including family therapy with his father. [App. 8a-9a].

After a few months in the residential facility, a team of professionals and family members began meeting to discuss T.D.'s transition to a lower level of care. [App. 11a-14a]. At various times, these meetings included T.D., his family therapist, his individual therapist, his guardian *ad litem*, Ms. Garcia, Mr. Duerson, and Ms. Patton. [*Id.*]. During these meetings, and in her reports to the juvenile court, Ms. Patton failed to report all information she had relating to Mr. Duerson, including the specific details of his prior sex offense, his initial failure to complete his probation for that offense, and the existence of criminal charges not subject to any conviction. [App. 9a-13a].

In August of 2010, the team approved a tentative plan to transition T.D. from the residential facility to the home of Mr. Duerson, who had completed his offense-specific treatment and was no longer on probation. [App. 11a]. The team met to complete a transition plan in September and October of 2010, but Ms. Patton did not attend these final meetings and the Department instead sent another representative. [App. 14a]. The recommendation to return T.D. to Mr. Duerson's house was approved by the juvenile court, and the transition was completed in October of 2010. [*Id.*] In November of 2010, the juvenile court granted temporary and legal physical custody of T.D. to Mr. Duerson under an order of supervision by the Department. [*Id.*]

Following T.D.'s reunification with Mr. Duerson, in June of 2011, Ms. Patton reported the following to the juvenile court: Mr. Duerson had used physical punishment on T.D.; school officials reported T.D. spent a lot of time in the nurse's office, appeared to be afraid of his father, and at times did not want to go home; and Ms. Garcia reported

that when T.D. stayed with her on the weekend he was disrespectful, refused to complete chores, smelled badly, and had unclean clothes. [App. 16a]. Ms. Patton referred Mr. Duerson to the Department's Fatherhood Initiative Program and recommended T.D. remain in Mr. Duerson's home despite concerns for his safety. [App. 16a-17a].

In September of 2011, the Department removed T.D. from Mr. Duerson's home after a report of sexual contact between T.D. and his half-brother. [App. 17a-18a]. Two and a half years later, in March of 2014, T.D. reported his father had sexually abused him while they were living together. [App. 18a]. The Department investigated and determined T.D.'s reporting of sexual abuse by his father was founded. [*Id.*]

In 2014, Ms. Garcia brought this action on behalf of T.D., then a minor, against Ms. Patton and the Department. [App. 19a]. T.D. alleged Ms. Patton and the Department violated his substantive due process rights under the Fourteenth Amendment by reunifying him with his father, relying on theories of special relationship and danger creation. [*Id.*]

Following discovery, T.D. filed a motion for partial summary judgment on the special relationship theory, and Ms. Patton filed a motion for summary judgment under both substantive due process theories, invoking the defense of qualified immunity. [*Id.*] On March 8, 2016, the District Court issued its Opinion and Order, denying T.D.'s motion and granting in part and denying in part Ms. Patton's motion. [App. 73a]. The District Court granted summary judgment in Ms. Patton's favor on the special relationship theory, but denied summary judgment on

the danger creation theory. [*See id.*] The District Court separately granted summary judgment in favor of the Department on the basis of the Department's Eleventh Amendment sovereign immunity, and T.D.'s claims against the Department are not part of this appeal. [App. 20a].

Ms. Patton filed an interlocutory appeal with the Tenth Circuit based on qualified immunity. [*Id.*] On August 28, 2017, the Tenth Circuit affirmed the denial of qualified immunity to Ms. Patton on the danger creation claim, holding that its prior opinion in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), put Ms. Patton on notice that her conduct relating to T.D.'s placement was unconstitutional. [App. 47a-48a]. Circuit Judge Briscoe concurred in the judgment, stating the *Currier* case was wrongly decided because it "directly conflicts" with this Court's precedent in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), and "should be reconsidered in an appropriate case." [App. 62a].

STATEMENT OF RELATED CASES

There are no related cases.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION IN THIS CASE, AND ITS PRIOR DECISION IN *CURRIER*, CREATE A STANDARD FOR A DANGER CREATION CLAIM INCONSISTENT WITH *DESHANEY*

The Circuit Courts have interpreted this Court's decision in *DeShaney v. Winnebago County Department*

of Social Services, 489 U.S. 189 (1989), as creating two forms of substantive due process claims arising from acts of private violence, under theories of special relationship and danger creation. However, since *DeShaney* was decided, this Court has never revisited the danger creation theory it generated and has never provided any definitive pronouncement of the scope of such a claim. The Tenth Circuit in *Currier v. Doran*, 242 F.3d 905, 917 (10th Cir. 2001), and again here applied the danger creation theory irreconcilably with *DeShaney*, improperly conflating the special relationship and danger creation theories. This Court should review the Tenth Circuit's opinion and provide definitive guidance on the scope of a danger creation claim, and the distinction between danger creation claims and special relationship claims, in the context of child placement decisions.

In *DeShaney*, a county department of social services placed the minor plaintiff, Joshua DeShaney, in protective custody following a report of suspected child abuse, but returned the child to his father after a child protection team found insufficient evidence of child abuse to retain custody. *DeShaney*, 489 U.S. at 192. After the department returned Joshua to his father, it received multiple reports of suspicious injuries and suspected abuse, but took no action before the father beat Joshua so severely that he suffered permanent brain damage. *Id.* at 192-93.

DeShaney included a substantive due process claim against the county and the social workers, claiming they knew Joshua faced a special danger of abuse from his father and proclaimed “by word and by deed” an intent to protect him against the danger. *Id.* at 197. This Court recognized that in extremely limited circumstances the

state assumes an affirmative duty to protect an individual from harm, such as when the state takes the individual into custody and holds him against his will, but found no special relationship with Joshua because the State did not so restrain his liberty that it rendered him unable to care for himself. *Id.* at 200. This Court also found the State’s assumption of temporary custody over Joshua did not change the analysis, holding “the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter.” *Id.* at 201.

In language subsequently relied on by federal courts to establish the danger creation theory of substantive due process liability, *DeShaney* then noted the State neither created any danger to Joshua nor increased his vulnerability to preexisting danger, stating: “While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.” *Id.* The State’s assumption of temporary custody over Joshua again did not alter the analysis, because returning Joshua to his father’s custody “placed him in no worse position than that in which he would have been had [the State] not acted at all.” *Id.* Because “the State had no constitutional duty to protect Joshua against his father’s violence, its failure to do so — though calamitous in hindsight — simply does not constitute a violation of the Due Process Clause.” *Id.* at 202.

Following *DeShaney*, the Tenth Circuit has articulated a danger creation claim containing the following elements: (1) the defendant created a danger or increased the plaintiff’s vulnerability to a danger in some way; (2) the plaintiff was a member of a limited and specifically

definable group; (3) the defendant's conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) the defendant acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking. *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013).¹

In *Currier*, the Tenth Circuit applied this test to claims against social workers involved in making placement recommendations to a juvenile court. The social workers removed the children from their mother's custody and initially placed them in state custody. *Currier* 242 F.3d at 909. Despite determining the children's father had not supported the children, had allowed them to live in alarming conditions, and would have a hard time taking care of them, the social workers nevertheless recommended the juvenile court grant physical custody to the father while keeping legal custody with the state. *Id.* Later, despite the receipt of multiple reports of suspicious injuries and a specific claim from the children's mother of abuse, one of the social workers recommended legal custody be granted to the father. *Id.* at 909-910. The father later poured boiling water over one of the children, who died from his injuries, and they were then removed from their father's custody. *Id.* at 910.

1. The Tenth Circuit's approach is consistent with other Circuits. *See, e.g., L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 242 (3d Cir. 2016); *Doe v. Rosa*, 795 F.3d 429, 438-39 (4th Cir. 2015); *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 708 (7th Cir. 2002); *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1073-74 (9th Cir. 2006).

The children brought claims for violation of their right to substantive due process under the danger creation theory. *Currier*, 242 F.3d at 918. The defendants invoked *DeShaney*, arguing no claim for a constitutional violation existed because custody was transferred from one natural parent to another. *Id.* The Tenth Circuit disagreed, finding the transfer from one parent to another was distinguishable from a removal from and return to the same parent, and stating: “Anthony and Latasha would not have been exposed to the dangers from their father but for the affirmative acts of the state; the same cannot be said for Joshua in *DeShaney*.” *Id.*

Contrary to the Tenth Circuit’s conclusion, however, the same actually could be said for Joshua in *DeShaney*. The state removed Joshua from his father and took him into its custody, and the state could have kept him in its custody or made some other decision about where to place him. Instead, the state returned Joshua to his father, and but-for the state’s reunification decision, Joshua would not have been exposed to the danger posed by his father. Both *Currier* and *DeShaney* involved a decision to recommend replacement of a child with their biological parent, despite signs and allegations of abuse, and nothing in *DeShaney* provides any indication this Court’s ruling turned on whether the child was returned to the parent he was removed from, or removed from one parent and placed with another.

Judge Briscoe’s concurrence below demonstrates the inconsistencies between the Tenth Circuit’s application of the danger creation doctrine and *DeShaney*. Initially, the concurrence was not persuaded by the Tenth Circuit’s “purported distinction between a state that assumes

custody of a child and then returns that child to the same parent and a state that assumes custody of a child and then returns that child to a different parent.” [App. 69a]. The concurrence noted that “[i]n both cases the state makes an affirmative recommendation regarding the placement of the child,” which was “not adequate to implicate substantive due process concerns” in *DeShaney*. [*Id.*]

The concurrence then examined the requirement of “affirmative conduct” in the Tenth Circuit’s danger creation test, noting the purported actions creating liability for the defendant in *Currier*, failing to report the father’s history of financial irresponsibility, failing to investigate bruises, and failing to investigate specific allegations of abuse, were in reality omissions rather than affirmative acts. [App. 71a]. The concurrence initially found it “hard to conclude that a social worker can be ‘responsible for’ the independent decision of a judge who ultimately orders a change of custody,” but assuming such responsibility existed, the concurrence rejected *Currier*’s transformation of omissions or failure to act into affirmative conduct by considering them “in the general context of” a custody recommendation. [*Id.*] The concurrence recognized “[t]he only affirmative act that could be found in *Currier* is the recommendation itself, which, in my view is no different from the affirmative recommendation in *DeShaney* that Joshua be returned to his father’s custody.” [*Id.*]

As the concurrence explained, if liability attaches to a recommendation for a child’s placement, then “any future harm that befalls a child in the recommended placement could be the basis for a substantive due process claim against the social worker,” which in turn “makes the

state the permanent guarantor of a child's safety." [App. 71a-72a]. This is squarely contrary to *DeShaney*, and the concurrence therefore concluded:

Either a custody recommendation is not the type of affirmative conduct that can support a substantive due process violation under our test for a state-created danger theory of liability, in which case *Currier* was wrongly decided on the facts; or our test for the state-created danger theory conflicts with the Supreme Court's decision in *DeShaney*, by imposing liability for acts that do not violate the Due Process Clause of the Constitution.

[App. 72a].

Here, the Tenth Circuit likewise premised liability on Ms. Patton's failure to provide the team and the juvenile court with additional information relating to Mr. Duerson's prior sex offense, which is a failure to act and not an affirmative action. As in *Currier*, the only possible affirmative action was Ms. Patton's recommendation that T.D. be returned to his father's house, and Ms. Patton was only one member of the team making the recommendation, with the ultimate decision being made by the juvenile court. This Court should therefore grant certiorari to consider whether the Tenth Circuit correctly set forth the elements of a danger creation claim, whether a failure to provide information or participation as one member of a team making a recommendation to a juvenile court creates a danger rising to the level of a substantive due process violation, and whether the Tenth Circuit correctly distinguishes between the removal and return to one

parent and the removal from one parent and return to another. Fundamentally, the Tenth Circuit's decisions in *Currier* and here conflict with *DeShaney*, and therefore cannot create clearly established law, entitling Ms. Patton to qualified immunity.

This case highlights the difficulties inherent in holding one member of a team making a placement recommendation to a juvenile court liable under a danger creation theory. Placement recommendations are often contributed to by numerous parties, including the children themselves, social workers, supervisory officials, parents or other relatives, guardians *ad litem*, and therapists, and the ultimate decision is made by the court. Each of these individuals may have information someone can later claim was relevant to the decision-making process, and after harm befalls the child each of these individuals will have a motivation to opine that additional information would have affected their decision. Oftentimes there is no good option for the placement of a child, and the team is left with the unenviable task of attempting to determine the least harmful of many bad options. Isolating one person in this complicated, fact intensive and imprecise process, and rendering one individual personally liable for all harm that may befall the child following a placement is indiscriminate and unfair, and renders any individual contributing to the decision the permanent guarantor of the child's safety, contrary to the fundamental holding of *DeShaney*. [App. 72a].

In addition, under the Tenth Circuit's reasoning, a placement with a non-custodial parent would not be viewed any differently than a placement with a foster family, a group home, or any unrelated individual.

That distinction is not supportable when one considers that even a non-custodial parent has a fundamental liberty interest in the care, custody, and management of his or her children, not something any other potential placement can claim. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).² Given the fundamental liberty interest of all parents in the rearing of their own children, and given the presumptive goal of all social services entities to keep family units together or reunite them, there is simply no rational reason to distinguish between placement with one parent versus another, and to treat placement with a non-custodial parent the same as placement with any other individual or entity. This Court should reject the Tenth Circuit's approach and clarify that the danger creation theory hinted at in *DeShaney* does not encompass the recommendation of a social services team for the return of a child to their biological parent, whether it be the parent they were living with previously or another parent with a separate home.

This Court should also grant certiorari to address an inconsistency between the Tenth Circuit's decision below and both *DeShaney* and the Tenth Circuit's own

2. While Plaintiff was living with his mother prior to his removal from her home, there is no indication Plaintiff's father had ever lost custody of him. However, even if he had, his father's fundamental liberty interest in the rearing of their children "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.*; *Winston v. Children & Youth Services*, 748 F. Supp. 1128, 1134 (E.D. Pa. 1990) ("The parents' liberty interest in a relationship with their child continues even when custody has temporarily been granted to the state or when custody has been granted to another parent.") (citing *Santosky*, 455 U.S. at 753).

decision in *Currier*. In the case below, the Tenth Circuit specifically relied on Ms. Patton’s failure to remove T.D. from Mr. Duerson’s house *after* physical and legal custody was granted to Mr. Duerson. [App. 15a-17a, 37a-38a, 40a-43a, 45a-47a]. *DeShaney* makes clear the failure to remove a child from his parent’s custody following reports of abuse does not state a substantive due process claim. Likewise, *Currier* held that after custody was granted to the father, the failure to remove the children in the face of continued abuse allegations did not satisfy the requirements for a danger creation claim. *Currier*, 242 F.3d at 920 n.7 (“Doran’s failure to investigate allegations of abuse while the children were in state legal custody should be distinguished, however, from a claim that the state failed to rescue the children once legal custody was given to Vargas.”).

The Tenth Circuit in this case disregarded both *DeShaney* and *Currier* by specifically relying on Ms. Patton’s recommendation that T.D. remain in his father’s home after custody transferred to Mr. Duerson. By holding Ms. Patton responsible for the failure to remove T.D. from his father’s home after custody transferred, the Tenth Circuit rendered Ms. Patton the “permanent guarantor of [his] safety,” contrary to this Court’s express direction. *DeShaney*, 489 U.S. at 201. This approach inappropriately conflates the principles underlying the special relationship theory and the danger creation theory, and creates a theory of danger continuation which is unsupported by any known precedent. The inconsistency with both prior Tenth Circuit precedent and this Court’s precedent warrants review by this Court and application of qualified immunity.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT BY ANALYZING THE CLEARLY ESTABLISHED PRONG OF QUALIFIED IMMUNITY AT TOO HIGH A LEVEL OF GENERALITY

This Court should also grant certiorari to correct the Tenth Circuit's determination of clearly established law, despite the lack of any prior precedent with sufficiently similar facts to provide fair notice of a constitutional violation. This Court has warned the lower courts consistently for at least the past 30 years not to analyze the clearly established qualified immunity issue at too high a level of generality. *See, e.g., Mullenix v. Luna*, 136 S.Ct. 305, 311 (2015); *City & Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1775-76 (2015); *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Just this year, this Court overturned the Tenth Circuit for failure to heed this requirement in the context of a Fourth Amendment claim, *White v. Pauly*, 137 S. Ct. 548 (2017), and on remand the Tenth Circuit granted qualified immunity to the defendants, finding “no case close enough to make the unlawfulness of [the officer’s] actions apparent.” *Pauly v. White*, 2017 U.S. App. LEXIS 21881 (10th Cir. Oct. 31, 2017) (quoting *Pauly v. White*, 814 F.3d 1060, 1091 (10th Cir. 2016) (Moritz, C.J., dissenting).

Initially, this Court has never held a single decision by a Circuit Court of Appeals creates clearly established law for qualified immunity purposes. Existing precedent from this Court suggests the opposite. *See, e.g., City & Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1776 (2015); *Carroll v. Carman*, 190 L.Ed.2d 311, 314 (2014); *Reichle v. Howards*, 566 U.S. 658, 665-6 (2012). As a

result, this Court should use this case to further clarify exactly what can create clearly established law. Does it require a decision from this Court? Does it require a majority of the Courts of Appeal? Can it exist when there is a Circuit Court split of authority? Does one decision by a Circuit Court of Appeals create clearly established law?

Here, the Tenth Circuit concluded the right was clearly established based solely on its earlier decision in *Currier*. However, *Currier* should not be found to create clearly established law due to its conflict with *DeShaney*, but even if the analysis of *Currier* were upheld, its facts are not sufficiently similar to the facts below to provide clear notice of a constitutional violation. First, the prior reports of abuse in *Currier* related to the same children who were being placed. *Currier*, 242 F.2d at 909-10. In this case, the prior offense involving a teenage girl who was unrelated to Mr. Duerson, and there were no reports of abuse of T.D. by Mr. Duerson before custody was transferred. [App. 9a]. Second, in *Currier*, the children's mother was making specific allegations of abuse of the children by their father, and the children's guardian *ad litem* expressly asserted the children would be at risk of harm in their father's house. *Id.* at 909-10. In this case, T.D.'s mother and guardian *ad litem* were active participants in the decision-making process, along with his therapist and family therapist. [App. 11a-14a]. Third, the Tenth Circuit below specifically relied on Ms. Patton's failure to remove T.D. from his father's home after physical and legal custody transferred to Mr. Duerson, [App. 15a-17a, 37a-38a, 40a-43a, 45a-47a], but *Currier* itself held only conduct arising before legal custody was given to the father could be considered. *Currier*, 242 F.3d at 919. Fourth, in *Currier* there was no indication the defendant

Dolan was part of a team decision-making process or was directed to make the placement recommendation by his employer. Compare *Johnson v. Holmes*, 455 F.3d 1133, 1144 (10th Cir. 2006) (rejecting claim social worker failed to exercise professional judgment in connection with the placement of a child in an adoptive home, emphasizing that social worker “did not decide to place Grace with Bogey on her own,” and instead acted on the advice of the department’s adoption consultant “and as part of a Department committee”). Alone or collectively, these undisputed distinctions between *Currier* and this case render reliance on *Currier* inapposite for purposes of the qualified immunity analysis, especially when this Court’s particularized requirement is considered and applied.

Neither the Tenth Circuit nor T.D. cited to any case in any jurisdiction holding a case worker who is only one member of a decision-making team which includes a child’s parents, therapist, and guardian ad litem, violates a child’s constitutional rights by participating in the team’s recommendation to the court for reunification of the child with his parent, by failing to provide explicit details of the parent’s conviction for a sex offense on an unrelated minor of which all team members were generally aware, or by failing to express concerns about prior issues with probation and sex offender treatment which were each successfully completed. The Tenth Circuit’s more general formulation of the right at issue fundamentally failed to provide Ms. Patton with “fair warning” that her actions violated T.D.’s constitutional rights in 2014. *Sheehan*, 135 S. Ct. at 1777.³

3. While not specifically relied upon in the case below, the Tenth Circuit has adopted a “sliding-scale approach” to the

This Court should grant certiorari to once again direct the Tenth Circuit to heed this Court's direction not to review clearly established law at too high a level of generality, and to make clear that the specificity requirement applies to all qualified immunity defenses, and not just in the context of a Fourth Amendment claim. This Court has not heretofore decided a clearly established qualified immunity case outside the Fourth Amendment context. This case provides an appropriate avenue to do so and to clarify the danger creation theory of *DeShaney* at the same time.

clearly established qualified immunity inquiry, such that the more obviously egregious the conduct is in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. *See, e.g., Pauly v. White*, 814 F.3d 1060, 1075 (10th Cir. 2016) (rev'd by *White v. Pauly*, 137 S.Ct. 548 (2017)); *Waters v. Coleman*, 632 Fed. Appx. 431, 435 (10th Cir. 2015); *Estate of Booker v. Gomez*, 745 F.3d 405, 427 (10th Cir. 2014); *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008). No basis in this Court's precedent supports the Tenth Circuit's sliding-scale qualified immunity approach and this Court's review of the Tenth Circuit's decision here will allow this Court to further clarify the correct clearly established qualified immunity analysis for the Tenth Circuit.

CONCLUSION

In conclusion, for all of the foregoing reasons, Petitioner Kelcey Patton respectfully requests that this Court grant her Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE TENTH
CIRCUIT, FILED AUGUST 28, 2017**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-1092

T.D.,

Plaintiff - Appellee,

v.

KELCEY PATTON,

Defendant - Appellant,

and

THE DENVER DEPARTMENT
OF HUMAN SERVICES,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO.
(D.C. No. 1:14-CV-01568-RM-MJW)

August 28, 2017, Filed

Before BRISCOE, EBEL, and MATHESON, Circuit
Judges.

MATHESON, Circuit Judge.

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T.D. sued Kelcey Patton under 42 U.S.C. § 1983 for violating his right to substantive due process. He relies on a “danger-creation theory,” which provides that “state officials can be liable for the acts of third parties where those officials created the danger that caused the harm.” *Currier v. Doran*, 242 F.3d 905, 917 (10th Cir. 2001) (quotations omitted).¹

Ms. Patton, a social worker for the Denver Department of Human Services (“DDHS”), was one of those responsible for removing T.D., a minor at the time, from his mother’s home, placing him into DDHS’s custody, and recommending T.D. be placed and remain in the temporary custody of his father, Tiercel Duerson. T.D. eventually was removed from his father’s home after DDHS received reports that T.D. had sexual contact with his half-brother, also Mr. Duerson’s son. DDHS later determined that during T.D.’s placement with Mr. Duerson, T.D. had suffered severe physical and sexual abuse at the hands of his father.

Ms. Patton moved for summary judgment on the ground that she is entitled to qualified immunity. The district court denied the motion. This interlocutory appeal

1. This action was originally brought by T.D.’s mother, Regina Garcia. T.D. was added as a plaintiff when he turned 18. Ms. Garcia has since been dismissed as a plaintiff. T.D. is therefore the only Plaintiff-Appellee in this case.

The action was originally brought against both Ms. Patton and the Denver Department of Human Services (“DDHS”). The district court granted summary judgment to DDHS. T.D. does not appeal that order, so Ms. Patton is the only Defendant-Appellant in this case.

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followed.² Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. Viewing the facts in the light most favorable to T.D., we conclude that, under *Currier*, Ms. Patton violated T.D.’s clearly established substantive due process constitutional right to be free of a state official’s creation of danger from a private actor.

We agree with the district court that Ms. Patton violated T.D.’s substantive due process right by knowingly placing T.D. in a position of danger and knowingly increasing T.D.’s vulnerability to danger.³ She recommended to the juvenile court that T.D. be placed and remain in Mr. Duerson’s temporary custody despite her admitted concerns about T.D.’s safety in the home, her knowledge of Mr. Duerson’s criminal history that included a conviction for attempted sexual assault against a minor in his care,

2. T.D. asserted two theories of liability under the Fourteenth Amendment against Ms. Patton: a “danger-creation” theory, discussed above, and a “special relationship” theory. The special-relationship theory allows state officials to be held liable “for the acts of private parties when the state has assumed a special relationship with and control over an individual.” *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013).

The parties litigated both theories in district court. The court granted summary judgment on the special-relationship theory, but denied summary judgment on the danger-creation theory. Ms. Patton appeals only the unfavorable ruling against her, so this appeal is limited to the § 1983 claim based on the danger-creation theory.

3. Ms. Patton does not contest the court’s determination that T.D. can show a constitutional violation, but instead focuses her arguments on whether she violated clearly established law. We nonetheless analyze the constitutional violation for reasons explained below.

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and notice of evidence that Mr. Duerson was potentially abusing T.D. She failed to inform the juvenile court about her concerns and knowledge of Mr. Duerson's criminal history and made her affirmative recommendations out of fear of being fired.

She also failed to investigate whether Mr. Duerson was abusing T.D. despite her awareness of evidence of potential abuse. This evidence included T.D.'s report that Mr. Duerson had hit him with a wooden mop handle and school officials' reports that T.D. was spending significant time in the nurse's office complaining of body aches and appearing fearful of his father. In the face of this information, she recommended to the juvenile court that T.D. remain with his father. Ms. Patton acted recklessly and in conscious disregard of a known and substantial risk that T.D. would suffer serious, immediate, and proximate harm in his father's home. Her conduct, taken as a whole, shocks the conscience and thus amounts to a substantive due process violation under the Fourteenth Amendment.

Based on the facts and legal determination in this court's *Currier* decision, a reasonable official in Ms. Patton's shoes would have understood she was violating T.D.'s constitutional rights. In both *Currier* and here, county social workers removed children from their mothers' homes and placed them in their fathers' homes, where the children were abused. The social workers in both cases failed to alert the juvenile court of relevant facts undermining the fathers' fitness as caretakers and recommended that the fathers assume custody of the children—despite being on notice that the fathers' homes were places of danger. And, in both cases, the social

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workers failed to investigate whether the fathers were abusing their children, despite being on notice of evidence suggesting abuse. Ms. Patton’s conduct sufficiently resembles the conduct we held unconstitutional in *Currier* such that a reasonable official in her position would have known that her actions violated T.D.’s clearly established right. She was therefore not entitled to qualified immunity.

I. BACKGROUND**A. Factual Background**

The following facts are presented in the light most favorable to T.D., the nonmoving party on the request for summary judgment on the danger-creation claim.⁴ *See Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016).⁵

4. T.D. asserts that we lack jurisdiction over this appeal because Ms. Patton’s arguments require us to rely on facts taken in her favor, rather than in T.D.’s favor. We disagree.

Ms. Patton acknowledges that we must take the facts in the light most favorable to T.D. She states that she does not ask us to review the district court’s presentation of the facts, but instead to “focus[] solely on whether the facts as determined by the District Court demonstrate a clearly established violation of T.D.’s constitutional rights.” Aplt. Br. at 3. We have jurisdiction over that legal question on interlocutory appeal based on the facts determined by the district court and taken in the light most favorable to the nonmoving party, here T.D. *Henderson v. Glanz*, 813 F.3d 938, 947-48 (10th Cir. 2015). We may not and do not, however, second guess the district court’s determinations of evidence sufficiency. *Id.* at 948.

5. The facts come from the district court’s order. We also present a few facts—such as dates of hearing reports and statements in documents submitted to the juvenile court—not

*Appendix A***1. T.D.’s Removal from his Mother’s Home**

T.D. is the son of Regina Garcia and Tiercel Duerson, who are separated. The family has a troubled past, with the parents having been referred to DDHS for intra-familial neglect, lack of supervision, and intra-familial sexual abuse.

In November 2009, T.D. turned 14 and was living with his mother, Ms. Garcia. On November 2, 2009, DDHS was notified that T.D. had not been in school, which served as a diversion program for criminal charges, since mid-October. DDHS also learned that his medications had not been refilled and he had not participated in his mandated therapy. After T.D. did not return to school, a DDHS social worker visited Ms. Garcia’s home and discovered the home in disarray, with animal feces, cigarette butts, and piles

explicitly presented in the court’s order, but from documents the court considered and that are consistent with the court’s factual presentation. *See Johnson v. Jones*, 515 U.S. 304, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) (providing that an appellate court may review the record to determine what facts the district court likely assumed when the district court did not state those facts); *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1152-53 (10th Cir. 2010) (stating that the “universe of facts” for appellate review of a denial of summary judgment are those facts “explicitly found by the district court, combined with those facts that it likely assumed”); *see also DiLuzio v. Village of Yorkville, Ohio*, 796 F.3d 604, 611 (6th Cir. 2015) (discussing how it was appropriate to consider facts that are not stated in the district court’s record, but that may bolster the court’s determination). The facts presented do not question the court’s determinations of evidence sufficiency. *Henderson*, 813 F.3d at 948.

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of dirty clothes on the floor. The social worker gave Ms. Garcia a list of tasks to accomplish, including sending T.D. back to his diversion program.

On December 15, 2009, DDHS was informed T.D. had been kicked out of his diversion program for noncompliance and truancy. On January 4, 2010, DDHS received another report that T.D.'s violent behavior was escalating at school and at home. For instance, T.D. had reportedly stabbed his sister with a fork and had threatened to commit suicide.

In early April 2010, T.D. was removed from his mother's home and placed at the "Family Crisis Center."

2. DDHS's Petition for Dependency or Neglect

On April 9, 2010, DDHS filed a "Petition in Dependency or Neglect" for T.D. and his sister in juvenile court based on DDHS's concerns that Ms. Garcia was unable to care for her children. Ms. Patton was the DDHS case worker on the Petition, and Lisa Gomez was appointed as T.D.'s guardian ad litem.

On May 12, 2010, the juvenile court held a hearing on the Petition. Ms. Patton prepared a report for the hearing, signed by her supervisor, Senait Ketema. In the report, Ms. Patton determined the family's risk assessment score was 11—signaling a high level of risk—and that the children were unsafe.⁶ Ms. Patton mentioned in the

6. DDHS reached these conclusions based on: T.D.'s family history of sexual abuse and multiple child protection referrals; T.D.'s

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report that Mr. Duerson had been incarcerated for two years for attempted sexual assault on a minor and that Ms. Garcia had taken out a restraining order against him to keep Mr. Duerson away from her family. Ms. Patton recommended that T.D. remain in the custody of DDHS for purposes of placement.

At the hearing, the juvenile court explored options for T.D.'s placement. The court ordered DDHS to obtain a parental risk assessment of Mr. Duerson under the applicable Colorado Sex Offender Management Board ("SOMB") standards to determine his likelihood of recommitting sex offenses, an important factor to evaluate whether T.D. should be placed with his father. Ms. Patton was responsible for arranging Mr. Duerson's risk assessment, but failed to do so.⁷

3. T.D.'s Placement in Shiloh House

On May 25, 2010, the juvenile court ordered DDHS to place T.D. in "Shiloh House," a residential child care

need for mental health treatment; Ms. Garcia's inability to control him; T.D.'s anger issues and enuresis (involuntary urination); Mr. Duerson's conviction for sexual abuse of a minor and his registration as a sex offender; Ms. Garcia's restraining order against Mr. Duerson; the fact that Ms. Garcia's children were all on individualized education programs; Ms. Garcia's disheveled home that smelled of urine; and Ms. Garcia's need for help in disciplining her children and making them follow house rules.

7. Although the parties dispute whether Ms. Patton failed to arrange for his risk assessment, the facts viewed favorably to T.D. support that she failed to do so.

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facility where T.D. could live, receive treatment, and go to school.

On July 30, 2010, the juvenile court held a permanency planning hearing—one of several that would happen every few months to determine T.D.’s placement and custody status. At this hearing, a family therapist reported that Mr. Duerson was making “great progress” in his therapy with T.D. The therapist also relayed Mr. Duerson’s request that T.D. be placed in his care after T.D. was discharged from Shiloh House.

4. Ms. Patton’s Review of Mr. Duerson’s Criminal History

Before the next juvenile court hearing, Ms. Patton reviewed Mr. Duerson’s criminal history, which revealed:

- In 2005, Mr. Duerson was convicted and sentenced to two years in prison for attempted sexual assault of a minor, P.G., his step-child living in his care at the time of the offense. Mr. Duerson was a registered sex offender for that conviction.
- In 2005, Mr. Duerson violated a restraining order by attempting to contact P.G.
- In November 2007, Mr. Duerson violated probation. His probation was revoked because he had “purposefully failed” to complete his sex offender treatment

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obligations had “been deceptive in disclosing his relationship with his current girlfriend,” and had “purposefully violated his no contact contract with his girlfriend, while missing treatment appointments.” Dist. Ct. Order at 9 (quotations omitted). The probation report documenting the violation stated that he was not amenable to treatment and was unwilling to comply with his probation conditions.

- Mr. Duerson was charged, but not convicted, for other offenses, including misdemeanor assault, misdemeanor wrongs to minors, misdemeanor domestic violence, and misdemeanor resisting police authority.
- Apart from his 2005 conviction, there had been “multiple other incidents” involving Mr. Duerson abusing P.G., including an incident when Mr. Duerson dragged P.G. into a bedroom and grabbed her butt. *Id.*

As part of her investigation, Ms. Patton also reviewed what the parties call the “Trails Report,” a document in the DDHS’s system prepared in 2005 by a DDHS social worker. The report detailed that Mr. Duerson’s 2005 conviction was based on his attempt to sodomize P.G. against her will.

Based on her investigation, Ms. Patton’s “gut [did not] feel good” about, and she questioned, placing T.D. with Mr. Duerson. *Id.* at 10.

*Appendix A***5. The August 17, 2010 Hearing**

On August 17, 2010, before the next juvenile court hearing, Ms. Patton, T.D., Briana Hutchinson (an outside family therapist), Kyle Hommes (T.D.'s clinician at Shiloh House), and Mr. Duerson met to discuss T.D.'s custody. The attendees agreed T.D. was ready to transition from Shiloh House to a lower level of care. Mr. Duerson reported that he had successfully completed his offense-specific therapy and that he was no longer on probation.

The meeting participants approved a tentative plan—subject to Ms. Gomez's approval—to transition T.D. from Shiloh House to Mr. Duerson's home. The participants agreed to gradually increase the visits between T.D. and Mr. Duerson, under the supervision of Mr. Duerson's wife.

Ms. Patton misrepresented her knowledge of Mr. Duerson's criminal history to the meeting participants. She also failed to share with the meeting participants the full extent of her concerns about T.D.'s placement with his father, including that Mr. Duerson was not taking his sex offense treatment seriously.⁸

6. The September 7, 2010 Hearing

On September 7, 2010, the juvenile court held another permanency planning hearing.

8. It is disputed to what extent Ms. Patton misrepresented her knowledge or failed to share her concerns with the meeting participants, but we must view the facts in T.D.'s favor.

*Appendix A***a. Report for the Hearing**

Before the September 7, 2010 hearing, Ms. Patton submitted a report to the juvenile court. It recounted how the participants at the August 17, 2010 meeting agreed T.D. was ready to transition to a lower level of care and that the family therapist believed it was in T.D.'s best interest to return to Mr. Duerson's home. The report also stated that Mr. Duerson believed he was better equipped to address T.D.'s special needs and that Mr. Duerson had completed his offense-specific therapy and was no longer on probation.

Although Ms. Patton had informed the juvenile court that Mr. Duerson had been convicted of a sexual offense against a minor in 2005 and was later put on probation for that offense, she did not include all of her particular knowledge about that conviction or other facts about Mr. Duerson's criminal history in the final September 7, 2010 report. In the final report, Ms. Patton did not attach Mr. Duerson's criminal history or the Trails Report, which provided details of Mr. Duerson's 2005 conviction. Nor did she inform the court that his probation was revoked due to his purposeful failure to fulfill his sex offender treatment obligations or the "multiple" other incidents of abuse involving P.G.

In an initial draft of her report, Ms. Patton had expressed her concerns about T.D.'s placement with his father, including: Mr. Duerson's criminal record (and specifically his attempted sexual assault on P.G. in 2005); the 2007 revocation of his probation for purposeful failure

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to fulfill his sex offender treatment obligations; and his therapist's concern that he was "not taking treatment seriously." Dist. Ct. Order at 10. Ms. Patton intentionally omitted those concerns in her final report to the juvenile court. She did so because her supervisor, Ms. Ketema, had told her that DDHS was going to return T.D. to Mr. Duerson and Ms. Patton should "not go against the DDHS." *Id.* (quotations omitted). Ms. Patton feared she would be fired if she included her knowledge or concerns in her final report.

b. The Hearing

Ms. Patton and Ms. Gomez attended the hearing on September 7, 2010. No other professional from the August 17, 2010 meeting was there. At the hearing, both Ms. Gomez and Ms. Patton recommended T.D.'s transfer to Mr. Duerson's custody.⁹ The juvenile court granted permission to begin that transition.

Before the hearing, Ms. Patton did not discuss the information in the Trails Report with Ms. Gomez. Ms. Gomez testified that she was under a misconception about the nature of Mr. Duerson's 2005 conviction, and, had she known about the details of the offense documented in the Trails Report, she "probably would not have recommended T.D.'s placement with [Mr. Duerson]" to the juvenile court.

9. Because T.D. and Mr. Duerson are American Indians, T.D.'s placement was subject to the Indian Child Welfare Act ("ICWA"), which requires "active efforts . . . to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). No party argues that ICWA's standards affect the outcome of this case.

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Id. at 11. (brackets and quotations omitted).

7. T.D.’s Transition and Placement in Mr. Duerson’s Home

Meetings were held on September 17 and October 8, 2010, to complete a plan to transition T.D. from Shiloh House to Mr. Duerson’s home. T.D., Ms. Garcia, Mr. Duerson (at one meeting), Ms. Hutchinson, Mr. Hommes, Mr. Duerson’s wife, Ms. Gomez, and a representative for DDHS attended. Ms. Patton did not attend either meeting.

On October 21, 2010, Ms. Gomez filed a Stipulated Agreement with the juvenile court reporting that T.D. had successfully transitioned to Mr. Duerson’s home on October 15, 2010. The Stipulated Agreement asked the court to give Mr. Duerson “temporary legal custody” of T.D. so that T.D. could enroll in school and be added to his father’s public assistance benefits. *Id.* at 13. It also documented that Ms. Patton agreed with the placement. Other than Ms. Patton and T.D.’s parents, none of the attendees at the August 17, 2010 meeting, such as Ms. Hutchinson or Mr. Hommes, were listed on the Stipulated Agreement.

On November 3, 2010, the juvenile court granted “temporary legal and physical custody” of T.D. to Mr. Duerson “under an order of supervision by [DDHS].” *Id.* (quotations omitted).

*Appendix A***8. The December 13, 2010 Hearing**

Ms. Patton prepared a report for a December 13, 2010 juvenile court hearing. It stated that Mr. Duerson had successfully completed probation, was compliant with DDHS's treatment plan, and was in contact with Ms. Patton. It also stated that T.D.'s behavior was improving to a point where he could transition from attending school at Shiloh House to attending a local school. In the report, Ms. Patton recommended that T.D. remain in Mr. Duerson's temporary custody.

In December 2010, Mr. Duerson and T.D. were discharged from their required family therapy sessions. The therapist stated in her discharge report that the family had reached their treatment goals and that she had "no safety concerns regarding [Mr. Duerson's] house." *Id.* at 14.

9. The March 21, 2011 Hearing

The juvenile court held another permanency planning hearing on March 21, 2011. In her report for the hearing, Ms. Patton said T.D.'s behavior had improved at school and at home and that, overall, T.D. "was flourishing" in Mr. Duerson's home. *Id.* She noted a minor concern that T.D. had missed 30 class periods in the second school term, which Mr. Duerson blamed on conflicting appointments and T.D. being sick. Ms. Patton said that she encouraged the family to try not to schedule appointments during school. Ms. Patton's report recommended that temporary custody of T.D. remain with Mr. Duerson.

*Appendix A***10. The June 13, 2011 Hearing**

In a report prepared for a June 13, 2011 permanency planning hearing, Ms. Patton wrote that Mr. Duerson had used physical punishment on T.D. Specifically, T.D. had told her and Ms. Gomez that his father had hit him across the back with a wooden mop handle for not completing his chores. School officials had told her that, in the last few months, T.D. had spent a lot of time at the nurse's office complaining of sickness and body aches, appeared to be afraid of his father, and at times did not want to go home. Ms. Garcia had reported that, during weekend stays with her, T.D. had acted disrespectfully, refused to complete chores, smelled badly, and had unclean clothes when he arrived at her home. Ms. Patton stated in her report that, as a result of this information, she had referred Mr. Duerson to participate in DDHS's Fatherhood Initiative Program.

In the report, Ms. Patton stated that, although she had "some concerns" with Mr. Duerson's "parenting skills," she still recommended that T.D. remain in his father's custody. *Id.* at 15. She testified at her deposition that she made this recommendation despite the fact that she truly "wanted to remove T.D. from [his father's] home because she was afraid for T.D.'s safety." *Id.* She did not express her concerns to the juvenile court because her supervisor, Ms. Ketema, had told her that T.D. would remain in his father's home, and Ms. Patton was afraid she would be fired if she did not recommend T.D. remain with his father.

At the June 13, 2011 hearing, the juvenile court ordered Mr. Duerson to participate in the recommended

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Fatherhood Initiative Program and not to use physical discipline on T.D.

11. The August 25, 2011 Hearing

In a report for an August 25, 2011 hearing, Ms. Patton informed the juvenile court that she was having trouble reaching Mr. Duerson and was unable to contact him for a period of time. She had no face-to-face contact with T.D. in July, as her supervisor had instructed.

Ms. Patton reported that she could confirm Mr. Duerson's attendance at only one fatherhood class since the last hearing in June. She also reported that she had tried several times, without success, to conduct a written parental assessment of Mr. Duerson. She stated, however, that Mr. Duerson was participating actively in family therapy and acting appropriately with young children. She recommended that T.D. remain in the temporary custody of Mr. Duerson. And, although she had failed to visit Mr. Duerson's home at least every other month as DDHS policy required, the report mistakenly stated Ms. Patton had made monthly visits to the home.¹⁰

12. T.D.'s Removal from Mr. Duerson's Home

On September 19, 2011, DDHS received a report of sexual contact between T.D. and his half-brother.

10. Whether Ms. Patton failed to observe Mr. Duerson's home at least every other month and whether a failure to do so violated DDHS's policies are disputed, but we are obliged to take the facts in the light most favorable to T.D.

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On September 21, 2011, DDHS removed T.D. from Mr. Duerson's home and took him into its temporary custody the next day.

In a report prepared for a November 16, 2011 hearing, Ms. Patton stated she had minimal communication with Mr. Duerson since the last hearing in August, and that Mr. Duerson's youngest children had been removed from the home due to domestic violence and drug use. She further reported that Mr. Duerson had attended only one fatherhood class since getting temporary custody of T.D., had moved out of state, and was not complying with his treatment plan.

13. Report and Investigation of Abuse

In March 2014, T.D. reported that Mr. Duerson had abused him while he was in his father's temporary custody. DDHS investigated and concluded that:

- In August 2011, Mr. Duerson had repeatedly sexually assaulted T.D. by forcibly orally sodomizing him twice;
- Mr. Duerson had hit T.D. with a broomstick and threatened to knock him unconscious and send him to the hospital for not performing oral sex on him;
- Mr. Duerson had forced T.D. to perform oral sex on him for 10-15 minutes as punishment for T.D.'s staying up past his bedtime;

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- Mr. Duerson had physically forced T.D. and his three-year-old brother to perform oral sex on each other; and
- Mr. Duerson had told T.D. not to tell anyone about the abuse.

DDHS determined the abuse T.D. had suffered while in Mr. Duerson's home was "severe." *Id.* at 18.

B. Procedural Background

In 2014, Ms. Garcia, on behalf of T.D., sued Ms. Patton and DDHS in state court alleging they violated T.D.'s substantive due process right under the Fourteenth Amendment. The defendants removed the case to the United States District Court for the District of Colorado. Plaintiffs' second amended complaint, the operative one here, raised a § 1983 substantive due process claim against Ms. Patton and DDHS based on a danger-creation theory and a special-relationship theory.

T.D. filed a motion for partial summary judgment on the special-relationship theory. Ms. Patton filed a cross-motion for summary judgment on both theories, asserting a defense of qualified immunity. DDHS also moved for summary judgment on the § 1983 claim.

The court granted summary judgment in Ms. Patton's favor on the special-relationship theory and against her on the danger-creation theory. On the danger-creation theory, the court concluded that Ms. Patton's conduct

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amounted to a constitutional violation and that, based on *Currier*, her conduct violated clearly established law. The court also granted summary judgment to DDHS.

T.D. does not appeal the grant of summary judgment to Ms. Patton on the special-relationship theory or the grant of summary judgment to DDHS. This appeal thus concerns only the court's order denying qualified immunity to Ms. Patton on T.D.'s danger-creation claim.

II. DISCUSSION

We affirm the district court's denial of qualified immunity because the facts, taken in the light most favorable to T.D., show Ms. Patton violated T.D.'s clearly established substantive due process right under the Fourteenth Amendment. We first describe the applicable standard of review and legal standards. We then analyze whether (1) Ms. Patton violated T.D.'s substantive due process right under a danger-creation theory and (2) whether his right was clearly established.

A. Standard of Review

"We review summary judgment de novo, applying the same legal standard as the district court." *Gutierrez*, 841 F.3d at 900. A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the

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nonmoving party,” *Gutierrez*, 841 F.3d at 900, here T.D., as the nonmoving party on the danger-creation theory.

B. Legal Standards**1. 42 U.S.C. § 1983 and Qualified Immunity**

Under 42 U.S.C. § 1983, a person acting under color of state law who “subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.” “Individual defendants named in a § 1983 action may raise a defense of qualified immunity, which shields public officials . . . from damages actions unless their conduct was unreasonable in light of clearly established law.” *Gutierrez*, 841 F.3d at 899.

“Once an individual defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant’s actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant’s unlawful conduct.” *Id.* at 900 (quotations omitted). “This is a heavy burden. If the plaintiff fails to satisfy either part of the inquiry, the court must grant qualified immunity.” *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017).

A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts,

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existing at the time of the alleged violation. *Gutierrez*, 841 F.3d at 900. To be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.” *White v. Pauly*, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)). Although there need not be a “case directly on point,” *id.* (quoting *Mullenix*, 136 S. Ct. at 308), “[a]n officer ‘cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it.’” *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015) (brackets omitted) (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014)).

Courts must not define “clearly established law at a high level of generality.” *Id.* at 1776 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). Instead, “the clearly established law must be ‘particularized’ to the facts of the case.” *White*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). “Otherwise, ‘plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.’” *Id.* (brackets and ellipses omitted) (quoting *Anderson*, 483 U.S. at 639)).

*Appendix A***2. Fourteenth Amendment Danger-Creation Claims**

The Due Process Clause of the Fourteenth Amendment provides “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. T.D.’s claim is based on substantive due process because he alleges that a state official deprived him of a liberty interest by creating or increasing the danger of private violence. *Currier*, 242 F.3d at 920.

To evaluate whether Ms. Patton is entitled to qualified immunity on T.D.’s substantive due process claim, we discuss: (1) the Supreme Court’s decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), which established the general rule that state officials are not liable for acts of private violence and set the stage for the danger-creation exception to that rule; (2) our decisions interpreting *DeShaney* to allow a danger-creation exception when state officials affirmatively create the danger of private violence or increase a plaintiff’s vulnerability to that danger; and (3) our decision in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), which was the basis of the district court’s order and which the parties agree is the critical case to evaluate whether Ms. Patton’s conduct violated T.D.’s clearly established right.¹¹

11. The court also cited *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998), as a basis for its clearly established determination. We disagree with the district court that *Armijo*, which has sufficiently distinguishable facts from those here, could provide clearly established law. We thus do not detail the facts of *Armijo*.

*Appendix A***a. *DeShaney***

In *DeShaney*, the complaint alleged Winnebago County social workers violated a child’s due process rights for “failing to intervene to protect [the child Joshua] against a risk of violence at his father’s hands of which they knew or should have known.” 489 U.S. at 193. The Supreme Court rejected that the social workers could be liable.

The Court wrote: “[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” *Id.* at 195. Accordingly, “[a]s a general matter . . . a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” *Id.* at 197. The Court wrote:

While the State may have been aware of the dangers that Joshua faced in the free world, it *played no part in their creation*, nor did it do anything to render him *any more vulnerable to them*. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, *it placed him in no worse position than that in which he would have been had it not acted at all*; the State does not become the permanent guarantor of an individual’s safety

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by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Id. at 201 (emphasis added).

b. Danger-creation exception

Relying on the language emphasized above in *DeShaney*, this court has recognized that, as an exception to *DeShaney*'s general rule, a state official may be liable when "a state actor affirmatively acts to create, or increase[] a plaintiff's vulnerability to, danger from private violence." *Currier*, 242 F.3d at 923; *see also Uhlig v. Harder*, 64 F.3d 567, 572 & n.7 (10th Cir. 1995).¹² Although the Supreme Court has not yet confirmed that a danger-creation exception exists under *DeShaney*, its statements in *DeShaney* "ha[ve] led every Circuit Court of Appeals . . . to recognize an exception to *DeShaney* for 'state-created dangers.'" *Jasinski v. Tyler*, 729 F.3d 531, 538 (6th Cir. 2013) (collecting cases); *accord Butera v. Dist. of Columbia*, 235 F.3d 637, 648-49, 651, 344 U.S. App. D.C. 265 (D.C. Cir. 2001).¹³

12. As noted, we have recognized another exception to *DeShaney*'s general rule—the special-relationship theory. *Gillen*, 710 F.3d at 1173. T.D. sought to invoke that theory in district court, but the court determined it did not apply and T.D. does not appeal that ruling.

13. *See Arledge v. Franklin Cty.*, 509 F.3d 258, 262-64 (6th Cir. 2007) (noting, in a child-placement case, the circuit had "recognized . . . the state-created danger theor[y] of due process liability" in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998), but holding the facts did not support the claim).

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To invoke the danger-creation theory, a plaintiff must show a state actor “affirmatively act[ed] to create or increases a plaintiff’s vulnerability to, danger from private violence.” *Currier*, 242 F.3d at 923; *see also Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002). If a plaintiff meets those preconditions, a plaintiff must next demonstrate:

- (1) the charged state entity and the charged individual actors created the danger or increased plaintiff’s vulnerability to the danger in some way;
- (2) plaintiff was a member of a limited and specifically definable group;
- (3) defendants’ conduct put plaintiff at substantial risk of serious, immediate, and proximate harm;
- (4) the risk was obvious or known;
- (5) defendants acted recklessly in conscious disregard of that risk; and
- (6) such conduct, when viewed in total, is conscience shocking.

Currier, 242 F.3d at 918 (spacing added).

On the final element—whether the conduct is conscience shocking—neither ordinary negligence nor

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permitting unreasonable risks qualifies as conscience shocking. *Ruiz*, 299 F.3d at 1184. “Rather, a plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.” *Id.* (quotations omitted).

c. *Currier v. Doran*

Our decision in *Currier*, which involved a danger-creation claim brought against social workers for New Mexico’s Children, Youth and Families Department (“CYF”), 242 F.3d at 908, controls the outcome of this case.

i. Factual Background

In *Currier*, CYF social worker Shirley Medina visited the home of two children, L.J. and A.J., who were reportedly neglected by their mother. *Id.* at 909. After finding the mother had left the state, Ms. Medina placed the children in the physical custody of CYF. *Id.* CYF petitioned New Mexico’s juvenile court for an order granting legal custody of the children to CYF. *Id.*

In her petition, Ms. Medina told the court that the children’s father, Christopher Vargas, had not supported the children, had allowed them to live in “alarming conditions,” and would “have a hard time taking care of the kids.” *Id.* She nonetheless recommended that the court grant physical custody of the children to Mr. Vargas, while keeping legal custody with CYF. *Id.*

Before the hearing on the petition, CYF social worker Tom Doran learned that Mr. Vargas had a history of

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financial irresponsibility, including having made only eight child-support payments in the preceding three years. *Id.* But Mr. Doran said nothing at the hearing about that knowledge. *Id.*

On May 10, 1993, based on Ms. Medina's recommendation, the court granted physical custody of the children to Mr. Vargas and kept legal custody with CYF. *Id.*

In July 1993, Mr. Doran noticed a small bruise on A.J.'s cheek. *Id.* Mr. Vargas's girlfriend explained it was a result of a playground fall. *Id.* In August 1993, A.J. had another bruise that was also explained as a result of a fall. *Id.* Mr. Doran did not investigate either bruise further. *Id.*

The mother eventually returned to the state and told the children's guardian ad litem that Mr. Vargas and his girlfriend were physically abusing the children, including by dunking them in a bathtub to punish them. *Id.* Mr. Doran learned about these accusations but failed to investigate. *Id.*

On October 19, 1993, based on Mr. Doran's recommendation, Mr. Vargas was awarded legal custody of the children. *Id.* at 909, 919 & n.6. This court determined "[Mr.] Doran was responsible for the [juvenile court's] decision to grant [Mr.] Vargas legal custody, through either his failure to investigate and report to the court or through his affirmative recommendation." *Id.* at 919.

Around that time, further indicia of abuse came to light. For instance, on October 20, 1993, CYF workers

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noticed bruises on L.J., who said that “Da, Da” had caused them. *Id.* at 910. At the guardian ad litem’s request, Mr. Doran interviewed Mr. Vargas and his girlfriend about the bruises, which the couple said were caused by falling from a bunk bed ladder. *Id.* On November 17, 1993, CYF officials again found bruises on A.J., also explained as caused by a bunk bed fall, and unexplained bite marks on L.J. *Id.* CYF then removed L.J. and A.J. from Mr. Vargas’s home and placed them with relatives. *Id.*

Mr. Doran prepared an affidavit for a November 19, 1993 meeting with his supervisor, Melba Gonzales, stating that the children would be subject to further abuse if permitted to stay with Mr. Vargas. *Id.* But Mr. Doran “failed to strongly advocate against return of the children to [Mr.] Vargas.” *Id.* Ms. Gonzales concluded that the children had to be returned to Mr. Vargas, which happened shortly thereafter. *Id.*

After the children returned to their father’s home, CYF received requests to investigate possible physical abuse of the children. *Id.* Ms. Medina took over the investigation and discovered bruises on A.J., but concluded that they were the result of a fall. *Id.* During the investigation, L.J. told Ms. Medina that she had been spanked with a belt. *Id.* Ms. Medina and Mr. Doran instructed the children’s mother to stop making allegations that Mr. Vargas was abusing the children. *Id.*

A few months later, Mr. Vargas poured boiling water on A.J., causing severe burns. *Id.* At the emergency department, doctors found A.J. “was bruised everywhere

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he was not burned.” *Id.* A.J. eventually died in the intensive care unit. *Id.* L.J. was also found “covered with bruises” and removed from Mr. Vargas’s home. *Id.*

Representatives for A.J. and L.J. brought a substantive due process claim under 42 U.S.C. § 1983 based on the danger-creation theory against Ms. Medina, Mr. Doran, Ms. Gonzales, and one other CYF worker. *Id.* at 908. The district court denied their assertion of qualified immunity. *Id.* at 911.

ii. Analysis in *Currier*

On appeal, this court addressed: (1) whether the facts supported a constitutional violation under the danger-creation theory; and (2) whether there was clearly established law. *See id.* at 917-25. We focus here on the claim against Mr. Doran, Ms. Medina, and Ms. Gonzales, whose actions were most relevant to T.D.’s claim.¹⁴

1) Constitutional Violation

Currier first addressed whether *DeShaney* barred the danger-creation claim and answered no. It held *DeShaney* did not bar the claim relating to the children’s placement in their father’s home because the children “would not have been exposed to the dangers from their father *but for the affirmative acts of the state.*” *Id.* at 918-19 (emphasis

14. Although Ms. Patton asserts that “the only potentially relevant analysis in *Currier* relates to the actions of Doran,” Aplt. Br. at 41, we regard the other social workers’ actions as relevant to this appeal.

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added). The court wrote: “When the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability.” *Id.* at 919. The court further addressed whether the facts supported a constitutional violation under the danger-creation theory.

As to Mr. Doran, the panel answered yes. On the first five elements of the danger-creation claim:

Doran’s conduct meets the danger creation theory of liability Doran “created the danger or increased the plaintiffs’ vulnerability to the danger” through his failure to investigate the numerous bruises and allegations of abuse and his responsibility for the court order granting legal custody to Vargas. [L.J. and A.J.] were members “of a limited and specifically definable group”: children the state has removed from their natural parent and taken into state custody. By failing to investigate the allegations of child abuse and by recommending that Vargas assume legal custody, Doran’s conduct put [A.J. and L.J.] at obvious risk of serious, immediate, and proximate harm, a harm that Doran recklessly and consciously disregarded.

Id. at 919-20 (brackets and citations omitted). The court considered Mr. Doran’s inaction (i.e., his failure to investigate) because it was coupled with his “affirmative

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conduct in removing the children from their mother and placing the children with their father.” *Id.* at 920 n.7.¹⁵

Although the sixth element was a “somewhat closer question,” *Currier* held Mr. Doran’s conduct, when “viewed in total,” shocked the conscience:

In light of the initial information Doran had about Vargas’ financial irresponsibility, and in light of the numerous bruises and allegations of abuse, Doran’s failure to investigate the bruises and allegations and his subsequent responsibility for the court order granting Vargas legal custody could be conscience shocking, depending, of course, on further context as provided by discovery.

Id. at 920.

15. The panel wrote:

It is true that the conduct Plaintiffs complain of is partially a failure by Doran to act on particular allegations of abuse. Doran’s failure to investigate allegations of abuse while the children were in state legal custody should be distinguished, however, from a claim that the state failed to rescue the children once legal custody was given to Vargas. Doran’s failure to investigate allegations of abuse should be viewed in the general context of the state’s affirmative conduct in removing the children from their mother and placing the children with their father.

Id.

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As to Ms. Medina, *Currier* held her involvement in the initial removal of the children from their mother's home could not support a danger-creation claim. *Id.* at 921. But she could be liable for instructing the mother to stop making allegations of child abuse after Mr. Vargas received custody because doing so "affirmatively" increased the children's vulnerability to abuse. *Id.*¹⁶

As to Ms. Gonzales, we held that, as a supervisor, she violated the children's constitutional rights by having knowledge that Mr. Doran and Ms. Medina were depriving children of those rights and failing to correct their conduct through training. *Id.* at 923.

Currier shows Mr. Doran, Ms. Medina, and Ms. Gonzales could be held individually responsible for their unconstitutional actions when they collectively contributed to a deprivation of the children's constitutional rights.

2) Clearly Established Law

Currier finally addressed whether the defendants' unconstitutional actions violated "clearly established" law. *Id.* at 923.

16. Along with Ms. Medina, Mr. Doran had instructed the mother to stop making allegations of abuse. *Id.* at 910. The *Currier* panel specifically addressed the social workers' instruction only as to Ms. Medina, and held it was relevant to and supported the danger-creation claim against her because her conduct increased the children's vulnerability to abuse from Mr. Vargas. *Id.* at 921. The panel's earlier discussion of whether to consider Mr. Doran's post-placement conduct was focused on his "failure to intervene," which does not describe affirmatively instructing the children's mother. *Id.* at 919-20.

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As to Mr. Doran, *Currier* held the law clearly established that “a reasonable state official would have known in 1993 and 1994 that reckless, conscience shocking conduct that altered the status quo and placed a child at substantial risk of serious, immediate, and proximate harm was unconstitutional.” *Id.* at 924. The law regarding Ms. Gonzales’s failure to train was also clearly established. *Id.* at 925. Although the law was not clearly established then that the timing of Ms. Medina’s conduct was relevant to a constitutional violation, *id.* at 925, our decision in *Currier* made it so going forward. That is, *Currier* made clear in its analysis of the claim against Ms. Medina that affirmative conduct after placement of a child can support a danger-creation claim. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (discussing how a court’s addressing prong one—even if there is no clearly established law under prong two—“promotes the development of constitutional precedent” for future cases).

The *Currier* court therefore affirmed the district court’s denial of qualified immunity for the danger-creation claim against Mr. Doran and Ms. Gonzales, but reversed as to the claim against Ms. Medina. 242 F.3d at 925.

C. *Analysis*

Ms. Patton’s conduct violated T.D.’s clearly established substantive due process right under *Currier* to be free from state-created danger. We therefore affirm the district court’s denial of Ms. Patton’s summary judgment

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motion asserting a defense of qualified immunity to the danger-creation claim.

On appeal, as she did in district court, Ms. Patton addresses only the second prong of her qualified-immunity defense—whether she violated a clearly established constitutional right. We nevertheless address both prongs, as the district court did, because the questions of whether there was a constitutional violation and, if so, whether the violation was of clearly established law, are intertwined. *See Pearson*, 555 U.S. at 236 (“It often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be.” (brackets and quotations omitted)).

First, we conclude, based on *Currier*, that Ms. Patton’s recommendations to place and keep T.D. in Mr. Duerson’s temporary custody coupled with her failure to investigate whether Mr. Duerson was abusing T.D., despite being on notice of evidence supporting such abuse, violated T.D.’s substantive due process right to be free from state-created danger.

Second, we conclude, again based on *Currier*, that T.D.’s substantive due process right was clearly established at the time of Ms. Patton’s conduct in 2010 and 2011. As explained below, *Currier* sufficiently defined T.D.’s right to put the unconstitutional nature of Ms. Patton’s conduct “beyond debate.” *See White*, 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774.

*Appendix A***1. The Constitutional Violation**

We first address whether Ms. Patton’s “affirmative conduct” satisfied *DeShaney*’s danger-creation exception. *Ruiz*, 299 F.3d at 1183. Determining that it did, we then turn to the elements of T.D.’s danger-creation claim.

Although we regard T.D.’s danger-creation claim as a single claim encompassing all of Ms. Patton’s alleged conduct, we sometimes refer to Ms. Patton’s “pre-placement conduct” and “post-placement conduct.” This concerns her conduct before and after November 3, 2010, when T.D. was placed in the temporary legal and physical custody of his father. We do so in part to align with our analysis in *Currier*, which looked at whether there was “affirmative conduct” before and after the children were placed. 242 F.3d at 919-21.

a. Affirmative conduct

This section addresses whether T.D. meets the necessary precondition of “affirmative conduct” for a danger-creation claim. *Ruiz*, 299 F.3d at 1183.

Currier supports that, because Ms. Patton recommended T.D.’s placement with Mr. Duerson, she engaged in affirmative pre-placement conduct. In *Currier*, the court stated: “When the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability.” 242 F.3d at 919. Mr. Doran’s pre-custody conduct met that standard when he

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took “affirmative conduct in removing the children from their mother and placing the children with their father.” *Id.* at 920 & n.7. Similarly here, Ms. Patton participated in removing T.D. from his mother’s home, intentionally withheld relevant information from her final report to the juvenile court, and recommended T.D.’s placement in Mr. Duerson’s home at both the September 9, 2010 juvenile court hearing and in the October 21, 2010 Stipulated Agreement.

Currier also supports that Ms. Patton acted affirmatively after November 3, 2010, when Mr. Duerson took temporary custody of T.D. In *Currier*, we determined that Ms. Medina, after the children were placed in Mr. Vargas’s custody, took “affirmative conduct” sufficient to support a danger-creation claim by discouraging the children’s mother from making allegations of abuse, thereby cutting off potential sources of private aid. 242 F.3d at 921-22. The ruling against Ms. Medina shows that post-placement conduct may be considered for a danger-creation claim provided it is “affirmative.” After T.D. was placed with Mr. Duerson on November 3, 2010, Ms. Patton did not merely “st[and] by and d[o] nothing when suspicious circumstances dictated a more active role for [her].” *DeShaney*, 489 U.S. at 203. She acted affirmatively. In her reports prepared for juvenile court hearings on December 13, 2010, March 21, 2011, June 13, 2011, and August 25, 2011, she recommended that T.D. “remain” in Mr. Duerson’s temporary custody. She made the June 13 and August 25 recommendations in the face of having received information that Mr. Duerson was abusing T.D. Her recommendations contributed to Mr. Duerson’s

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retaining “temporary physical and legal custody” over T.D. and furthering the danger Mr. Duerson posed to T.D. *See Currier*, 242 F.3d at 918 (“[A.J. and L.J.] would not have been exposed to the dangers from their father but for the affirmative acts of the state; the same cannot be said for Joshua in *DeShaney*.”).

Our review of T.D.’s danger-creation claim thus includes Ms. Patton’s conduct both before and after T.D. was placed in Mr. Duerson’s temporary custody on November 3, 2010.

b. Elements of the danger-creation claim

The facts taken in T.D.’s favor show he satisfies the six elements of his danger-creation claim.

i. Element 1: Ms. Patton created or increased the danger posed to T.D.

Ms. Patton created the danger of private violence or increased T.D.’s vulnerability to the danger posed by Mr. Duerson. *See Currier*, 242 F.3d at 918. We devote most of our analysis to this element.

First, Ms. Patton was one of those responsible for T.D.’s initial placement in Mr. Duerson’s home and thus created or increased T.D.’s vulnerability to the danger posed by Mr. Duerson.¹⁷ In her September 7, 2010 report

17. When stating Ms. Patton was “responsible” for T.D.’s placement, we do not intend to suggest she was solely responsible

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to the juvenile court and at the hearing, Ms. Patton intentionally deleted from her report her concerns about Mr. Duerson and withheld certain facts undermining Mr. Duerson's fitness as a caretaker, including:

- (1) details of Mr. Duerson's 2005 conviction of attempted sexual assault on a minor, his step-daughter P.G. who was in his care, documented in the Trails Report;
- (2) his 2005 violation of a restraining order by attempting to contact P.G.;
- (3) his 2007 probation violation due to his purposeful failure to fulfill his sex offender treatment obligations;
- (4) his other charged offenses including misdemeanor wrongs to minors and misdemeanor domestic violence; and
- (5) "multiple other incidents" involving Mr. Duerson's physical and sexual abuse of P.G.

Nor did Ms. Patton express her own admitted negative "gut" feeling about T.D.'s placement with his father.¹⁸

for the placement decision. Rather, we use the term to describe her significant contribution to his placement, thereby making her responsible, potentially along with others, for creating the danger posed to T.D.

18. On appeal, Ms. Patton emphasizes that there was "no question the Juvenile Court was aware of [Mr. Duerson's] attempted

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Viewing the facts in T.D.'s favor, we conclude a reasonable jury could find Ms. Patton's failure to inform the juvenile court of her knowledge and concerns, when coupled with her affirmative incomplete and therefore misleading statements, influenced the juvenile court's placement decision, making Ms. Patton responsible for T.D.'s placement in Mr. Duerson's home—a place of danger.

Second, Ms. Patton created or increased T.D.'s vulnerability to the danger posed by Mr. Duerson after T.D. was placed in his temporary custody on November 3, 2010. In her four post-placement hearing reports, she recommended that T.D. remain in Mr. Duerson's temporary custody, despite having evidence that he was physically abusing T.D. The record shows:

- (1) T.D. reported to her that Mr. Duerson had hit him with a wooden mop handle for not completing chores; and
- (2) School officials reported to her that T.D.

sexual assault,” and that Mr. Duerson had already completed his probation and sex offender treatment, so her removal of those facts bore no “constitutional significance.” Aplt. Br. at 44-45. But Ms. Patton's argument misses the point that she intentionally excluded information from her report that was potentially important to the juvenile court's placement decision. Nor does she present evidence or argue the juvenile court independently had the information she excluded from her reports. Indeed, although the juvenile court knew about the facts of Mr. Duerson's conviction and probation, there is no evidence showing it had access to the Trails Report—an internal DDHS document that detailed particular facts of his offense and documented “multiple” other incidents of abuse against P.G.

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was spending significant time at the nurse's office complaining of sickness and body aches, appeared to be afraid of his father, and at times did not want to go home to his father.

Ms. Patton did not disclose this information until her third post-placement report on June 13, 2010, and she never disclosed her fear for T.D.'s safety and true desire to remove T.D. from the home based on that information. Ms. Patton instead recommended in all of her reports that T.D. remain in Mr. Duerson's temporary custody. Her decision to withhold her safety concerns, coupled with her recommendations to keep T.D. in his father's home in the face of evidence of potential abuse, made her one of those responsible for the juvenile court's decision to keep T.D. in Mr. Duerson's temporary custody.

Third, Ms. Patton failed to investigate whether Mr. Duerson was abusing T.D.¹⁹ As noted earlier, the *Currier* court considered Mr. Doran's failure to investigate whether Mr. Vargas was abusing the children because his failure was coupled with his "affirmative conduct in removing the children from their mother and placing the children with their father." *Id.* at 920 n.7. *Currier* thus supports

19. Ms. Patton asserts that "there is no allegation Ms. Patton failed to investigate any allegation of abuse at any point." Aplt. Br. at 50. The complaint alleged otherwise. *See, e.g.*, App., Vol. I at 31, ¶¶ 26-28 (alleging Ms. Patton failed to monitor Mr. Duerson's home at least every month to uncover the extent of the abuse on T.D.); *id.* at ¶¶ 31-34 (alleging Ms. Patton failed to investigate credible reports of abuse).

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that we may consider Ms. Patton's failure to investigate evidence Mr. Duerson was abusing T.D. because it was coupled with her affirmative actions in exposing T.D. to the danger posed by his father.

When T.D. was in Mr. Duerson's temporary custody, Ms. Patton received (1) T.D.'s allegation that Mr. Duerson had hit him with a wooden mop and (2) the school officials' reports that T.D. had appeared fearful of his father, complained of body aches, and spent significant time in the school nurse's office. Despite knowing about these allegations, Ms. Patton failed to conduct at-home site visits to Mr. Duerson's home at least every other month, as DDHS policy required.²⁰ Nor did she complete DDHS's required face-to-face contact with T.D. in July 2011, as Ms. Ketema had directed her to do. She also failed to follow up after T.D. had missed 30 class periods—merely accepting Mr. Duerson's excuses that T.D. had conflicting appointments or was "sick." *See, e.g., Currier*, 242 F.3d at 919 (concluding Mr. Doran failed to investigate by not following up after Mr. Vargas reported the children's bruises were the result of falls). Ms. Patton also reported

20. Although whether she visited his home every other month and whether she was required to do so by DDHS are in dispute, we must view those facts in T.D.'s favor.

The district court justified its decision not to consider Ms. Patton's alleged failure to visit Mr. Duerson's home at least once every other month on the ground it did "not constitute affirmative action." Dist. Ct. Order at 39 n.23. But as our analysis shows, Ms. Patton's failure to visit Mr. Duerson's home may be relevant so long as there is accompanying affirmative action. *See Currier*, 242 F.3d at 920 & n.7.

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at the August 25, 2011 hearing that (1) she “was having difficulty” contacting Mr. Duerson for a “period of time,” and (2) she had failed to conduct a written parental assessment of Mr. Duerson after the June 13, 2011 hearing. Dist. Ct. Order at 16.

In sum, her actions amounted to a failure to investigate evidence that Mr. Duerson was abusing T.D. *See Currier*, 242 F.3d at 919-20 (holding that Mr. Doran created the danger by failing to investigate evidence of potential abuse, including noticing bruises on the children and learning about specific and general allegations of abuse).

* * * *

By (1) recommending that T.D. be placed and later recommending that T.D. remain in Mr. Duerson’s temporary custody, (2) intentionally removing from her report to the juvenile court her knowledge and concerns regarding Mr. Duerson’s fitness as a caretaker, and (3) failing to investigate evidence of potential abuse, Ms. Patton helped create or increase T.D.’s vulnerability to the danger posed by Mr. Duerson both before and after November 3, 2010. *See id.* at 919 (providing that Mr. Doran was responsible for creating the danger in granting Mr. Vargas legal custody “through either his failure to investigate and report to the court [evidence regarding Mr. Vargas’s history of financial responsibility] or through his affirmative recommendation”).

*Appendix A***ii. Element 2: Limited and specifically definable group**

T.D. was a member of a limited and specifically definable group. *See id.* at 918. In *Currier*, we regarded the group to be “children the state has removed from their natural parent and taken into state custody,” *id.* at 920, and continued to view the children as members of that group after their placement with Mr. Vargas. *See id.* at 921-22 (holding Ms. Medina acted unconstitutionally under a danger-creation theory for her conduct after the children had been placed in the custody of Mr. Vargas).

Because the state removed T.D. from his natural parent (Ms. Garcia) and took him into state custody, T.D. falls within the same “limited and specifically definable group” as the children in *Currier*. *Id.* at 920 (quotations omitted). *Currier* supports that he remained in that group even after Mr. Duerson was awarded temporary custody. *Id.* at 921-22.

iii. Element 3: Ms. Patton’s conduct put T.D. at substantial risk of serious, immediate, and proximate harm

Ms. Patton’s conduct helped put T.D. at a substantial risk of serious, immediate, and proximate harm. *Id.* at 918.

We agree with the district court’s determination that “a jury could quite easily believe that [Mr. Duerson’s] prior sexual offense against P.G., his step-child, would have provided notice that he might re-offend against

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another child in his care.” Dist. Ct. Order at 36. This was especially so given Ms. Patton’s withholding information from the juvenile court of Mr. Duerson’s purposeful failure to fulfill his sex offender treatment obligations leading to his 2007 probation violation,²¹ and “the multiple incidents of improper contact between [Mr. Duerson] and P.G. in the Trails report.” *Id.* The latter showed his offense was not an isolated incident and increased the risk he posed of reoffending. Ms. Patton thus contributed to putting T.D. at risk of serious, immediate, and proximate harm by withholding relevant information and recommending T.D. be placed with his father. Ms. Patton further contributed to the risk of harm to T.D. after the placement by failing to investigate evidence of potential abuse and continuing to recommend T.D. remain in Mr. Duerson’s temporary custody despite being on notice that Mr. Duerson was abusing T.D.

iv. Elements 4 and 5: Ms. Patton acted recklessly and in conscious disregard of an obvious or known risk

The record shows that Ms. Patton acted recklessly and in conscious disregard of a risk (element 4) that was obvious or known (element 5). *See Currier*, 242 F.3d at 918.

In her initial draft report for the September 7, 2010 hearing, Ms. Patton had included her concerns about

21. Although Mr. Duerson eventually completed his sex offense treatment before T.D.’s placement with him, Mr. Duerson’s previous unwillingness to comply with such treatment may have been relevant to the juvenile court’s assessment of his commitment to maintaining a safe environment for another minor placed in his care.

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placing T.D. with Mr. Duerson based on her knowledge of his criminal history—in particular, his abusing a child in his care. But she intentionally deleted those concerns in the final report for fear of being fired. In her June 13, 2011 hearing report, although she reported various incidents of potential abuse to the juvenile court, Ms. Patton nonetheless intentionally withheld her concerns that she feared for T.D.’s safety and her professional judgment that T.D. should be removed from his father’s home.

Ms. Patton’s intentional exclusion of her knowledge and concerns from her hearing reports showed she acted recklessly and in conscious disregard of an obvious or known risk that Mr. Duerson posed to T.D. *See id.* at 918 (holding that Mr. Doran acted recklessly in conscious disregard for the children’s safety through his affirmative recommendation, despite his knowledge of allegations of abuse and facts undermining Mr. Vargas’s fitness as a caretaker).

v. Element 6: Ms. Patton’s conduct was conscience shocking

Ms. Patton’s conduct, viewed “in total” and in T.D.’s favor, was conscience shocking in light of:

- (1) her withholding of certain information about Mr. Duerson’s criminal history;
- (2) her withholding of her concerns about Mr. Duerson from her September 7, 2010, June 13, 2011, and August 25, 2011 reports to the juvenile court for fear of being fired;

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- (3) her awareness of and failure to investigate evidence of potential abuse, including T.D.'s report that Mr. Duerson had hit him with a wooden mop and school officials' reports that he had spent significant time in the school nurse's office complaining of body aches and appearing fearful of his father; and
- (4) her responsibility for T.D. being placed and remaining in Mr. Duerson's home.

Ms. Patton's conduct significantly exceeded "ordinary negligence" or "permitting unreasonable risks" and rose to "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Ruiz*, 299 F.3d at 1184 (quotations omitted); *see also Currier*, 242 F.3d at 919-20 (determining that Mr. Doran's parallel conduct to Ms. Patton's was conscience shocking) (discussed more below).

* * * *

In sum, Ms. Patton's conduct violated T.D.'s substantive due process right by creating or increasing T.D.'s vulnerability to the danger of private violence by Mr. Duerson.

2. Clearly Established Law

Under *Currier*, T.D. suffered a constitutional violation of a right that was clearly established. As

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previously discussed, to show clearly established law, “existing precedent must have placed the statutory or constitutional question beyond debate.” *White*, 137 S. Ct. at 551 (quotations omitted). Although there need not be a “case directly on point,” *id.*, “[a]n officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it.” *Sheehan*, 135 S. Ct. at 1774 (brackets and quotations omitted).

Our decision in *Currier* meets those exacting standards. Based on the parallel facts of *Currier* and the law established in that case, a reasonable official in Ms. Patton’s shoes would have understood that she was violating T.D.’s constitutional right by creating or increasing T.D.’s vulnerability to the danger posed by Mr. Duerson. *Sheehan*, 135 S. Ct. at 1774. Ms. Patton’s attempts to distinguish *Currier* are unavailing.

a. Parallels to Currier

Currier and this case are factually and legally on point. Both involved county social workers removing a child (children in *Currier*) from a mother and then recommending the child be placed in the father’s home, where the child was abused by the father. Both cases also involved members of the same limited and specifically definable group—“children the state has removed from their natural parent and taken into state custody.” *Currier*, 242 F.3d at 920. These parallels and additional facts in *Currier* define “beyond debate” T.D.’s substantive

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due process right to be free from a state-created danger. *White*, 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774.

First, in *Currier*, Mr. Doran (1) failed to investigate evidence of potential abuse, including bruises on the children, general allegations of abuse, and a “very specific accusation” of abuse and (2) recommended to the court that Mr. Vargas assume legal custody. 242 F.3d at 919. Those facts supported *Currier*’s conclusions that Mr. Doran (1) created or increased the children’s vulnerability to the danger, (2) placed the children at an obvious risk of serious, immediate, and proximate harm, and (3) recklessly and consciously disregarded that risk. *Id.* at 920.

Like Mr. Doran, Ms. Patton (1) failed to investigate evidence of abuse, including a “very specific” report of abuse (e.g., T.D.’s wooden mop report) and other indicia of abuse (e.g., T.D.’s complaints to school nurses of body aches and fear of Mr. Duerson), and (2) recommended to the juvenile court that Mr. Duerson receive and keep temporary custody of T.D. Accordingly, based on the facts of *Currier*, a reasonable official in Ms. Patton’s shoes would have understood that she (1) created or increased T.D.’s vulnerability to the danger, (2) placed T.D. at an obvious risk of serious, immediate, and proximate harm, and (3) recklessly and consciously disregarded that risk. *Id.*²²

22. We recognize *Currier* addressed Mr. Doran’s conduct after physical—but before legal—custody was granted to Mr. Vargas, and here we are considering Ms. Patton’s conduct both before and after legal and physical custody was awarded to Mr. Duerson. But, as discussed below, the timing of custody was not the critical factor in *Currier* to determine the scope of relevant conduct. Instead, we

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Second, in *Currier*, Mr. Doran withheld from the juvenile court facts undermining the fitness of Mr. Vargas as a caretaker—specifically, his history of not paying child support—and contributed to this court’s determination that he was responsible for the children’s placement with Mr. Vargas. *Id.* at 919. *Currier* therefore put Ms. Patton on notice that she, too, could be held responsible for placing T.D. in danger by withholding from the juvenile court facts undermining Mr. Duerson’s fitness as a caretaker—specifically, certain information regarding his criminal history.

Third, *Currier* found Mr. Doran’s conduct to be conscience shocking in light of:

- (1) his withholding of information about Mr. Vargas’s failure to pay child support;
- (2) his awareness of and failure to investigate potential abuse, including the numerous bruises on the children explained as caused by bunk bed falls and allegations Mr. Vargas was abusing the children; and
- (3) his responsibility for the juvenile court’s granting Mr. Vargas legal custody.

Id. at 920. Ms. Patton’s conduct closely resembles Mr. Doran’s in light of:

looked to whether and when there were “affirmative actions” taken to create the danger.

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- (1) her withholding of certain information about Mr. Duerson's criminal history;
- (2) her awareness of and failure to investigate evidence of potential abuse, including T.D.'s report that Mr. Duerson had hit him with a wooden mop and school officials' reports that he had spent significant time in the school nurse's office complaining of body aches and appearing fearful of his father; and
- (3) her responsibility for T.D.'s being placed and remaining in Mr. Duerson's home.

As noted above, Ms. Patton also withheld her concerns about Mr. Duerson from her September 7, 2010, June 13, 2011, and August 25, 2011 reports to the juvenile court for fear of being fired. Based on the foregoing, a reasonable official in Ms. Patton's position would have understood that her conduct was a constitutional violation.

b. Ms. Patton's arguments

Ms. Patton attempts to show *Currier* does not provide clearly established law. She first argues *Currier* forecloses using her post-placement conduct to support a constitutional violation.²³ Her remaining arguments

23. We regard this argument as more appropriately directed to whether there was a constitutional violation, but we nonetheless address it here because Ms. Patton has presented it as a prong-two argument.

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attempt to distinguish *Currier*.²⁴ Ms. Patton does not persuade us that she is entitled to qualified immunity for lack of clearly established law.

i. Post-custody conduct

Ms. Patton first argues *Currier* held that “post-custody conduct” was not relevant to the danger-creation analysis for Mr. Doran, so her own post-placement conduct after the November 3, 2010 placement is also irrelevant. Aplt. Br. at 48-49 (citing *Currier*, 242 F.3d at 919-20). This argument misinterprets *Currier*.

In *Currier*, this court recognized that, during the time the defendant official engaged in conduct that affirmatively contributed to danger creation, all of the defendant’s conduct tending to do so—including a failure to investigate—is relevant. Relevance turns not on when the custody placement occurred but when the defendant’s affirmative danger-creating conduct occurred. Our analysis in *Currier* made this clear. We considered Mr. Doran’s recommendation that Mr. Vargas should have legal custody of his children to be relevant even though

24. Ms. Patton also points out that we reviewed a motion to dismiss the claim in *Currier* under the notice-pleading standard of *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), rather than the more particularized requirements of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Aplt. Br. at 37 n.6. But Ms. Patton does not argue or explain how that may affect whether *Currier* provides clearly established law.

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Mr. Vargas had already assumed physical (though not legal custody) of the children. *Currier*, 242 F.3d at 919. Further, we did not consider Mr. Doran's failure to investigate abuse of the children after Mr. Vargas received legal custody to be relevant, not because the legal custody decision had been made, but because the panel said Mr. Doran was not at that time engaging in affirmative conduct to put the children in danger, such as recommending to the juvenile court that the children remain with Mr. Vargas. *Id.* at 909, 919. Finally, we considered Ms. Medina's instructing the children's mother to remain silent about the father's alleged abuse to be relevant even though she did so after Mr. Vargas obtained legal custody. *Id.* at 921. In short, conduct relevant to danger creation depends on affirmative conduct, which can occur before and after a parent obtains legal custody of a child.

Under *Currier*, T.D.'s placement in Mr. Duerson's home on November 3, 2010, did not determine what conduct was relevant to T.D.'s danger-creation claim. Rather, *Currier* shows the relevant inquiry is whether Ms. Patton took affirmative actions after that date. Ms. Patton, similarly to Ms. Medina in *Currier*, took affirmative actions after November 3, 2010, by recommending four times that T.D. remain in Mr. Duerson's temporary physical and legal custody. Those affirmative actions made her post-placement conduct, including her failure to investigate evidence of potential abuse, relevant to analyze T.D.'s danger-creation claim.

*Appendix A***ii. Attempts to distinguish *Currier***

Ms. Patton’s attempts to distinguish *Currier* on four grounds all fail.

1) Same children

Ms. Patton argues the “dispositive distinction” between *Currier* and this case is that in *Currier* the past allegations of child abuse that occurred before custody was granted to the father concerned the same children who were placed in Mr. Vargas’s custody. Oral Arg. at 3:12-28. Ms. Patton contends she was never “alerted to *any* abuse of T.D. by [Mr. Duerson] before custody was transferred to [him].” Aplt. Br. at 42, 50 (bold omitted); Oral Arg. 3:24-3:48. This argument fails for two reasons.

First, what matters most is not the identity of the victims, but that the social workers in both cases had evidence of child abuse by the fathers before making their custody recommendations, and thus had notice the fathers’ homes would be dangerous places. In *Currier*, Mr. Doran had notice, based on the allegations that Mr. Vargas had abused the children after assuming physical custody of them, that Mr. Vargas’s home would continue to be a place of danger if the father were granted legal custody. *See Currier*, 242 F.3d at 919-20. He nevertheless recommended Mr. Vargas be awarded legal custody of the children. *Id.* at 919.

Here, Mr. Duerson’s abuse of P.G.—his step-child under his care—gave Ms. Patton notice that Mr. Duerson’s

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home would be a place of danger for T.D. *See* Dist. Ct. Order at 36 (explaining the record supported that Ms. Patton was on notice that Mr. Duerson might “re-offend against another child in his care”). By intentionally omitting from her report to the juvenile court her concerns and details of Mr. Duerson’s criminal history—including her knowledge that there were “multiple other incidents” of Mr. Duerson abusing P.G.—Ms. Patton’s own actions reflect she knew the information she excluded was important to the court’s placement decision. Compared to Mr. Doran, Ms. Patton had even stronger evidence that Mr. Duerson was a child abuser. But she nonetheless recommended that a child be placed in a convicted child abuser’s home.

Second, just as Mr. Doran recommended in *Currier* that Mr. Vargas’s children should live with him even though he had previously abused them, Ms. Patton, after learning about Mr. Duerson’s abuse of T.D., recommended that T.D. should stay with his father. The juvenile court followed those recommendations, leaving T.D. in the home and enabling the father to abuse him on multiple occasions.

Combined with her pre-placement conduct, her post-placement conduct makes this case even stronger than *Currier* for a danger-creation violation. In *Currier*, once Mr. Doran knew that Mr. Vargas had abused his children after receiving physical (but not legal) custody of them, Mr. Doran’s single recommendation supporting Mr. Vargas’s legal custody of those children contributed to a constitutional violation. *Currier* thus clearly established that, once Ms. Patton knew that Mr. Duerson had abused T.D. in his home, her recommendations that T.D. should

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remain in Mr. Duerson’s temporary custody also led to a constitutional violation.²⁵ In sum, her pre-and post-placement conduct together supports a clear *Currier* violation.

2) “Team” process

Ms. Patton raises two related arguments about a “team” process in placing T.D. with Mr. Duerson. Both fail.

First, she questions whether she could be liable when other “team” members also supported T.D.’s placement with his father. *See, e.g.*, Aplt. Br. at 46 (arguing that Ms. Patton’s failure to disclose information to other individuals “does not establish a constitutional violation”). Whether more properly viewed as a prong-one constitutional violation argument or a prong-two clearly established law argument, it lacks merit.

She identifies the “team” as including Ms. Gomez (T.D.’s guardian ad litem), T.D.’s parents, and the attendees at the August 17, 2010 meeting, including T.D., Briana Hutchinson (an outside family therapist),

25. At oral argument, Ms. Patton’s lawyer attempted to argue that her notice of Mr. Duerson’s physically abusing T.D. did not give her notice he would sexually abuse T.D. Apart from being improperly raised for the first time at oral argument, *see EEOC v. TriCore Reference Labs*, 849 F.3d 929, 941 n.13 (10th Cir. 2017), this argument lacks merit. A home where the caretaker abuses a child is a place of danger—whatever form that abuse takes. In any event, Mr. Duerson had both physically and sexually abused P.G.—putting Ms. Patton on notice that he could do either or both to T.D.

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and Kyle Hommes (T.D.’s clinician at Shiloh House). But Ms. Patton was the DDHS case worker who made the recommendation at the September 7, 2010 hearing and who withheld her knowledge and concerns about the placement from the final report submitted to the juvenile court. And apart from Ms. Patton, the only “team” member who participated at the September 7, 2010 hearing was Ms. Gomez, with whom Ms. Patton failed to share the full extent of her knowledge of Mr. Duerson’s history or her concerns about T.D.’s placement with him, including details of Mr. Duerson’s 2005 conviction documented in the Trails Report. Ms. Gomez testified that she would “probably” have changed her placement recommendation had Ms. Patton shared these details with her because they would have corrected her misconception about the nature of the 2005 conviction.²⁶ Dist. Ct. Order at 11 (brackets omitted). Ms. Patton also cannot shift blame to other “team” members when she failed to disclose to them the full extent of her knowledge about Mr. Duerson’s criminal history or her concerns about T.D.’s placement in his home.²⁷

26. Ms. Patton asserts other “team” members had access to the information she knew, or could have requested that information. For instance, she argues that “[i]t is at least ‘likely’” Ms. Gomez looked up Mr. Duerson’s past criminal history in a state database, Aplt. Br. at 47, but, even if that were so, it would not compensate for her lack of knowledge of the Trails Report—a different document than Mr. Duerson’s criminal history report.

27. As noted above, her particular knowledge included details of Mr. Duerson’s criminal offense against P.G., and her concerns included the reasons for his 2007 probation revocation (e.g., his purposeful failure to fulfill his sex offender treatment obligations).

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Second, she argues “there is no indication Do[r]an was part of a team decision-making process” in *Currier*. Aplt. Br. at 42-43. But Ms. Patton is incorrect that *Currier* lacked any “team” process in placing the children. In *Currier*, four CYF social workers worked together to place the children in Mr. Vargas’s custody. The children’s guardian ad litem and mother also were involved in the children’s placement. *See* 242 F.3d at 908-10. And despite the involvement of a group in *Currier*, this court held the social workers could be held individually responsible for a danger-creation claim. *See id.* at 920 (Mr. Doran), 921 (Ms. Medina), 923 (Ms. Gonzales). Ms. Patton’s “team” process argument does not dilute *Currier* as clearly established law.

3) Supervisor’s direction

Ms. Patton next attempts to distinguish *Currier* because Mr. Doran’s supervisor, Ms. Gonzales, did not direct him to recommend custody, whereas Ms. Patton’s supervisor, Ms. Ketema, instructed her to do so.

We do not see why this matters for a danger-creation claim based on *Currier*. *Currier* establishes that the requisite mental state for a danger-creation claim is whether Ms. Patton “acted recklessly in conscious disregard” of a risk that was “obvious or known.” 242 F.3d at 918. Ms. Patton’s reasons for deleting parts of her initial

Although it is disputed to what extent Ms. Patton misrepresented her knowledge of Mr. Duerson’s criminal history or shared her concerns with the meeting’s attendees, we must view the facts in the light most favorable to T.D.

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report to the juvenile court that outlined her concerns about T.D.'s placement with Mr. Duerson (i.e., to avoid being fired) support that she knew of the danger posed to T.D. in Mr. Duerson's home and that she consciously disregarded that risk.

Nor does *Currier* allow her to escape liability due to her supervisor's misconduct. In *Currier*, we held that Mr. Doran's supervisor, Ms. Gonzales, could also be liable for unconstitutional conduct by knowingly failing to correct Mr. Doran's and Ms. Medina's unconstitutional behavior. *Id.* at 922-23. The actions of Mr. Doran's supervisor did not absolve Mr. Doran of liability. This same is so with Ms. Patton and Ms. Ketema.

4) Failure to provide criminal record

Ms. Patton argues *Currier* does not support a danger-creation claim “premised on the failure to provide a juvenile court with a complete criminal history where the court is aware of the only conviction in that history.” Aplt. Br. at 45. This argument overlooks the relevant facts in *Currier*, where Mr. Doran was held responsible for a placement decision in part because he failed to disclose relevant information regarding Mr. Vargas's fitness as a caregiver—his failure to pay child support. Similarly, and even stronger here, Ms. Patton failed to disclose relevant information regarding Mr. Duerson's fitness—the details regarding Mr. Duerson's criminal conviction for abusing a child in his care, “multiple” other incidents of child abuse, and other facts supporting he was not only unfit to care for T.D., but also posed a danger of private violence to T.D.

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* * * *

Ms. Patton fails in her attempts to argue *Currier* does not provide clearly established law. *Currier* did more than establish T.D.’s substantive due process rights “at a high level of generality.” *White*, 137 S. Ct. at 552 (quotations omitted).²⁸ It is a “case where an offic[ial] acting under

28. On August 16, 2017, counsel for Ms. Patton submitted a letter under Fed. R. App. P. 28(j), advising the circuit clerk of this court’s decision in *Dahn v. Amedei*, No. 16-1059, 867 F.3d 1178, 2017 U.S. App. LEXIS 15031, 2017 WL 3470142 (10th Cir. Aug. 14, 2017), and stating it is germane to Ms. Patton’s argument that “the District Court addressed the clearly established law inquiry at too high a level of generality.”

In *Dahn*, a foster child had relocated from Oklahoma to Colorado, where a private adoption agency placed him for adoption with a foster father who abused him before and after the adoption was approved. Oklahoma had custody of the child until the adoption. 2017 U.S. App. LEXIS 15031, [WL] at *1, *6. The lawsuit alleged that county caseworkers in Colorado had violated the child’s right to substantive due process for their failure to respond adequately to reports of abuse while the child was living with the father before the adoption. The caseworkers moved to dismiss, arguing they were entitled to qualified immunity.

The district court denied the motion, concluding the caseworkers had a special relationship with the child under clearly established law. It relied on *Schwartz v. Booker*, 702 F.3d 573 (10th Cir. 2012), for clearly established law. *Dahn*, 2017 U.S. App. LEXIS 15031 [WL] at *6. *Schwartz* held that the special-relationship doctrine applies not only to county employees who had placed a child in foster care but also to employees in another county who were responsible for investigating reports of abuse to the child, noting the placement made the child dependent on the state and all its county departments. *Id.* at 581-85.

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similar circumstances . . . was held to have violated” the Constitution. *Id.* The law and facts of *Currier* put a reasonable person in Ms. Patton’s circumstances on notice that her conduct regarding T.D.’s placement was unconstitutional. *Id.* at 551.

III. CONCLUSION

We affirm the district court’s denial of summary judgment.

We reversed in *Dahn*, holding that *Schwartz* did not clearly establish extension of “the special-relationship doctrine across state lines as well as county lines.” *Dahn*, 2017 U.S. App. LEXIS 15031 [WL] at *7.

Dahn does not support Ms. Patton’s generality argument here. *Dahn* concerns the special-relationship doctrine; this case concerns the danger-creation doctrine. Moreover, as our analysis shows, the district court did not extend the law that was clearly established in *Currier*, this case and *Currier* are factually parallel, and this case presents an even stronger foundation than *Currier* for a danger-creation claim.

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BRISCOE, Circuit Judge, concurring.

I agree that we are bound by our prior ruling in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). However, I believe *Currier* was wrongly decided because it directly conflicts with the Supreme Court’s precedent in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). In addition, to the extent the Court in *DeShaney* left the door open for an exception based on a state-created danger, the test the Tenth Circuit has devised for that exception has been applied too broadly. Our precedent should be reconsidered in an appropriate case.

I

In *DeShaney*, the Supreme Court held that social workers were not constitutionally liable for failing to protect Joshua Deshaney from his father, Randy DeShaney. *DeShaney*, 489 U.S. at 191. Authorities first learned that Joshua might be endangered when DeShaney’s second wife complained to police that DeShaney had hit Joshua, causing marks. *Id.* at 192. “The Winnebago County Department of Social Services (DSS) interviewed [DeShaney], but he denied the accusations, and DSS did not pursue them further.” *Id.* A year later, Joshua was admitted to a local hospital with “multiple bruises and abrasions,” and the examining physician notified DSS of suspected child abuse. *Id.* DSS “immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital.” *Id.*

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The county then convened a “‘Child Protection Team’ — consisting of a pediatrician, a psychologist, a police detective, the county’s lawyer, several DSS caseworkers, and various hospital personnel — to consider Joshua’s situation.” *Id.* The Team decided that “there was insufficient evidence of child abuse to retain Joshua in the custody of the court,” but did “recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counseling services, and encouraging his father’s girlfriend to move out of the home.” *Id.* DeShaney promised to cooperate with these recommendations. *Id.* “Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father.” *Id.*

Following this incident, a DSS caseworker visited the DeShaney home monthly. “[S]he observed a number of suspicious injuries on Joshua’s head; she also noticed that he had not been enrolled in school, and that the girlfriend had not moved out.” *Id.* at 192-93. She recorded these observations, “along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua.” *Id.* at 193. During this time, the case worker also received two more reports from emergency room personnel that Joshua had been treated for suspicious injuries. *Id.* at 192-93. The second of these reports was in November 1983. *Id.* at 193. On the caseworker’s next two monthly visits to the DeShaney home, she was told that Joshua was too ill to see her. *Id.* In March 1984, DeShaney beat Joshua so severely that Joshua suffered permanent brain damage. *Id.* “DeShaney was subsequently tried and convicted of child abuse.” *Id.*

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Joshua and his mother brought § 1983 claims against the County and DSS employees alleging that the defendants “had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known.” *Id.* at 193. They claimed that a “special relationship” existed between Joshua and the State “because the State knew that Joshua faced a special danger of abuse at his father’s hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger.” *Id.* at 197 (quoting Brief for Petitioners at 13-20, *DeShaney*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249, (No. 87-154), 1987 WL 880157). Specifically, as is most relevant here, the *DeShaney* plaintiffs asserted in their briefing that the county had violated Joshua’s due process rights because, *inter alia*, it “*handed him back* to his abusing father and the father’s abusing girlfriend.” Brief for Petitioners at 5 (emphasis added).

The Supreme Court began by discussing the scope of substantive due process claims. “The Due Process Clause of the Fourteenth Amendment provides that ‘[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.’” *DeShaney*, 489 U.S. at 194. This Clause “does not transform every tort committed by a state actor into a constitutional violation.” *Id.* at 202. Rather, it “was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’” *Id.* at 196 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986)). It is

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“a limitation on the State’s power to act,” not “a guarantee of certain minimal levels of safety and security.” *Id.* at 195. In other words, “[i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other.” *Id.* at 196. “[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *Id.* “[A] State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” *Id.* at 197.

The Court recognized that “in certain *limited circumstances* the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.” *Id.* at 198 (emphasis added). Specifically, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Id.* at 199-200. In such a case, “[t]he affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *Id.* at 200. The conduct alleged in *DeShaney* did not meet this standard. *Id.* at 199-200 & 200 n.9. The Court held that there was no special relationship between Joshua and the State, because the State had not “by the affirmative exercise of its power so restrain[ed] [Joshua’s] liberty that it render[ed] him unable to care for himself.” *Id.* at 200. The Court stated further

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that the State’s assumption of temporary custody over Joshua did not change the analysis because “the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter.” *Id.* at 201.

In its analysis, the Court also stated that the State’s conduct, including returning Joshua to his father, did not create a danger to Joshua or increase his vulnerability to danger. *Id.* at 201. It wrote, “[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played *no part* in their creation, nor did it *do anything* to render him any more vulnerable to them.” *Id.* (emphasis added). Again, the State’s temporary assumption of custody of Joshua did not alter this analysis because returning Joshua to his father’s custody “placed him in no worse position than that in which he would have been had [the State] not acted at all.” *Id.* Thus, the Court’s opinion in *DeShaney* addressed both the special relationship exception and the state created danger exception and concluded that neither created an affirmative constitutional duty on the part of the state to protect Joshua. *Id.* Because “the State had no constitutional duty to protect Joshua against his father’s violence, its failure to do so — though calamitous in hindsight — simply d[id] not constitute a violation of the Due Process Clause.” *Id.* at 202.

Despite this clear statement in *DeShaney*, we held in *Currier* that social workers are constitutionally liable for harms inflicted upon children if the social worker was “responsible for” the court’s decision to authorize the custody arrangement in which the child was later

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harmed. *Currier*, 242 F.3d at 919-20. We attempted to avoid the controlling precedent in *DeShaney* by drawing a distinction that returning a child to the same parent did not increase the child's vulnerability to danger from violence at the hands 202. of that parent, but returning a child to a different parent did. *Id.* at 918.

The plaintiffs in *Currier*, as representatives of the children Latasha and Anthony, brought § 1983 claims against, among others, Tom Doran, a social worker for the Children, Youth, and Families Department of the State of New Mexico (CYF), alleging that Doran had “violated their fundamental rights under the Fourteenth Amendment of the United States Constitution.” *Id.* at 908. The facts relevant to the issue in *DeShaney*, presented in the light most favorable to the *Currier* plaintiffs, are as follows.

On April 30, 1993, CYF investigated a report of neglect regarding Latasha and Anthony, who were, at the time, in the custody of their mother, Devonne Juarez. *Id.* at 909. A CYF worker found Latasha and Anthony, both under the age of four at the time, in the care of their five-year-old cousin. *Id.* Juarez had left the state. *Id.*

CYF petitioned the Children's Court for an order formally transferring legal custody of Latasha and Anthony to CYF. *Id.* A hearing regarding this petition was held on May 10, 1993. *Id.* As of this hearing, Doran had learned that the children's father, Vargas, had a “history of financial irresponsibility” and had made only eight child support payments in the previous three years. *Id.* Doran

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attended the Children's Court hearing, but did not say anything about Vargas's failure to pay child support. *Id.* The Children's Court granted legal custody of the children to CYF, but physical custody to Vargas. *Id.*

On July 22, 1993, Doran visited Vargas's home and noticed a small bruise on Anthony's cheek, which Vargas's girlfriend attributed to a fall on the playground. *Id.* On August 3, 1993, Anthony had another bruise when he arrived at CYF for an office visit. *Id.* This bruise was also attributed to a fall. *Id.* Juarez reported in both August and September that Vargas was physically abusing the children. *Id.* Doran was aware of at least one of these reports but did not investigate. *Id.* Also in August 1993, Juarez alleged that Vargas's fiancée punished the children by dunking them in a bathtub full of water. *Id.* Again, Doran was aware of this allegation but did not investigate. *Id.* On October 15, 1993, the children came to CYF for an office visit. Latasha had two visible bruises on her back. When asked who gave them to her, she replied "Da Da." *Id.* at 910.

On October 19, 1993, legal custody was transferred to Vargas. *Id.* at 909. On April 16, 1994, Vargas poured boiling water on Anthony. *Id.* Anthony later died from his injuries. *Id.* This court affirmed the denial of qualified immunity to Doran under a state-created danger theory. *Id.* at 919.

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As a factual matter, I cannot square *Currier* with *DeShaney*. I am not persuaded by our purported distinction between a state that assumes custody of a child from a parent and then returns that child to the same parent and a state that assumes custody of a child and then returns that child to a different parent. In both cases the state makes an affirmative recommendation regarding the placement of the child. And, in *DeShaney*, this purportedly affirmative conduct was not adequate to implicate substantive due process concerns. *DeShaney*, 489 U.S. at 201. Therefore, assuming *arguendo* that the state-created danger theory of substantive due process violations is a valid theory of liability in some circumstances, then either the conduct alleged in *Currier* does not meet the Tenth Circuit’s test, or that test sets the bar too low.

Under our test, to establish a claim under the danger-creation theory, a plaintiff must show: (1) “that the state actor engaged in affirmative conduct”; (2) “that there was private violence”; (3) that the state actor “created the danger or increased plaintiff’s vulnerability to the danger in some way”; (4) that “plaintiff was a member of a limited and specifically definable group”; (5) that the state actor’s “conduct put plaintiff at substantial risk of serious, immediate, and proximate harm”; (6) that “the risk was obvious or known”; (7) that the state actor “acted recklessly in conscious disregard of that risk”; and (8) that “such conduct, when viewed in total, is conscience

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shocking.”²⁹ *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014) (quoting *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013)). Although I doubt that Doran’s conduct meets several of these elements, I focus here on the first, affirmative conduct.

With respect to this element, we held in *Currier* that Doran “was responsible for the Children’s Court’s decision to grant Vargas legal custody, through *either* his failure to investigate and report to the court or through his affirmative recommendation.” *Currier*, 242 F.3d at 919 (emphasis added). The factual basis for this conclusion was that Doran failed to tell the Children’s Court about Vargas’s history of financial irresponsibility, failed to further investigate bruises after Vargas and his fiancée offered an explanation, and failed to investigate Juarez’s allegation that Vargas’s fiancée had punished the children by dunking them in a bathtub full of water. *Id.* Notably, these are all omissions, not affirmative acts. We then stated that “Doran ‘created the danger or increased the plaintiff[s]’ vulnerability to the danger’ through his *failure to investigate* the numerous bruises and allegations of abuse and his *responsibility* for the court order granting

29. We have referred to these first two elements as “preconditions” that must be met before a plaintiff may allege a substantive due process claim premised on a theory of state-created danger. *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1105 (10th Cir. 2014); *Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909, 920 n.8 (10th Cir. 2012) (recognizing that the omission of these two preconditions from the six-factor test had “generate[d] oversight on the part of courts and counsel alike,” because these preconditions are necessary to invoke the state-created danger theory).

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legal custody to Vargas.” *Id.* at 919-20 (emphasis added). In a footnote, we elaborated:

It is true that the conduct Plaintiffs complain of is partially a failure by Doran to act on particular allegations of abuse. Doran’s failure to investigate allegations of abuse while the children were in state legal custody should be distinguished, however, from a claim that the state failed to rescue the children once legal custody was given to Vargas. Doran’s failure to investigate allegations of abuse should be viewed in the general context of the state’s affirmative conduct in removing the children from their mother and placing the children with their father.

Id. at 920 n.7.

As a general matter, I find it hard to conclude that a social worker can be “responsible for” the independent decision of a judge who ultimately orders a change of custody. But, even if we assume such responsibility exists, we cannot transform omissions or failures to act into affirmative conduct merely by considering them “in the general context of” a custody recommendation. The only affirmative act that could be found in *Currier* is the recommendation itself, which, in my view is no different from the affirmative recommendation in *DeShaney* that Joshua be returned to his father’s custody.

If constitutional liability attaches to such a recommendation, any future harm that befalls a child in the recommended placement could be the basis for a

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substantive due process claim against the social worker. This rule makes the state the permanent guarantor of a child's safety. The Supreme Court has told us that substantive due process does not reach so far. *DeShaney*, 489 U.S. at 201. Either a custody recommendation is not the type of affirmative conduct that can support a substantive due process violation under our test for a state-created danger theory of liability, in which case *Currier* was wrongly decided on the facts; or our test for the state-created danger theory conflicts with the Supreme Court's decision in *DeShaney*, by imposing liability for acts that do not violate the Due Process Clause of the Constitution.

**APPENDIX B — OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO, FILED MARCH 8, 2016**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 14-cv-01568-RM-MJW

REGINA GARCIA, AS PARENT AND NEXT
FRIEND TO T.D., T.D.,

Plaintiffs,

v.

KELCEY PATTON, THE DENVER
DEPARTMENT OF HUMAN SERVICES,

Defendants.

Judge Raymond P. Moore

OPINION AND ORDER

On January 19, 2015, plaintiff T.D. (“T.D.” or “plaintiff”) filed a Second Amended Complaint against Kelcey Patton (“Patton”) and The Denver Department of Human Services (“the DDHS”). (ECF No. 94).¹ Therein, plaintiff raised a claim pursuant to 42 U.S.C.

1. T.D.’s mother, Regina Garcia, was named as a plaintiff in the Original Complaint (ECF No. 4) and the First Amended Complaint (ECF No. 84), but was omitted as a plaintiff in the Second Amended Complaint.

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§ 1983 (“§ 1983”) for injuries he allegedly suffered after being placed with his father (“Father”). (ECF No. 94 at ¶¶ 55-83.) Plaintiff premised his § 1983 claim under two separate theories of liability: (1) the existence of a special relationship between plaintiff and Patton (*id.* at ¶ 58); and (2) Patton and the DDHS’ creation of a danger (*id.* at ¶¶ 59, 72). Plaintiff sought solely monetary damages. (*Id.* at 9.)

Pending before the Court is plaintiff’s motion for partial summary judgment against Patton as to the special-relationship theory of liability (“plaintiff’s motion for summary judgment”) (ECF No. 131) and statement of undisputed material facts (ECF No. 131-1). Defendant filed a response to plaintiff’s motion for summary judgment (ECF No. 179), a response to plaintiff’s statement of undisputed material facts (ECF No. 180), and an affidavit (“affidavit”) (ECF No. 180-2). Plaintiff then filed a reply (ECF No. 202) and a reply statement of undisputed material facts (“plaintiff’s RSUMF”) (ECF No. 203).

Patton subsequently filed her own motion for summary judgment as to both alleged theories of liability under § 1983 (“Patton’s motion for summary judgment”) (ECF No. 144) and statement of undisputed material facts (ECF No. 145). Plaintiff filed a response in opposition to the motion for summary judgment (ECF No. 181) and a response to defendant’s statement of undisputed material facts (ECF No. 182). Defendant then filed a reply (ECF No. 204) and a reply statement of undisputed material facts (“Patton’s RSUMF”) (ECF No. 205).²

2. The DDHS has also filed a motion for summary judgment (ECF No. 135), which has been fully briefed (ECF Nos. 183, 201). The Court will dispose of that motion in a separate opinion.

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For the reasons discussed herein, plaintiff's motion for summary judgment is DENIED, and Patton's motion for summary judgment is GRANTED IN PART and DENIED IN PART.

I. Factual Background

The following uncontested and properly supported facts are taken from plaintiff's RSUMF (ECF No. 203) and Patton's RSUMF (ECF No. 205), both of which, consistent with this Court's Civil Practice Standards, contain plaintiff's or Patton's initial statement of uncontested material facts, plaintiff's or Patton's response statement of uncontested material facts, and plaintiff's or Patton's reply statement.³

On November 2, 2009, the DDHS received a report from T.D.'s therapist at the Mental Health Center day treatment program stating T.D. had not been in school since October 15, 2009, his medications had not been refilled, and he had not participated in therapy. (ECF No. 205 at ¶ 1.) T.D. was in a diversion program for criminal charges and his diversion counselor was requesting

3. Patton accurately asserts that, in plaintiff's response statement of material facts (ECF No. 182), plaintiff violated this Court's Civil Practice Standards in submitting more than 40 additional facts without prior leave. (*See* ECF No. 205 at 28 n.1); *see also* Civil Practice Standard IV.B.2.b.ii. However, because virtually all of plaintiff's additional facts are merely a regurgitation of the facts submitted in connection with plaintiff's own motion for summary judgment, the Court has considered them in any event. Thus, on this one occasion only the Court will excuse plaintiff's counsel's failure to to read the Court's publicly available Civil Practice Standards.

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probation. Both the counselor and the therapist had called plaintiff's mother, Regina Garcia ("Garcia"), but she responded only once, stating she was in a different town and would bring T.D. back to school, but she didn't. After Garcia returned, the case worker went to Garcia's home and reported there were three dogs, a litter of puppies, and a cat in the home, animal feces and cigarette butts on the floor, dishes piled up in the sink, many piles of dirty clothes, and all the bedrooms and bathrooms appeared dirty. The case worker provided Garcia with a list of tasks to accomplish, including getting T.D. back into the day program and re-filling his medications. (*Id.*). At this time, Garcia and Father had been referred to the DDHS for, respectively, intra-familial neglect and lack of supervision and intra-familial sexual abuse, both of which the DDHS had determined to be "[f]ounded." (ECF No. 147-1 at 1-2.)

On April 9, 2010, the DDHS filed a Petition in Dependency or Neglect ("the Petition"), as to T.D. and his sister, M.D. ("M.D."), with the Juvenile Court for the City and County of Denver ("the Juvenile Court"). (ECF No. 147-2 at 1-2; ECF No. 203 at ¶ 3; ECF No. 205 at ¶ 5.) The filing of the Petition was based on, *inter alia*, the following events. On December 15, 2009, the DDHS received a referral that T.D. had been kicked out of treatment at the Mental Health Corporation of Denver due to noncompliance and truancy; specifically, bringing a knife to school and threatening to stab two boys. (ECF No. 205 at ¶ 3.) There was also concern that the boyfriend of T.D.'s oldest sister was involved in a gang, and the boyfriend had T.D. stealing and selling marijuana for him. T.D. was also on probation and had tested positive

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for “THC.” (*Id.*) On January 4, 2010, the DDHS received a referral that T.D.’s violent behavior was increasing at home and school; specifically, T.D. had stabbed a sister in the elbow with a fork. (*Id.* at ¶ 4.) Garcia reported that T.D. had threatened to commit suicide on more than once occasion. (*Id.* at ¶ 5.) The family’s in-home therapist reported T.D. was physically assaulting M.D. Garcia had an IQ of 74, and was receiving services from “Denver Options.” The DDHS had concerns about Garcia’s ability to care for her children. (*Id.*) The Petition further noted that Father had engaged in a sexual offense against a minor; specifically, Garcia’s oldest daughter P.G. (“P.G.”), and referenced the criminal case number. (*Id.* at ¶ 6.)

On May 12, 2010, a dispositional hearing was held with respect to the Petition. (*Id.* at ¶ 7.) The DDHS’ report for the hearing (“the Hearing Report”) reflected, *inter alia*, the following. T.D.’s family had a history of sexual abuse and multiple child protection referral inquiries. T.D. needed mental health treatment and was beyond the control of Garcia. Father sexually abused P.G., and was incarcerated for 2 years for sexual assault on a child. Father was also a registered sex offender. Garcia took out a restraining order to keep Father away from her family. T.D. had issues with anger and enuresis. All of Garcia’s children were on Individualized Education Programs. Garcia’s residence was disheveled and smelled of urine. Garcia required assistance in disciplining her children, in making them follow house rules, and getting them to help with chores. The family’s risk assessment score was 11, indicating a high level of risk, and the children were determined to be unsafe. (*Id.*) The Hearing Report

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recommended that T.D.'s custody remain with the DDHS for purposes of placement. (*Id.* at ¶ 9.) The Hearing Report was signed by Patton, a social caseworker, and her supervisor, Senait Ketema ("Ketema"). (ECF No. 147-3 at 16.) At all times relevant to this case, Patton was a caseworker for the DDHS. (ECF No. 203 at ¶ 2.)

At the May 12, 2010 hearing, the Juvenile Court ordered the DDHS to obtain a parental risk assessment of Father pursuant to the standards and guidelines of the Colorado Sex Offender Management Board ("SOMB"). (*Id.* at ¶ 24.) A parental risk assessment outlines concerns for safety and risk with respect to sex offenses. (ECF No. 131-13 at 31:11-18.)⁴ Father's risk of reoffending was an important consideration. (ECF No. 131-10 at 50:25-51:2; ECF No. 203 at ¶ 26.)⁵ The most important factor that a caseworker must consider when making a placement decision is the safety of the child. (ECF No. 203 at ¶ 31.) It was Patton's responsibility to arrange for the parental risk assessment of Father. (*Id.* at ¶ 27.)⁶ Gomez was comfortable making recommendations about T.D.'s placement without

4. Both parties assert the purpose of a parental risk assessment. (ECF No. 203 at ¶ 25.) Plaintiff's assertion misstates the cited testimony, while Patton's assertion is not supported by citation to any evidence.

5. Although Patton responds to this factual assertion, her response does not dispute the deposition testimony to which plaintiff cites in support. (*See* ECF No. 203 at ¶ 26.)

6. It is disputed whether Patton actually arranged for the assessment, and if she failed to, whether this violated the DDHS' policies. (*See* ECF No. 203 at ¶¶ 27, 29, 32.)

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a parental risk assessment because she “had people in the home” and “recommendations.” (*Id.* at ¶ 73; ECF No. 180-3 at 105:12-106:4.) A parental risk assessment would have revealed that Father was a “high risk” with regard to all of his children, which means that he would not have been allowed contact with his children until he completed Section 5.7 of the SOMB Standards. (ECF No. 203 at ¶ 30; ECF No. 131-18.) On August 11, 2010, Cynthia Jamison (“Jamison”), Father’s offense-specific treatment provider, reported that Father had met the requirement for completion of treatment under the SOMB Standards. (ECF No. 205 at ¶ 13.)

By May 25, 2010, the Juvenile Court had ordered, and T.D. had been placed, in a therapeutic residential child care facility called Shiloh House. (ECF No. 203 at ¶¶ 5, 7; ECF No. 205 at ¶ 10.) At Shiloh House T.D. resided, received treatment, and went to school. (ECF No. 205 at ¶ 10.) T.D. participated weekly in a family therapy session with Garcia, a family session with Father, an individual therapy session, and two group therapy sessions focusing on coping skills and anger management. (*Id.*)

At a July 30, 2010 permanency planning hearing, it was reported that Father was participating in weekly family therapy with T.D., and the family therapist reported that they were making “great progress” and Father was “excellent support” to T.D. (*Id.* at ¶ 11.) The family therapist also noted that Father had requested T.D. return to Father’s home once T.D. was discharged from Shiloh House. (*Id.*) After the July 20, 2010 permanency planning hearing, M.D. reported that she had been

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touched inappropriately by three different boys while living with Garcia. (*Id.* at ¶ 12.) M.D. was removed from Garcia's home and placed in foster care. (*Id.*)

On August 17, 2010, a meeting was held at Shiloh House, and attended by T.D., Father, Patton, Briana Hutchinson ("Hutchinson"), an outside family therapist for T.D. and Father, and Kyle Hommes ("Hommes"), T.D.'s clinician. (*Id.* at ¶ 14.)⁷ Jamison was not present at this meeting or at any other meeting. (ECF No. 203 at ¶ 38.)⁸ At the meeting, the above individuals discussed a change of custody involving a transition of T.D. from

7. In her statement of additional undisputed material facts, Patton asserts that the DDHS is not "solely responsible for a change in placement," and others are also responsible for assessing safety and risk in a placement, citing Gomez's deposition testimony. (ECF No. 203 at ¶ 70.) Gomez's testimony, however, is far from conclusive on these matters. First, she testified initially that, in a change in placement, the DDHS "consults" with a guardian ad litem. (ECF No. 180-3 at 85:11-17.) Then, after being asked whether a guardian and clinicians are responsible for safety and risk assessments, she replied, "Yep." (*Id.* at 85:20-24.) No further questioning occurred on this issue, such as the specifics on what a guardian or clinicians would be responsible for in terms of safety and risk assessments. Second, Gomez's testimony is thrown into doubt given that both clinicians on the Team testified that their role was to facilitate T.D.'s placement with Father because the placement decision had already been made. (See ECF No. 180-6 at 73:14-23; ECF No. 180-1 at 67:2-13.) As such, this fact is at best disputed.

8. It is disputed whether Jamison *should* have been included in the team meetings. (See ECF No. 203 at ¶ 39.) While plaintiff cites to testimony from persons who state that, in their belief, Jamison should have been included, Patton cites her own deposition testimony in which she testified that Shiloh House invited people to the meetings.

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Shiloh House to Father's house. (*Id.*) A "tentative plan" was made for the transition, subject to the approval of T.D.'s guardian ad litem, Lisa Gomez ("Gomez"). (*Id.*; ECF No. 147-7 at 5.) The individuals agreed to start increased visits between T.D. and Father—visits that would be supervised by Father's wife, Nicole Duerson ("Nicole"), who had completed informed supervision classes. (ECF No. 205 at ¶ 15.) The individuals agreed that T.D. was no longer displaying behavior that justified placement in a therapeutic residential child care facility, and, since being removed from Garcia's home and placed in a structured environment, he had thrived. (*Id.* at ¶ 16.) The individuals further agreed that T.D. was ready to transition to a lower level of care. (*Id.*) Father told the meeting participants that he had completed his offense specific therapy and was no longer on probation. (*Id.* at ¶ 15.) A report to the Juvenile Court for a September 7, 2010 permanency planning hearing stated that, at the August 17, 2010 meeting, Hutchinson believed it to be in T.D.'s "best interest" to return to Father's home.⁹ (ECF No. 147-5 at 3.)

Prior to the August 17, 2010 meeting, Patton had reviewed Father's criminal history. (ECF No. 203 at ¶ 9.)¹⁰ Father's criminal history reflected that, in April

9. Plaintiff disputed Patton's citation to this report on the ground that Hutchinson testified during her deposition that it was not her job to say whether T.D. should be placed in Father's home. (ECF No. 205 at ¶ 15.) That may be the case, but it does not properly dispute the fact that, in the report for the September 7, 2010 hearing, the report stated that Hutchinson believed T.D.'s return to Father's home was in T.D.'s best interest.

10. Plaintiff asserts that Patton misrepresented her knowledge of Father's criminal history, specifically, a conviction for the

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2005, he was convicted of, and sentenced to two years' imprisonment for, one count of attempted sexual assault of a minor. (ECF No. 131-11 at 3.) Father's criminal history reflected that, in November 2007, he violated probation. (*Id.*; ECF No. 203 at ¶ 16.) Father's criminal history further reflected charges for a multitude of offenses, including, *inter alia*, misdemeanor assault, misdemeanor wrongs to minors, misdemeanor domestic violence, and misdemeanor resisting police authority. (ECF No. 131-11 at 1-3.)¹¹ The criminal history also stated, and Patton was aware, that Father was a registered sex offender. (*Id.* at 1; ECF No. 203-1 at 10:2-4.) Gomez reviewed the "[r]egistry of actions" related to Father's "criminal case," but she did not review the criminal case file. (ECF No. 203 ¶ 69; ECF No. 180-3 at 79:6-25.)

With respect to Father's attempted sexual assault of a minor, the minor at issue was P.G., Father's step-daughter. (ECF No. 203 at ¶ 12; ECF No. 131-17.) A "Complaint — Revocation of Sex Offender Intensive Supervision Probation (SOISP)" ("the revocation complaint") stated the following about the offense. P.G. was napping on a

attempted sexual assault of a minor, to the individuals on the "Multi-Disciplinary Team" involved in T.D.'s placement. (*See* ECF No. 203 at ¶ 33.) As discussed in more detail *infra*, this issue is dispute.

11. Plaintiff asserts that Father's criminal history included multiple "charges and convictions" for these offenses. (ECF No. 203 at ¶ 9.) The Court has reviewed the document reflecting Father's criminal history, and the only offense that shows a conviction is the one for attempted sexual assault on a minor. (*See* ECF No. 131-11 at 1-3.) None of the remaining charges reflect a disposition other than Father being charged for the offense.

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couch when Father climbed onto the couch, covered P.G. with a blanket, and pulled down P.G.'s panties. (ECF No. 131-19 at 2.) Father attempted to place his penis in P.G.'s anus, and Father used his hands to pull P.G. toward him while P.G. was trying to pull up her panties. P.G. stated she felt Father's penis on her butt, but Father was unsuccessful with penetration due to P.G.'s mother, Garcia, entering the room. (*Id.*) In a document that the parties refer to as a "Trails report," it stated that P.G. told an interviewer that Father "tried to 'put his dick in my butt.'" (ECF No. 203 at ¶ 13; ECF No. 131-17.) The Trails report also contained reports of multiple other incidents between P.G. and Father, in which Father dragged P.G. by her legs into a bedroom, and Father grabbed P.G.'s butt. (ECF No. 131-17.) Prior to T.D.'s placement in Father's home, Patton had reviewed the Trails report. (ECF No. 203 at ¶ 14.) Patton also knew that, in 2005, Father had violated a restraining order by attempting to contact P.G. (*Id.* at ¶¶ 19-20.)

Patton was aware that Father's probation was revoked because he refused to comply with its terms. (ECF No. 203 at ¶ 18; ECF No. 131-10 at 10:15-18.) In the revocation complaint, a probation officer recommended revoking Father's probation because Father had "purposely failed to fulfill his treatment obligations at [Redirecting Sexual Aggression]," he had "been deceptive in disclosing his relationship with his current girlfriend," and he "purposely violated his no contact contract with his girlfriend, while missing treatment appointments at RSA." (ECF No. 131-19 at 2.) The probation officer noted that Father was "not amenable to treatment at this time

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due to his unwillingness to comply with all treatment and Probation conditions.” (*Id.* at 2-3.) The probation officer stated that Father was arrested on November 13, 2007, after he indicated that he “wanted to ‘go to jail.’” (*Id.* at 2.) Father said that he wanted to go to jail because “‘it is hard for me, the roadblocks, and being suicidal.’” (*Id.*)¹²

Prior to T.D.’s placement with Father, Patton’s “gut [did not] feel good” about, and she questioned, placing T.D. with Father. (ECF No. 203 at ¶ 21; ECF No. 131-10 at 129:10-130:2.)¹³ Patton’s feeling in this regard was “[n]ot entirely” due to father’s criminal history, and she wanted to make sure the team had thought of all possible options, including returning T.D. to Garcia’s home. (ECF No. 180-4 at 130:17-131:6.) In an initial draft of Patton’s report to the Juvenile Court, she listed her concerns about placing T.D. with Father. (ECF No. 131-10 at 184:6-9.) Those concerns were: Father’s criminal record, specifically, Father’s attempted sexual assault on P.G.; the revocation of Father’s probation for noncompliance; and

12. Plaintiff asserts that Father told the probation officer that he would rather go to jail than complete sex offender treatment. (ECF No. 203 at ¶ 17.) However, the revocation complaint to which plaintiff cites does not support that assertion, nor does the testimony of Ketema. Thus, this alleged fact is not properly supported.

13. Plaintiff asserts that, prior to placement, Patton was concerned that T.D. would not be safe in Father’s home, citing Patton’s deposition testimony. (ECF No. 203 at ¶ 21.) The portions of the transcript cited, however, do not support that assertion. To the extent plaintiff contends that “‘her gut did not feel good’ was another way of saying [Patton] was concerned that T.D. would not be safe in father’s home,” this inference is for a jury, if any, to decide.

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Jamison's concern that Father was "not taking treatment seriously." (*Id.* at 186:9-187:21.) These concerns were taken out of the report and not expressed to the Juvenile Court. (*Id.* at 175:9-176:18.)¹⁴ Patton did not place her concerns in the report because her supervisor, Ketema, told her "do not go against the DDHS," as the DDHS was going to return T.D. to Father. (*Id.* at 175:9-14, 176:12-18.) Patton was also scared that if she expressed her concerns she might be fired. (*Id.* at 177:1-3; ECF No. 203 at ¶ 23.)¹⁵

Gomez, T.D.'s guardian ad litem, did not have any immediate concerns with Father re-offending because there were "eyes in the home," family therapy was being performed, Father had shown an "amazing" amount of interest in the case, Father was supportive, Garcia was going into the home and having dinner with the family, and no one expressed any concerns. (ECF No. 203 at ¶ 72.) Gomez "likely" looked up Father's past criminal history on a state court database and was aware of the

14. It is disputed whether Patton told the members of the "Multi-Disciplinary Team" about her concerns with placing T.D. with Father. (*See* ECF No. 203 at ¶ 35.) Although plaintiff cites testimony reflecting that Hutchinson does not recall being told about Jamison's concerns or the revocation of Father's probation, and that Gomez was not told about Jamison's concerns, Patton cites testimony from Hommes that there were "concerns" about Father's sex offense treatment. At the very least, the evidence to which plaintiff cites does not support the contention that Patton did not tell the team about *any* of her concerns.

15. Although Patton responds to this factual assertion, her response does not dispute the deposition testimony to which plaintiff cites in support. (*See* ECF No. 203 at ¶ 23.)

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same. (*Id.* at 203 at ¶ 75; ECF No. 180-3 at 127:25-128:6.) Frequently, parents have extensive criminal histories in Gomez's cases, but this does not prevent children returning to the parents, as the criminal history is a risk factor to be mitigated. (ECF No. 203 at ¶ 75; ECF No. 180-3 at 128:11-17.)

Generally, Gomez did not access Trails reports, but instead had conversations with a caseworker about the same. (ECF No. 203-5 at 46:22-47:7.) Gomez believed that Father's attempted sexual assault on P.G. involved "an inappropriate relationship between a stepfather and stepdaughter" in which P.G. did not resist Father's conduct. (*Id.* at 43:10-44:2.) Gomez had discussions with Patton and Garcia about Father's attempted sexual assault on P.G. (*Id.* at 44:9-14.) In Gomez's conversations with Patton about the offense, the information contained in the Trails report never came up. (*Id.* at 45:9-47:11.) If Gomez had been provided with the information from the Trails report about Father's attempted sexual assault on P.G. she "[p]robably" would not have recommended T.D.'s placement with Father "without further assessment." (*Id.* at 45:9-46:17.)

On September 7, 2010, a permanency planning hearing was held before the Juvenile Court. (ECF No. 205 at ¶ 19; ECF No. 147-10 at 1-2.) At this hearing, by the agreement of Gomez and Patton, the Juvenile Court gave permission to transition T.D. to Father. (ECF No. 205 at ¶ 19.) Garcia and Garcia's attorney were also present at the hearing. (*Id.*) Because T.D. and Father were members of a Native American tribe, T.D.'s placement was subject to the Indian

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Child Welfare Act (“the ICWA”). (ECF No. 203 at ¶ 68.) Under the ICWA, parties are required to make “active efforts” to reunify a family, rather than “reasonable efforts” under non-ICWA cases. (*Id.*) “Active efforts” under the ICWA means that treatment plans must be written in a specific format in order to engage a family on issues of safety. (*Id.*; ECF No. 203-3 at 55:14-25.) If a parent is a high risk of sexually offending against a child, the ICWA does not require placement of that child with the parent. (ECF No. 203-3 at 56:6-11.)

On September 17, 2010, a meeting was held at Shiloh House, and attended by T.D., Garcia, Hutchinson, Hommes, Nicole, Gomez, and Betty Virden (“Virden”), a representative for DDHS. (*Id.* at ¶ 20.) Patton was not present at this meeting. At the meeting, T.D.’s discharge plan was discussed, and supports were put in place to make his transition to Father’s home smooth. T.D. would begin with overnight passes on the weekend of September 24, 2010, followed by weekend long passes. (*Id.*)

On October 8, 2010, another meeting was held at Shiloh House, and attended by T.D., Garcia, Hutchinson, Hommes, Father, Nicole, Gomez, and Virden. (*Id.* at ¶ 21.) Patton was not present at the meeting. At the meeting, T.D.’s discharge plan was finalized. (*Id.*) As part of the discharge plan, T.D. would transition home with Father after school on October 15, 2010 and additional services would be provided through the “Griffith Center” to help support the transition. (*Id.*; ECF No. 147-12 at 5.) In a report on the October 8, 2010 meeting, Gomez and Garcia, among others, checked a box acknowledging their

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agreement with the plan discussed in the meeting and signed the report. (ECF No. 147-12 at 6.)¹⁶

In a “Stipulated Agreement Re: Change of Placement and Custody” (“the Stipulated Agreement”), it was noted that T.D. had “successfully transitioned” to Father’s home on October 15, 2010. (ECF No. 205 at ¶ 22; ECF No. 147-9 at ¶ 5.) Gomez filed the Stipulated Agreement with the Juvenile Court on October 21, 2010. (ECF No. 205 at ¶ 23.) The Stipulated Agreement moved the Juvenile Court to allow a change in placement and “temporary legal custody” with respect to T.D. from the DDHS to Father. (ECF No. 147-9 at 1, ¶ 8.) The Stipulated Agreement stated that temporary legal custody should be returned to Father so that T.D. could enroll in school and so T.D. could be added to Father’s public assistance benefits. (*Id.* at ¶ 6.) The Stipulated Agreement further stated that Gomez had contacted Patton, Garcia, Garcia’s attorney, Carolyn

16. Plaintiff disputes this fact on the ground that, in her deposition testimony, Garcia testified that she did not agree with T.D. being placed with Father. (ECF No. 205 at ¶ 21.) First, the cited portions of Garcia’s deposition testimony do not support plaintiff’s dispute. The first portion relates to pages 93 and 94 of the transcript, however, page 94 was not provided in plaintiff’s exhibit. (*See* ECF No. 182-3 at 3-4.) The second portion relates to Garcia not giving her attorney authorization to agree to placement and custody, which is not the issue raised in this factual statement. (*See id.* at 101:3-12.) The third portion relates to Garcia telling her family therapist “about [Father],” which is not the issue here and the testimony does not set forth what Garcia told her family therapist about Father. In any event, Garcia’s testimony certainly does not dispute the fact that she checked the “Agree” box on the report and signed it. Thus, this fact is not properly disputed.

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Pelloux, about T.D.'s change in placement, and they all agreed with the same. (*Id.* at ¶ 7; ECF No. 203 at ¶ 76.)¹⁷ In an "Order" dated November 3, 2010, the Juvenile Court granted "temporary legal and physical custody" to Father "under an order of supervision by [the DDHS]." (ECF No. 205 at ¶ 24; ECF No. 147-9 at 4.)¹⁸

At the time of T.D.'s placement with Father, T.D. suffered from bipolar and had a "borderline" IQ. (ECF No. 203 at ¶¶ 49-50.) Patton completed a verbal safety plan that she discussed with the Multi-Disciplinary Team ("the Team"), Father, and Nicole. (ECF No. 205 at ¶ 25; ECF No. 144-1 at 116:16-117:15.) Patton believed that Hutchinson

17. Plaintiff again objects to the fact that Garcia agreed to T.D.'s placement with Father based on the same testimony discussed in footnote 16. (ECF No. 205 at ¶ 23.) For similar reasons to the ones discussed *supra*, however, that testimony does not properly dispute the clear fact that Gomez stated in the Stipulated Agreement that Garcia agreed with the placement.

18. Patton asserts that the Juvenile Court's Order was entered on October 22, 2010, citing a printed copy of the Juvenile Court's docket. (ECF No. 205 at ¶ 24.) Patton's citation is accurate (*see* ECF No. 147-10 at 1), however, the copy of the actual Order clearly shows that it was dated on November 3, 2010 (*see* ECF No. 147-9 at 4). Given this discrepancy, the Court is more persuaded to accept the copy of the actual Order, for purposes of the date that it was entered, rather than a printout of the Juvenile Court's docket. On an unrelated front, plaintiff appears to dispute the legal impact of the Juvenile Court's Order with respect to whom had custody of T.D. following entry of the Order. (*See, e.g.*, ECF No. 205 at ¶ 24.) However, the legal impact of the Order is not a factual issue. Moreover, the language of the Order is clearly set forth in the exhibit, and plaintiff has not properly disputed the language used.

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would be in Father's home twice a week monitoring the placement. (ECF No. 205 at ¶ 26.)¹⁹ T.D. continued to attend the Shiloh Home day treatment program and the Team anticipated transitioning him to local home school within the next trimester. (*Id.* at ¶ 27.) Since being placed in Father's home, T.D. had continued to make persistent progress in his treatment and had earned regular passes with Garcia. (*Id.*)

A report to the Juvenile Court for a December 13, 2010 review hearing stated that Father had been successfully discharged from probation, was compliant with the DDHS' treatment plan, and was maintaining contact with T.D.'s case worker. (*Id.* at ¶ 17.) After a permanency planning hearing in December 2010, Father and T.D. were successfully discharged from Griffith Center family therapy. (*Id.* at ¶ 28.) The family therapist reported the family reached all of their treatment goals and she had no safety concerns regarding Father's house. (*Id.*) T.D. had made improvements in his behavior and transitioned from Shiloh Home day treatment to Everitt Middle School. (*Id.* at ¶ 29.) T.D. was no longer acting out in a physically aggressive manner, and was following household rules. Overall, it appeared T.D. was flourishing in Father's house. Patton expressed one concern with T.D. missing 30 class periods in the second school term, and encouraged the family to schedule appointments during school breaks to minimize missed school days. (*Id.*)

19. It is disputed whether Patton failed to observe Father's home "at least every other month," and whether the efforts Patton made to do so violated the DDHS' policies. (*See* ECF No. 203 at ¶ 51.)

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In a report prepared for a June 13, 2011 permanency planning hearing, Patton stated that, at the last hearing on March 21, 2011, it was reported that Father had used physical punishment on T.D. (*Id.* at ¶ 30; ECF No. 147-14 at 4.) Patton and Gomez met with T.D. outside the presence of his parents, and T.D. reported that Father had hit him with a wooden handle mop across his back because he did not complete his chores. (ECF No. 205 at ¶ 30.) To assist Father in developing his parenting skills, Patton gave Father a referral to participate in the DDHS' Fatherhood Initiative Program. (*Id.*) Patton further reported that T.D. was staying with Garcia on weekends, and, after the March 2011 hearing, Garcia had reported to Patton that T.D. was disrespectful and refused to complete chores, and often smelled bad and had unclean clothes when he arrived at her home. (*Id.* at ¶ 32.) Patton was also contacted by school officials who reported that in the last few months of school T.D. spent a large amount of time at the nurse's office complaining of sickness and body aches, and appeared to be fearful of Father and at times did not want to go home. (*Id.*)

Upon hearing of these issues, Patton wanted to remove T.D. from Father's home because she was afraid for T.D.'s safety. (ECF No. 131-10 at 197:14-199:15.) Ketema instructed Patton to hold a face-to-face meeting with T.D., but stated that T.D. would remain in Father's home. (*Id.* at 198:19-199:10.) Patton understood that she would be terminated if she did not follow those instructions. (*Id.* at 199:19-24.) In the June 13, 2011 permanency planning hearing report, Patton stated that she wanted to maintain T.D. in Father's home and that, although she had some

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concerns with Father's parenting skills, she wanted to preserve the family unit. (ECF No. 205 at ¶ 30; ECF No. 147-14 at 4.)²⁰ At the June 13, 2011 permanency planning hearing, the Juvenile Court ordered that Father was not to use physical discipline on T.D., and that Father participate in the "Fatherhood Initiative" or a comparable program. (ECF No. 205 at ¶ 33.)

In a report prepared for an August 25, 2011 permanency planning hearing, Patton reported that she was having difficulty contacting Father and was unable to complete her face to face contact with T.D. for the month of July. (*Id.* at ¶ 34; ECF No. 147-16 at 3.) Patton was able to follow up with Father regarding his agreement to attend fatherhood classes, and he claimed he attended one class but couldn't name the organization. (ECF No. 205 at ¶ 34; ECF No. 147-16 at 3.) Patton then made another referral to attend the DDHS' fatherhood classes, and followed up with the class coordinator. (ECF No. 205 at ¶ 34; ECF No. 147-16 at 3.) The coordinator confirmed Father had attended the class and actively participated, but expressed concern with his level of commitment due to his inquiry regarding how long he would have to attend. (ECF No.

20. Patton asserts that she and Gomez felt comfortable with keeping T.D. in Father's home. (ECF No. 203 at ¶ 53.) However, other than her affidavit, the evidence she cites reflects only that Patton—"this worker"—wanted to keep T.D. in Father's home. (See ECF No. 131-32 at 4.) The Court will not allow Patton to re-write her in-the-moment report with her post-deposition affidavit. See *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (explaining that self-serving affidavits are not sufficient to defeat summary judgment).

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205 at ¶ 34; ECF No. 147-16 at 3.) Patton confirmed completing the program was part of Father's treatment plan and requested an order requiring Father to complete the program. (ECF No. 205 at ¶ 34; ECF No. 147-16 at 3.) Patton also reported she had tried several times without success to obtain a written parental assessment, but confirmed Father actively participated in family therapy and appeared to be appropriate with younger children. (ECF No. 205 at ¶ 34; ECF No. 147-16 at 3.)

On September 19, 2011, the DDHS received a report from an unnamed "[r]eporting party," reporting allegations of sexual contact between T.D. and his half-brother. (ECF No. 205 at ¶ 35; ECF No. 147-17 at 8.) On September 21, 2011, the DDHS removed T.D. from Father's home. (ECF No. 203 at ¶ 66.) On September 22, 2011, the DDHS filed a motion to take T.D. into temporary custody, and the motion was granted on the same day. (ECF No. 205 at ¶ 36.) T.D. was then placed at the "Family Crisis Center" on an emergency basis. (*Id.* at ¶ 37.) On September 26, 2011, a hearing was held for the re-placement of T.D. (ECF No. 205 at ¶ 39.) At this hearing, it was reported that T.D. was "on the run" from the Family Crisis Center. (*Id.*)

In a report prepared for a November 16, 2011 permanency planning hearing, Patton reported that she had, had minimal contact with Father since the previous court hearing, and Father's youngest children were removed from his home due to domestic violence and drug use in the home. (*Id.* at ¶ 40.; ECF No. 147-19 at 3.) The DDHS and Gomez agreed that removal of T.D. from Father's home was warranted due to reports of T.D. being

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physically punished. (ECF No. 205 at ¶ 40; ECF No. 147-19 at 3.) Patton also reported that Father attended only one fatherhood program class, Father had moved out of state and was not in compliance with his treatment plan, and the DDHS did not agree to Father having any contact with T.D. (*Id.* at ¶ 41; ECF No. 147-19 at 4.) At the November 16, 2011 hearing, the Juvenile Court noted that T.D. was at the Family Crisis Center and doing better. (ECF No. 205 at ¶ 42.) The Juvenile Court prohibited contact between Father and T.D. (*Id.*)

In March 2014, T.D. reported that Father had sexually assaulted him while he was in Father's care. (ECF No. 203 at ¶ 57; ECF No. 205 at ¶ 43.) The DDHS conducted an investigation into these allegations. (ECF No. 203 at ¶ 58.) The DDHS' investigation made the following conclusions.²¹ In August 2011, Father repeatedly sexually assaulted T.D. by forcibly orally sodomizing him on two occasions, and by forcing him and his three-year-old brother to perform sex acts on each other. (*Id.* at ¶ 59.) Father hit T.D. with a broomstick, and threatened to knock T.D. unconscious and send him to hospital if he did not perform oral sex on Father. (*Id.* at ¶ 60.) Father forced T.D. to perform oral sex on Father for 10 to 15 minutes as punishment for T.D. staying up past his bedtime. (*Id.* at ¶ 62.) Father physically forced T.D. and his younger brother to perform oral sex on

21. In response to plaintiff's factual assertions regarding the DDHS' investigatory conclusions, Patton merely states that the conclusions are reflected in ECF No. 131-33. That does not specifically dispute the factual assertions stated in plaintiff's statement of uncontested material facts, thus, the Court deems those statements as undisputed. *See* Civil Practice Standard IV(B)(2)(b)(ii).

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each other. (*Id.* at ¶ 63.) Father told T.D. not to tell anyone about the abuse because, if he did, Father would go to jail and never talk to T.D. again. (*Id.* at ¶ 64.) The DDHS concluded that the abuse T.D. suffered was “severe.” (*Id.* at ¶ 65; ECF No. 131-31 at 70:4-23; ECF No. 131-35.)

II. Legal Standard for Summary Judgment

Summary judgment is appropriate “when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). Initially, the movant bears the “responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986). If this burden is met, then the non-moving party must set forth specific facts showing that there is a genuine dispute for trial. *Id.* at 324. A fact is material if it has the potential to affect the outcome of a dispute under applicable law. *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). An issue is genuine if a rational trier of fact could find for the non-moving party. *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000).

In performing this analysis, the factual record and any reasonable inferences therefrom are construed in the light most favorable to the non-moving party. *Id.* However, a mere “scintilla of evidence” is insufficient to avoid summary judgment. *Turner v. Public Service Co. of Colorado*, 563 F.3d 1136, 1142 (10th Cir. 2009). Instead,

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a non-movant “must proffer facts such that a reasonable jury could find in her favor.” *Id.*

III. Qualified Immunity

As discussed *infra*, Patton raises a qualified immunity defense to both theories of liability under § 1983. When a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff to satisfy a “heavy two-part burden.” *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (quotation omitted). First, the plaintiff must establish that the defendant’s actions violated a constitutional or statutory right. If the plaintiff succeeds in this endeavor, he must then establish that “the right at issue was clearly established at the time of the defendant’s unlawful conduct.” *Id.* In determining whether a right is “clearly established,” a court “assesses the objective reasonableness of the action at the time of the alleged violation and asks whether the right was sufficiently clear that a reasonable officer would understand that what [she] is doing violates that right.” *Id.* (quotation and alteration omitted). In other words, “the plaintiff does not have to show that the specific action at issue had been held unlawful, but the alleged unlawfulness of the defendant’s conduct must be apparent in light of preexisting law.” *Armijo ex rel. Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1260 (10th Cir. 1998). Preexisting law refers to a “Supreme Court or Tenth Circuit opinion on point,” however, a factually identical case is not required, as “some degree of generality in factual correspondence” is allowed. *Id.*

*Appendix B***IV. Discussion**

Generally speaking, state officials are not liable under the Due Process Clause for violence committed by third parties. *J.W. v. Utah*, 647 F.3d 1006, 1011 (10th Cir. 2011). There are, however, two exceptions to this general rule: when (1) “the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual,” *id.*, also known as a “special relationship”; and (2) the state “created the danger that harmed the individual,” *Armijo*, 159 F.3d at 1260 (quotation omitted), also known as “danger creation.”

Plaintiff moves for partial summary judgment against Patton as to the special-relationship theory of liability. (ECF No. 131.) Plaintiff argues that he was in the DDHS’ “legal” custody from September 2010 to November 2011, Patton knew that placement with Father was dangerous or she failed to exercise professional judgment in that regard, there was an affirmative link between Father’s danger and T.D.’s injuries, and Patton’s conduct was conscience shocking. (*Id.* at 4-11.) Plaintiff also argues that Patton is not entitled to qualified immunity. (*Id.* at 12-17.)

In return, Patton moves for summary judgment as to both alleged theories of liability under § 1983. (ECF No. 144.) As to the special-relationship theory, Patton argues that it fails because T.D. was not in state custody when the alleged injurious conduct took place, and, in any event, he is entitled to qualified immunity on that issue. (*Id.* at 1, 5-6.) With respect to the danger-creation theory of liability, Patton argues that he is entitled to

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qualified immunity because, even if her conduct violated T.D.'s constitutional rights, those rights were not clearly established at the time of the alleged violations. (*Id.* at 7 n.3, 8, 16-20.)

A. Special Relationship

As previously explained, a special relationship is created when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection. *J.W.*, 647 F.3d at 1011. This includes when a state places a child in foster care. *Id.* However, a defendant only violates this duty if: (1) she knew of the danger to the individual or failed to exercise professional judgment in that regard; and (2) an affirmative link can be shown to the injuries suffered. *Schwartz v. Booker*, 702 F.3d 573, 585 (10th Cir. 2012). “Whether the state official failed to exercise professional judgment requires more than mere negligence; the official must have abdicated her professional duty sufficient to shock the conscience.” *Id.* at 585-586.

The parties’ motions for summary judgment cross horns on the special-relationship theory; specifically, as to whether T.D. was in the custody of the DDHS, and, if so, when. In his motion for summary judgment, plaintiff asserts that he was in the custody of the DDHS from September 2010 to November 2011, citing his statement of undisputed facts, which, in turn, relies on an admission made during discovery by Patton and the DDHS. (ECF No. 131 at 5; ECF No. 203 at ¶ 4.) However, on July 9, 2015, the Court granted Patton and the DDHS’ joint motion to

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withdraw that admission—a motion that plaintiff did not oppose. (*See* ECF No. 194.) Thus, that admission cannot support the argument made in plaintiff’s motion for summary judgment.

Perhaps realizing this, plaintiff changes tack in his reply, arguing now that “T.D.’s custodial status at the time of the assault is insignificant.” (ECF No. 202 at 6 n.1.) Plaintiff argues that “[t]he proper analysis focuses [] on the custodial relationship at the time of the defendant’s conduct.” (*Id.* at 6.) Plaintiff, thus, asserts that he was in the DDHS’ custody for purposes of his § 1983 claim because, when Patton “facilitated [T.D.’s] placement in a home that she knew or suspected was dangerous,” he was in the DDHS’ custody. *Id.* at 8-9.

In response to plaintiff’s motion for summary judgment, and in her own motion for summary judgment, Patton argues otherwise. Specifically, she argues that custody for purposes of this claim should be measured from the time that the “acts of private violence allegedly occurred.” (ECF No. 144 at 5-6; ECF No. 179 at 3-5.) Patton argues that, as a result, T.D. was not in the DDHS’ custody for purposes of § 1983 liability because legal custody transferred to Father by at least November 2010, and Father’s alleged assault of T.D. took place after this date. (ECF No. 179 at 4-5.) In response to Patton’s motion for summary judgment, as well as reiterating his arguments about when the custodial relationship should be assessed, plaintiff also retorts that Father was only awarded “temporary legal custody of T.D.” for the purposes of enrolling T.D. in school and adding T.D. to father’s public assistance benefits. (ECF No. 181 at 14.)

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The Tenth Circuit Court of Appeals has recently explained the scope of the special-relationship theory. In *Schwartz*, the Tenth Circuit explained that the theory originated from the Supreme Court's decision in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L. Ed. 2d 249 (1989), where the Supreme Court held that, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Schwartz*, 702 F.3d at 580 (quoting *DeShaney*, 489 U.S. at 199-200). The *DeShaney* Court further clarified that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney*, 489 U.S. at 200. Once a special relationship is formed, the Tenth Circuit explained in *Schwartz* that it triggers "a continuing duty" that is violated when a state official knows of a danger or fails to exercise professional judgment with respect thereto, and there is an affirmative link to the injuries suffered. *Schwartz*, 702 F.3d at 580. Importantly, the Tenth Circuit explained that "the scope of this relationship has turned on the dependent and involuntary nature of the custodial relationship between the individual and the State. *Id.*

Here, although plaintiff alleges that the order awarding Father temporary legal custody was "ambigu[ous]"—on the ground that there is no evidence explaining "the temporary nature" of the custody (ECF No. 181 at

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14)—there is effectively no dispute that T.D. was not in the DDHS’ custody at the time that the alleged injuries occurred in this case. First, the Court can discern no ambiguity from the Juvenile Court’s November 3, 2010 order transferring temporary legal and physical custody to Father. The order stated that “temporary legal and physical custody is returned to [Father] under an order of supervision by the [DDHS].” (ECF No. 147-9 at 4.) The language of the order has clear meaning, and plaintiff provides no explanation of how the word “temporary” adds any ambiguity to that meaning. (*See* ECF No. 181 at 14.) To the extent plaintiff is arguing that the length or term of Father’s legal and physical custody of T.D. is ambiguous, that may be the case, but that does not make the fact that Father was granted legal and physical custody ambiguous, even if such grant was on a temporary basis.

To the extent that any further clarification is needed, plaintiff’s own argument belies his conclusion. Plaintiff asserts that Father was granted temporary custody “so that [T.D.] could enroll in school and be added to Father’s public assistance benefits.” (ECF No. 181 at 14.) As Patton argues, “[i]f Plaintiff’s basic human needs were being provided through Father’s benefits, they were not being provided by the [DDHS].” (ECF No. 204 at 5.) Simply put, one of the purposes of granting Father custody of T.D. was so that Father would be able to obtain benefits that would allow him to provide for T.D.’s basic human needs. As a result, when legal and physical custody was transferred to Father on November 3, 2010, a special relationship no longer existed between T.D. and the DDHS. *See DeShaney*, 489 U.S. at 200.

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That leaves plaintiff's principal argument: that T.D.'s custodial status at the time of Father's alleged assault is insignificant because the proper focus is on the custodial relationship at the time of Patton's conduct. (ECF No. 202 at 6-8 & n.1.) Patton counters that plaintiff's position is "fundamentally inconsistent" with the basic premise of the special-relationship theory being involuntary restraint that triggers an affirmative duty to protect. (ECF No. 204 at 6.) Patton asserts that the theory has never been applied to a child that was once in state custody, but was later returned to the custody of one of his parents. (*Id.* at 7.)

The Court finds helpful in this regard the Tenth Circuit's discussion of the special-relationship theory and the scope of the affirmative duty to protect in *Armijo*. In that case, the Tenth Circuit explained that, if a state restrains an individual's freedom to protect himself, "the state may thereby enter into a 'special relationship' *during such restraint* to protect that individual from violent acts inflicted by others." *Armijo*, 159 F.3d at 1261 (emphasis added). Applying this concept to the facts in that case, the Tenth Circuit explained that the facts showed that the plaintiff was a public school student confined in a school counselor's car during a drive home from school. *Id.* The Tenth Circuit stated that, even if those circumstances constituted a custodial relationship, that relationship ended once the plaintiff exited the car and ran to his house "because *at that point he was no longer under any involuntary restraint by a school official.*" *Id.* (emphasis added.). The Tenth Circuit further stated that the only restraint imposed on the plaintiff was the principal's directive that he could not return to school,

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which “[did] not rise to the same level of involuntary restraint as arresting, incarcerating, or institutionalizing an individual.” *Id.* The Tenth Circuit also noted that the defendants’ knowledge of a risk of harm to the plaintiff was “not relevant to the determination of whether a special relationship existed.” *Id.* at 1262 n.5.

Although not precisely on point to the facts of this case, the Court finds the reasoning and conclusion in *Armijo* to be persuasive as to the resolution of the parties’ battle here. Notably, the reasoning in *Armijo* makes it evident that the focus of the special-relationship theory is the level of restraint imposed on an individual *at the time of that individual’s injury*. See *id.* at 1261-62 (“The fact that Armijo ended his life *after* he was ‘released’ [] bars any liability under the special relationship doctrine.”) (emphasis in original); see also *J.W.*, 647 F.3d at 1011 (explaining that the state owed children “the affirmative duty of protection *while they were in foster care*.”) (emphasis added).

In *Armijo*, when the plaintiff’s injuries occurred, the only restraint imposed was that he not return to school. 159 F.3d at 1261. The Tenth Circuit concluded that this was insufficiently restrictive to constitute involuntary restraint. *Id.* Here, at the time of T.D.’s alleged injuries, neither the DDHS nor Patton had imposed any restraint upon T.D. Even construing the facts in a light incredibly favorably to plaintiff, the only possible restraint that the DDHS and/or Patton could conceivably be charged with is facilitating or recommending T.D.’s placement with Father. However, plaintiff cites no support that

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would equate placing a child with his natural father as a “restraint” on the child, and certainly not a restraint that rises “to the same level of involuntary restraint as arresting, incarcerating, or institutionalizing an individual.” *See id.* The fact that Father allegedly exercised his parental control in cruel and injurious ways does not transform the nature of the DDHS’ or Patton’s relationship, or lack thereof, with T.D. at the time of his alleged injuries. Moreover, as the Tenth Circuit explained in *Armijo*, this result does not change even if Patton was aware of a risk of harm to T.D., as there was no present custodial relationship at the time of T.D.’s alleged injuries. *See id.* at 1262 n.5.

In his reply in support of his motion for summary judgment, plaintiff states that the “most analogous” case on this issue is *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133 (10th Cir. 2006). (ECF No. 202 at 7-8.) *Johnson* involved a child with severe spina bifida being placed with an adoptive parent. *Johnson*, 455 F.3d at 1135-38. Although there was some hesitation and doubt about the adoptive parent, a government department allowed preadoptive placement. During the preadoptive placement, a nurse noticed swelling, bruises on the child’s face and right hand, and marks on the child’s body. *Id.* at 1136-37. After a delayed home visit, a state official determined there was no evidence of physical abuse. *Id.* at 1137. During the same period, the adoptive parent’s father moved into the home, and the adoptive parent removed the child from daycare and fired the home health nurses. *Id.* at 1137-38. In addition, the social worker primarily assigned to the child did not visit her for a two-month

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period. *Id.* at 1138. The child's adoption was finalized after these events. The abuse allegations and the state official's report with respect to the same were provided to the children's court and guardian ad litem prior to the final adoption. A month after the adoption, the child was brought to an emergency room and subsequently died. Hospital personnel determined that her death was due to child abuse. *Id.*

The child's personal representative filed suit against, *inter alia*, a social worker, Virginia Villareal ("Villareal"), who had initially been the supervisor of the child's primary case worker and then, for a two-month period, became the child's primary case worker. *Id.* at 1136-38. Pertinent to this case, the personal representative brought a claim under § 1983 against Villareal premised on the special-relationship theory. *Id.* at 1144. The personal representative alleged, *inter alia*, that Villareal failed to exercise professional judgment in placing the child in the adoptive parent's home, and in failing to investigate the arrival of the adoptive parent's father and the decisions to withdraw the child from daycare and fire the home health nurses. *Id.* Villareal conceded that the state had a special relationship with the child, but argued that her conduct did not violate the Fourteenth Amendment. *Id.* at 1143.

With respect to the allegation regarding the child's placement in the adoptive parent's home, the Tenth Circuit noted that Villareal did not make the placement on her own, given that she acted on the advice of an adoption consultant and as part of the government department's committee, and only two department employees expressed

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any doubts about the placement, both of which the Tenth Circuit considered “mild doubts.” *Id.* at 1144. As a result, Villareal did not fail to exercise professional judgment in that regard. *Id.* The Tenth Circuit, however, concluded that there were disputed questions of fact as to Villareal’s professional judgment in failing to investigate the arrival of the adoptive parent’s father and the removal of the child from daycare, and in failing to make any visits to the adoptive parent’s house for a two-month period. *Id.* at 1145.

Plaintiff contends that, although the Tenth Circuit did not determine whether the special relationship between the child and the government department persisted after the adoption, because the Tenth Circuit “focus[ed] on the social worker’s conduct during the time that the child was in state custody as opposed to conduct by the social worker or the mother following the adoption, the Tenth Circuit demonstrated that the appropriate special relationship analysis concentrates on the state actor’s behavior during the period of state custody and not the custodial relationship at the time of third-party abuse.” (ECF No. 202 at 8.) This, however, is a mischaracterization of the Tenth Circuit’s analysis.

First, as plaintiff concedes, the Tenth Circuit’s opinion contains no discussion of any type on the issue here: whether the state’s special relationship with the child continued after a third party’s adoption of the child. The simple reason for this is that Villareal conceded the issue, *Johnson*, 702 F.3d at 1143, that is clearly not the case here. Second, with respect to the focus of the Tenth Circuit’s analysis, there is also a simple reason why it

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“focus[ed]” solely upon Villareal’s pre-adoption conduct: that was the only conduct that the personal representative alleged violated the Fourteenth Amendment. *See id.* at 1144. Notably, the Tenth Circuit’s recitation of the factual background only contains facts as to Villareal’s pre-adoption conduct. *Id.* at 1135-38. Thus, the Tenth Circuit had no facts or arguments before it related to “the social worker or the mother following the adoption.” (*See* ECF No. 202 at 8.) In any event, it is axiomatic that the facts in *Johnson* would involve conduct that occurred *while* the child was in the custody of the defendants; otherwise, there would be no claim under § 1983 premised on the special-relationship theory. *See DeShaney*, 489 U.S. at 199-200. The actual issue here is whether such a custodial relationship continues for purposes of § 1983 liability after the relationship has ended by the transfer of legal and physical custody to a third-party. That is simply not addressed in *Johnson* due to the defendant’s concession of the issue. Therefore, the Court does not find that case helpful or analogous.

Plaintiff also, briefly, cites to *DeShaney*, *Schwartz*, *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), and *Yvonne L. ex rel. Lewis v. New Mexico Dep’t of Human Servs.*, 959 F.2d 883 (10th Cir. 1992). None of those cases are helpful to plaintiff however. In *DeShaney* and *Maldonado*, the courts concluded that a custodial relationship for § 1983 purposes did not exist. *DeShaney*, 489 U.S. at 201; *Maldonado*, 975 F.2d at 732-733. While in *Schwartz* and *Yvonne L.*, although a custodial relationship existed, this was because the children had been placed, and were injured or died, in foster care. *Schwartz*, 702

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F.3d at 576-577, 580; *Yvonne L.*, 959 F.2d at 885, 892-93. That is not the situation here.

As a result, in light of Tenth Circuit case law indicating that the focus of the special-relationship theory is the level of restraint imposed on an individual at the time of that individual's injury, and plaintiff's failure to show that a custodial level of restraint existed at the time of his injuries, plaintiff has failed to establish that Patton's actions violated a constitutional or statutory right. *See Armijo*, 159 F.3d at 1261. Thus, Patton is entitled to qualified immunity as to plaintiff's § 1983 claim premised on the special-relationship theory. *See Medina*, 252 F.3d at 1128. Moreover, even if plaintiff had established the first part of the qualified immunity analysis, because he has failed to provide a case that is remotely legally or factually analogous to the circumstances here, the second part of the analysis would have failed. *See id.*; *Armijo*, 159 F.3d at 1260.

Accordingly, plaintiff's motion for summary judgment is DENIED. Patton's motion for summary judgment is GRANTED with respect to the special-relationship theory of liability under § 1983.

B. Danger Creation

1. Basic Principals

In this Circuit, there is a six-part test for determining whether a defendant created a danger for the purposes of § 1983 liability. Those parts are as follows: (1) the

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defendant created the danger or increased the plaintiff's vulnerability to the danger in some way; (2) the plaintiff was a member of a limited and specifically definable group; (3) the defendant's conduct put the plaintiff at a substantial risk of serious, immediate, and proximate harm; (4) the risk of harm was obvious or known; (5) the defendant acted recklessly in conscious disregard of that risk; and (6) the defendant's conduct, when viewed in totality, is conscience shocking. *Armijo*, 159 F.3d at 1262-63. With respect to the first part, the Tenth Circuit has explained that, "if the danger to the plaintiff existed prior to the state's intervention, then even if the state put the plaintiff back in that same danger, the state would not be liable because it could not have created a danger that already existed." *Id.* at 1263. Moreover, the analysis "focuses on the *affirmative actions* of the state in placing the plaintiff in harm's way." *Currier v. Doran*, 242 F.3d 905, 919 (10th Cir. 2001) (emphasis added).

As an initial matter, in her motion for summary judgment, Patton moves for summary judgment as to the danger-creation theory based upon qualified immunity. (ECF No. 144 at 1-2, 7-20.) However, "[s]olely with respect to the danger creation theory, [Patton] moves for summary judgment on the second prong of the qualified immunity inquiry...." (*Id.* at 7 n.3.) In other words, Patton concedes, for purposes of her summary judgment motion only, that there are genuine issues of material fact as to whether plaintiff's constitutional rights were violated. (*See id.*) Patton, though, does not identify the genuine issues of material fact that exist. (*See id.*) Therefore, although not necessary for purposes of the first part of the qualified-

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immunity analysis, the Court must still identify Patton's conduct that arguably violated plaintiff's constitutional rights, otherwise there would be no way of determining whether "a reasonable officer would understand that what [Patton did] violate[d] that right." *Medina*, 252 F.3d at 1128 (quotation omitted). In doing so, the Court is required to construe genuine disputes of fact in favor of the nonmovant, plaintiff here. *See Tolan v. Cotton*, 572 U.S. , 134 S.Ct. 1861, 1866, 188 L. Ed. 2d 895 (2014).

2. Pertinent Genuine Issues of Material Fact

Doing so, the properly supported facts show the following. First, Patton was aware of Father's criminal history, including his conviction in April 2005 of attempted sexual assault of a minor. (ECF No. 203 at ¶ 9; ECF No. 131-11 at 3.) Patton was aware that this offense involved Father attempting "to put his dick in [P.G.'s] butt," and trying to pull P.G.'s panties down. (ECF No. 203 at ¶ 14; ECF No. 131-17.) Patton was also aware that Father had dragged P.G. by her legs into a bedroom, and Father had grabbed P.G.'s butt. (ECF No. 203 at ¶ 14; ECF No. 131-17.) Patton further knew that, in 2005, Father had violated a restraining order by attempting to contact P.G., and in November 2007, he violated his probation, with respect to his attempted-sexual-assault offense, for non-compliance. (ECF No. 203 at ¶¶ 16, 19-20.) Patton was also aware that Father was a registered sex offender, and that his criminal history reflected charges for a multitude of offenses, including, *inter alia*, misdemeanor assault, misdemeanor wrongs to minors, misdemeanor domestic violence, and misdemeanor resisting police authority. (ECF No. 203 at ¶ 9; ECF No. 203-1 at 10:2-4; ECF No. 131-11 at 1-3.)

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The facts further show that the Juvenile Court was informed that Father had been convicted and sentenced for attempting to sexual assault P.G. (ECF No. 205 at ¶ 7.) However, Patton did not attach Father’s criminal history record in her reports to the Juvenile Court, even though she initially planned to do so. (ECF No. 203 at ¶ 41). In that regard, although it is disputed, plaintiff’s expert testified that Father’s criminal history should have disqualified him from being a placement option. (ECF No. 131-16 at 92:5-21.)²²

Next, the facts show that, prior to T.D.’s placement with Father, Patton’s “gut [did not] feel good” about, and she questioned, placing T.D. with Father. (ECF No. 203 at ¶ 21; ECF No. 131-10 at 129:10-130:2.) In an initial draft of Patton’s report to the Juvenile Court, she listed her concerns as: (1) Father’s criminal record, specifically, Father’s attempted sexual assault on P.G.; (2) the revocation of Father’s probation for noncompliance; and (3) Jamison’s concern that Father was “not taking treatment seriously.” (ECF No. 131-10 at 184:6-9, 186:9-187:21) These concerns were taken out of the report and not expressed to the Juvenile Court. (*Id.* at 175:9-176:18.) Patton did not place her concerns in the report because her supervisor, Ketema, told her “do not go against the

22. Patton objects to plaintiff’s expert on the ground that plaintiff may not rely on an unverified expert report at summary judgment. (ECF No. 203 at ¶ 11.) That may be true, however, in this instance, plaintiff does not rely on his expert’s report, rather plaintiff relies on the expert’s deposition testimony, which is undisputedly an acceptable form of evidence to use at summary judgment. *See* Fed.R.Civ.P. 56(c)(1)(A).

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DDHS,” as the DDHS was going to return T.D. to Father. (*Id.* at 175:9-14, 176:12-18.) Patton was also scared that if she expressed her concerns she might be fired. (*Id.* at 177:1-3; ECF No. 203 at ¶ 23.)

Gomez believed that Father’s attempted sexual assault on P.G. involved “an inappropriate relationship between a stepfather and stepdaughter” in which P.G. did not resist Father’s conduct. (ECF No. 203-5 at 43:10-44:2.) Gomez had discussions with Patton and Garcia about Father’s attempted sexual assault on P.G. (*Id.* at 44:9-14.) In Gomez’s conversations with Patton about the offense, the information contained in the DDHS’ Trails report never came up. (*Id.* at 45:9-47:11.) If Gomez had been provided with the information from the Trails report about Father’s attempted sexual assault on P.G. she “[p]robably” would not have recommended T.D.’s placement with Father “without further assessment.” (*Id.* at 45:9-46:17.) Gomez was also not told about Jamison’s concerns with Father. (ECF No. 131-13 at 51:3-15.)

Although the extent is disputed, the facts also show that, with respect to the other members of the Team, Patton may have withheld some, if not all, of her concerns regarding T.D.’s placement with Father. First, Hutchinson could not recall being told about Jamison’s concerns or the revocation of Father’s probation. (ECF No. 131-29 at 80:9-22, 81:1-14.) Hutchinson testified that, if Patton had expressed her “concerns,” she would “probably not” have endorsed T.D.’s placement with Father. (*Id.* at 81:19-22.) Hutchinson also testified that the decision to place T.D. with Father “had already been made or was in the process

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of being made” and she would not have been involved in the Team if there were concerns regarding Father. (ECF No. 180-6 at 73:14-23.) Second, Hommes testified that there were conversations about “concerns” with Father. (See ECF No. 180-1 at 65:16-24, 66:10-15, 18-25, 67:2-13, 19-25, 68:1.) However, he also testified that he could not recall any of the conversations or remember if Patton had told him about any of her concerns. (*Id.* at 65:16-17, 20-24, 66:14-15, 18-21, 67:3-5.) Hommes further testified that T.D.’s placement with Father felt like “a decision [that] had been made, and it wasn’t going to be reversed.” (*Id.* at 67:5-13, 66:21-25.) Hommes’ testimony also throws into doubt Patton’s assertion that Father’s criminal record was shared with the Team (see ECF No. 203 at ¶ 37), as Hommes testified that, if he had known about that record, he would not have endorsed T.D.’s placement with Father, (ECF No. 131-9 at 71:13-16).

After the Juvenile Court granted “temporary legal and physical custody” to Father on November 3, 2010 (ECF No. 147-9 at 4), the facts show the following. At a March 21, 2011 hearing before the Juvenile Court, it was reported that Father had used physical punishment on T.D. (ECF No. 205 at ¶ 30; ECF No. 147-14 at 4.) After the hearing, Patton and Gomez met with T.D. outside the presence of his parents, and T.D. reported that Father had hit him with a wooden handle mop across his back. (ECF No. 205 at ¶ 30.) Patton then gave Father a referral to participate in the DDHS’ Fatherhood Initiative Program. (*Id.*) Patton also became aware that T.D. was staying with Garcia on weekends, and Garcia had reported T.D. was disrespectful, refused to complete chores, often

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smelled bad, and had unclean clothes when he arrived at her home. (*Id.* at ¶ 32.) Patton was also contacted by school officials who reported that in the last few months of school T.D. spent a large amount of time at the nurse's office complaining of sickness and body aches, appeared to be fearful of Father, and at times did not want to go home. (*Id.*)

Upon hearing of these issues, although Patton wanted to remove T.D. from Father's home because she was afraid for T.D.'s safety, Ketema instructed Patton that T.D. would remain in Father's home, and Patton understood that she would be terminated if she did not follow those instructions. (ECF No. 131-10 at 197:14-199:15, 19-24.) In the June 13, 2011 permanency planning hearing report, Patton informed the Juvenile Court of the above issues, but stated that she wanted to maintain T.D. in Father's home and that, although she had some concerns with Father's parenting skills, she wanted to preserve the family unit. (ECF No. 205 at ¶ 30; ECF No. 147-14 at 4.) At the June 13, 2011 permanency planning hearing, the Juvenile Court did not order T.D.'s removal from father's house. (*See* ECF No. 205 at ¶ 33; ECF No. 147-15.)

On September 19, 2011, the DDHS received a report from an unnamed "[r]eporting party," concerning allegations of sexual contact between T.D. and his half-brother. (ECF No. 205 at ¶ 35; ECF No. 147-17 at 8.) On September 21, 2011, the DDHS removed T.D. from Father's home. (ECF No. 203 at ¶ 66.) After conducting an investigation in March 2014, the DDHS concluded that, *inter alia*, in August 2011, Father repeatedly sexually

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assaulted T.D. by forcibly orally sodomizing him on two occasions and by forcing him and his three-year-old brother to perform sex acts on each other. (*Id.* at ¶¶ 57-59.)

3. Analysis

As explained *supra*, the Court does not recount these facts in order to determine whether plaintiff has established genuine issues of material fact with respect to his danger-creation claim. For purposes of summary judgment only, Patton has conceded that such genuine issues exist. (*See* ECF No. 144 at 7 n.3.) Moreover, because Patton failed to outline the specific genuine issues of material fact that exist, it was necessary for the Court to do so in Section B.2 *supra*. The question now is whether the law was clearly established that Patton's conduct violated plaintiff's constitutional right.

The parties first appear to argue over the standard by which the Court is to gauge whether the law was clearly established. (*See* ECF No. 181 at 4-6; ECF No. 204 at 9-10.) Plaintiff asserts that the Court should inquire as to whether the constitutional right was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." (ECF No. 181 at 5 (quotation omitted)). Patton contends that the inquiry should ask "whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted." (ECF No. 204 at 10 (quotation, alteration, and emphasis omitted)). The Court discerns little difference. The constitutional right must be clear and, based upon the clarity of the right, it must be apparent or clear to the

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defendant that her conduct violated the right. *Armijo*, 159 F.3d at 1260. The real debates here are with the construction of the right and the application of the genuine issues of fact to that right.

Here, the constitutional right at issue is clear. Specifically, case law in the Tenth Circuit has clearly established that state officials can violate a child's substantive due process rights if the official's reckless conduct created or increased a child's vulnerability to a danger that was known or obvious and the conduct was conscience-shocking. *Currier*, 242 F.3d at 923-924; *Armijo*, 159 F.3d at 1262-63. This right has been clearly established since 1993 or 1994. *See Currier*, 242 F.3d at 924. Thus, the only question is whether a reasonable official would have understood that Patton's conduct violated this right. Because, at this juncture, all facts must be construed in a light most favorable to plaintiff, including all disputed facts, the Court finds that a reasonable official would have understood Patton's conduct to have violated plaintiff's right to be safe from a state-created danger.

The problem with Patton's analysis of this inquiry is that she fails to apply one of the fundamental concepts of summary judgment practice: that all facts must be construed in the light most favorable to the non-movant. *See Tolan*, 134 S.Ct. at 1866. Specifically, in her motion for summary judgment, Patton presents a fact pattern that construes all of the material facts, and particularly the disputed material facts, in her own favor. In the motion for summary judgment, Patton contends that she was involved in a team decision-making process, T.D.'s

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placement was “collectively determined,” and the Team made a recommendation to the Juvenile Court. (ECF No. 144 at 17.) Patton goes on that Father’s attempted sexual assault on an “unrelated 15-year old female” did not provide notice that he would re-offend, the entire Team had “access” to the Trails system, and Garcia had personal knowledge of Father’s offense. (*Id.* at 18.)

The facts, though, many of which are disputed, can just as easily be viewed in an entirely different light. To start with, the concept that a team decision-making process resulted in the recommendation to place T.D. with Father is severely undermined by Hommes’ testimony that it felt like the decision had already been made by the time that the Team discussed concerns about Father and Patton’s own testimony that Ketema told her that the DDHS was going to return T.D. to Father. In addition, Hutchinson testified that she did not have any role in the placement decision, and she would not have been on the Team if there were concerns regarding the placement. Next, a jury could quite easily believe that Father’s prior sexual offense against P.G., his step-child, would have provided notice that he might re-offend against another child in his care, given the disputed issues over the revocation of Father’s probation and his offense-specific treatment, and the multiple incidents of improper contact between Father and P.G. in the Trails report—the same concerns that Patton removed from her initial report. In any event, Patton has conceded that a risk of harm was known or obvious, as well as serious and immediate, by conceding the first part of the qualified-immunity analysis; another reason to construe facts in this regard in plaintiff’s favor.

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Ultimately, a critical piece of evidence is Patton's testimony that, although she had three concerns about T.D.'s placement with Father, she removed any mention of those concerns from the report submitted to the Juvenile Court because her supervisor warned her not to "go against" the DDHS and she feared being fired if she did express her concerns. (*See* ECF No. 131-10 at 175:9-14, 176:12-18, 177:1-3.) Based on this testimony, Patton failed to disclose important information to the Juvenile Court, not due to any professional reason, but due to fear for her own job security. This is important because a reasonable jury could infer from the failure to disclose that Patton was aware of a risk to T.D., Patton intentionally and with disregard of that risk withdrew her concerns from the report, and the risk was substantial, serious, and immediate. Put another way, why would Patton's supervisor and her supervisor's supervisor insist that the concerns be withdrawn from the report, other than they might result in T.D. not being placed with Father; a result contrary to that which the DDHS was trying to ensure? Patton asserts that, based upon her testimony, she appears to have been a conduit for the DDHS' position (ECF No. 204 at 15), but the Court can discern no reason why that should scupper plaintiff's claim. Patton was the person with the concerns and, despite T.D.'s safety being Patton's supposed paramount interest, it was her conduct, in removing her concerns, that placed T.D. at risk.

Patton's failure to disclose her concerns to the Juvenile Court also taints many of the other salient facts in this case. Notably, it is very much disputed as to what amount of information was disclosed to the members of the Team.

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Patton contends that the Team had “access” to the Trails system, however, this does not dispute Hommes’ testimony that he did not know about Father’s criminal record, Gomez’s testimony that she did not generally access the Trails system, or Gomez, Hommes, or Hutchinson’s testimony that at least some of Patton’s concerns were not discussed with them, and if they had been, there positions viz a viz T.D.’s placement could, probably, or would have been different. Gomez is particularly important in this regard. Patton focuses many of her arguments on the fact that the decision to place T.D. with Father was made subject to Gomez’s approval and that, before the Juvenile Court, it was Gomez that requested T.D. be placed with Father. (ECF No. 204 at 15-16.) However, to the extent those facts are true, they are irrelevant if Gomez was making her approval and requests based upon incomplete information. At her deposition, Gomez testified that, in her conversations with Patton, the information contained in the Trails report about Father’s attempted sexual assault on P.G. never came up, and, if she had been provided with said information, she “[p]robably” would not have recommended T.D.’s placement with Father “without further assessment.” (ECF No. 203-5 at 5:9-7:11.)

Patton making an affirmative recommendation to the Juvenile Court *prior* to T.D.’s placement with Father is not the only time that such a recommendation occurred in this case. *After* T.D.’s placement with Father, Patton testified that, in an August 25, 2011 report to the Juvenile Court, she was instructed by her supervisor to recommend that T.D. remain in Father’s home, even though Patton believed that T.D. should be removed. (ECF No. 131-10 at 197:14-

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199:15, 19-24, 200:12-18.) Notably, Patton responded “Yes” when asked if she wanted to remove T.D. because she was afraid for his safety. (*Id.* at 199:11-15.) The events running up to Patton’s conclusion that T.D. should be removed included reports that (1) T.D. often smelled bad and had unclean clothes, (2) at school, T.D. spent a large amount of time at the nurse’s office complaining of sickness and body aches, and appeared to be fearful of Father and at times did not want to go home, and (3) Father hit T.D. across the back with a wooden mop handle. (*Id.* at 197:14-198:18.)

Patton argues that these events, and her wish to remove T.D. from Father’s home, should not be considered for purposes of the danger-creation analysis because those things occurred *after* T.D.’s placement with Father, citing *Currier*. (ECF No. 144 at 18-19; ECF No. 204 at 13.) Patton accurately cites pertinent language from *Currier*, however, it does not help her. In *Currier*, the Tenth Circuit declined to consider the defendants’ failure to intervene once custody was given to the children’s father. 242 F.3d at 919. The reason for this, though, was that the danger-creation theory “focuses on the *affirmative actions* of the state in placing the plaintiff in harm’s way.” *Id.* (emphasis added). Thus, the defendants’ failure to intervene, a non-affirmative action, failed to come within the definition of a state-created danger. *See id.*

Here, Patton’s conduct in failing to report her belief that T.D. should be removed and her affirmative recommendation that T.D. remain in Father’s home,²³

23. Plaintiff also relies on another aspect of Patton’s post-custody conduct: her failure to visit Father’s home at least once

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satisfies the *Armijo* danger-creation requirements. First, the affirmative recommendation that T.D. remain in Father's home, as well as the failure to report Patton's true recommendation, were both considered in *Currier* to be the type of affirmative actions that satisfy *Armijo*. See *id.* ("[the social worker] was responsible for the Children's Court's decision to grant [the father] legal custody, through either his failure to investigate and report to the court or through his affirmative recommendation.") Second, T.D. was a member of a limited and definable group: a child placed into the custody of his natural father. Third, in light of the reports of which Patton was aware from T.D.'s school and mother, and her investigation of the wooden mop incident, her conduct put T.D. at a substantial risk of serious, immediate, and proximate harm. Fourth, the risk was known to Patton. Fifth, Patton acted intentionally in conscious disregard of the risk to T.D. Finally, Patton's conduct could be considered conscience-shocking in light of the fact that she did not recommend removal because she feared for her job, rather than any concern for T.D.'s safety.

The only remaining question is whether any case law in the Tenth Circuit—neither party argues that Supreme Court case law is applicable (*see* ECF No. 144 at 9 n.5; ECF No. 181 at 11)—would have allowed a reasonable official to understand that Patton's conduct violated T.D.'s constitutional right. On this front, the

every other month. (ECF No. 203 at ¶¶ 51.) Patton disputes whether this fact is actually a fact, but, even if it was, it is not relevant to the danger-creation analysis because a failure to meet, with nothing else, does not constitute affirmative action. See *Currier*, 242 F.3d at 919.

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parties wage battle over a solitary case: *Currier*. (See ECF No. 144 at 19-20; ECF No. 181 at 8-13; ECF No. 204 at 11-18.) In *Currier*, the Tenth Circuit concluded that a social worker created a danger or increased vulnerability to the danger through: his failure to investigate (1) the numerous bruises on the children and (2) allegations of abuse, and (3) his responsibility for the court order granting legal custody to the father. 242 F.3d at 919-920. The Tenth Circuit further concluded that the social worker was not entitled to qualified immunity because, by 1993 and 1994, a reasonable official would have known that “reckless, conscience shocking conduct that altered the status quo and placed a child at substantial risk of serious, immediate, and proximate harm was unconstitutional.” *Id.* at 924. The Tenth Circuit described its application of the social worker’s conduct to the danger-creation theory as “a relatively straightforward application of the doctrine.” *Id.* at 924-925. In contrast, the Tenth Circuit also concluded that another social worker was entitled to qualified immunity because the plaintiffs relied on a “particular theory of danger creation” that was not established in case law. *Id.* at 925.

In light of the recitation of the facts construed most favorably to plaintiff in Section B.2 *supra*, the Court finds that *Currier* would have allowed a reasonable official in Patton’s position to understand that her conduct violated T.D.’s constitutional right. The Court finds the facts here to be another “relatively straightforward” application of the danger-creation theory, especially given that Patton’s conduct is of a similar ilk to the conduct highlighted in *Currier*. Specifically: the affirmative recommendation in

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Patton's report that T.D. be placed with Father; Patton's affirmative removal of her concerns about Father from her report;²⁴ Patton's failure, albeit disputed, to report at least all of her concerns to all of the Team members; Patton's failure, albeit disputed, to report Father's entire criminal history to all of the Team members; the affirmative recommendation in Patton's June 13, 2011 permanency planning hearing report that T.D. remain in Father's house; and Patton's failure to report her belief that T.D. should be removed from Father's house.

As the Tenth Circuit did in *Currier*, the Court views Patton's failures to report in the larger context of the state's affirmative conduct in placing T.D. with Father and then recommending T.D. remain with Father. *See* 242 F.3d at 920 n.7 ("[the social worker's] failure to investigate allegations of abuse should be viewed in the general context of the state's affirmative conduct in removing the children from their mother and placing the children with their father.") This is especially so here, given that so much of Patton's argument is premised on the "involvement of a multi-disciplinary team who issued a group recommendation to the [Juvenile Court]." (*See* ECF No. 204 at 15-16.) To the extent Patton failed to fully

24. As far as the Court is aware, a copy of the placement report has not been submitted in connection with the motions for summary judgment addressed herein. The Court relies solely upon Patton's deposition testimony in finding that there is evidence to support plaintiff's contention that Patton removed her concerns from her report after being instructed to do so by her supervisor under threat of job termination. (*See, e.g.*, ECF No. 131-10 at 183:21-185:13, 197:14-199:24.)

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report to the Team members, *inter alia*, her concerns and Father's criminal history, any argument that the Team came to a "group" recommendation is undermined, even more so when certain Team members believed that the recommendation had been made before their participation began.

Equally important, it is all together unclear how much information regarding Father's entire criminal history was disclosed to the Juvenile Court. Although it is undisputed that the Juvenile Court was informed of the fact that Father had been convicted and sentenced for attempting to sexually assault P.G. (ECF No. 205 at ¶ 7), it is also undisputed that Patton did not attach Father's criminal history record in her reports to the Juvenile Court (ECF No. 203 at ¶ 41). This failure to report Father's full criminal history is important, as plaintiff has presented expert deposition testimony stating that Father's criminal history should have disqualified him being a placement option. (*See* ECF No. 131-16 at 92:5-21.)

As such, the Court finds Patton's alleged conduct to be a relatively straightforward application of this Circuit's well-established law that reckless, conscience-shocking, and affirmative conduct that places a child at substantial risk of serious, immediate, and proximate harm is unconstitutional. *See Currier*, 242 F.3d at 924; *Armijo*, 159 F.3d at 1264. Although, Patton's conduct does not precisely fit with the same conduct committed in *Currier* or *Armijo*, the principle that the danger-creation theory focuses upon affirmative action has been recognized since *Armijo*, and, in *Currier*, the Tenth Circuit applied

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this principle to an affirmative recommendation. Under the circumstances here, the second part of the qualified immunity analysis does not require any greater clarity on a defendant's part than this. *See Currier*, 242 F.3d at 923-924 (explaining the basis for its conclusion that the danger-creation theory was clearly established prior to the defendant's actions).

Patton makes various attempts to distinguish *Currier*. (ECF No. 204 at 11-18.) None are helpful. First, Patton asserts that *Currier* was decided at the motion-to-dismiss stage, and thus, the plaintiffs' allegations were accepted as true. (*Id.* at 11-12.) This is true, but Patton fails to explain how this makes a difference here. (*See id.*) As discussed in great detail *supra*, the Court has set forth those material facts that are undisputed. In addition, in Section B.2 the Court has explained those facts that, although disputed, must be construed in favor of plaintiff for purposes of summary judgment because they are properly supported by evidence in the record. Second, although Patton asserts that the evidence must be construed in the light most favorable to plaintiff (*id.* at 11-12), Patton proceeds to do the exact opposite. The Court has discussed in detail *supra* how Patton has wandered far from established summary judgment practice in setting forth the facts, and will not go through that wandering nature again. Suffice to say, merely because Patton disputes facts such as the basis for Father's probation revocation,²⁵ the extent

25. The Court will momentarily dwell on Father's probation revocation, as it is the focus of much dispute between the parties. Patton contends that probation was revoked due to Father's "continued relationship with the mother of his children" (ECF No.

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that information was relayed to the Team, the extent of Patton's role in recommendations that were made to the Juvenile Court, and the extent that the placement recommendation was a group decision, does not mean that Patton's versions of those facts are the facts for purposes of summary judgment. *See Tolan*, 134 S.Ct. at 1866-68 (vacating and remanding because the court "credited the evidence of the party seeking summary judgment and failed to properly acknowledge key evidence offered by the party opposing that motion.").

Third, Patton argues that the ages of the children in *Currier*, both of whom were under 4 years of age, is "significant[ly]" different to plaintiff's age when he was returned to Father, which was 14 years. (ECF No. 204 at 15.) Patton cites to Gomez's deposition testimony for the principle that teenagers have the ability to self-report and notify the DDHS of any concerns in the home. (*Id.*) Gomez's testimony does not support this broad principle.

204 at 12), while plaintiff contends that it was revoked due to Father's refusal to participate in sex offender treatment (ECF No. 181 at 11). The revocation complaint actually states that Father's probation was revoked for multiple reasons. Specifically, Father "purposely failed to fulfill his treatment obligations," Father "purposely violated his no contact contract with his girlfriend," and Father "had been deceptive in disclosing his relationship with his current girlfriend." (ECF No. 131-19 at 2.) The revocation complaint went on to recommend that, "[i]n light of *all* circumstances of this case," Father's probation be revoked. (*Id.* at 3 (emphasis added)). In any event, given that Patton testified that she could not recall receiving the revocation complaint (ECF No. 131-10 at 10:23-25), even if Father's probation was revoked solely due to the violation of his no contact contract, this could not have been a basis for Patton's decisionmaking with respect to T.D.

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Gomez merely testified that, for purposes of *visitation*, “there is a thought process” that teenagers have an ability to self-protect or to self-report what is happening to them. (ECF No. 180-3 at 112:3-25.) Gomez testified that, as a result, *contact* with Father was recommended. (*Id.* at 112:25-113:2.) Nowhere in the cited testimony does Gomez discuss self-reporting as being a reason to place a child with an adoptive or natural parent. In any event, a child’s alleged ability to self-report is certainly no reason for a social worker to create a danger or increase vulnerability to a danger.

Finally, the Court acknowledges that Garcia’s own role in the recommendation to place T.D. with Father is as disputed as Patton’s. (*See, e.g.*, ECF No. 203 at ¶ 76; ECF No. 204 at 15-17.) However, as with all disputed factual issues, they are for the jury to resolve. *See Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 886 (10th Cir. 2014) (affirming the district court’s denial of qualified immunity as a matter of law because issues of material fact existed), *cert. denied*, 135 S. Ct. 975, 190 L. Ed. 2d 890 (2015). For purposes of the instant analysis, even if Garcia failed to report the extent of Father’s criminal history or object to T.D.’s placement with Father, this does not absolve Patton of her responsibilities to T.D., primary of which was T.D.’s safety. (*See* ECF No. 203 at ¶ 31.)

Accordingly, the Court finds that Patton is not entitled to qualified immunity as a matter of law with respect to plaintiff’s danger-creation claim. As a result, Patton’s motion for summary judgment is DENIED with respect to the danger-creation claim and that claim only will proceed to trial.

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V. Conclusion

For the reasons set forth herein, the Court:

- (1) DENIES plaintiff's motion for partial summary judgment (ECF No. 131); and
- (2) GRANTS IN PART and DENIES IN PART Patton's motion for summary judgment (ECF No. 144); to wit,
 - (a) the motion is GRANTED with respect to plaintiff's claim premised on the special-relationship theory; and
 - (b) the motion is DENIED with respect to plaintiff's claim premised on the danger-creation theory.

The Order Setting Case for Trial (ECF No. 216) remains in place with respect to defendant Kelcey Patton.

SO ORDERED.

DATED this 8th day of March, 2016.

BY THE COURT:

/s/

RAYMOND P. MOORE
United States District Judge

**APPENDIX C — DENIAL OF REHEARING OF
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT, FILED OCTOBER 24, 2017**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

T.D.,

Plaintiff - Appellee,

v.

KELCEY PATTON,

Defendant - Appellant,

and

THE DENVER DEPARTMENT
OF HUMAN SERVICES,

Defendant.

ORDER

Before BRISCOE, EBEL, and MATHESON, Circuit
Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted
to all of the judges of the court who are in regular active

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service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/
ELISABETH A. SHUMAKER,
Clerk