IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

JANE DOE,

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

Plaintiffs,

v.

APRIL WOODARD, El Paso County Department of Human Services caseworker, individually,

CHRISTINA NEWBILL, Supervisor, El Paso County Department of Human Services, individually,

SHIRLEY RHODUS, Children, Youth and Family Services Director, El Paso County Department of Human Services, individually,

RICHARD BENGTSSON, individually, and in his official capacity as Executive Director, El Paso County Department of Human Services, for prospective relief,

REGGIE BICHA, Executive Director of the Colorado Department of Human Services, in his official capacity for prospective relief,

EL PASO COUNTY BOARD OF COUNTY COMMISSIONERS, comprised of Sallie Clark, Darryl Glen, Dennis Hisey, Amy Lathen, and Peggy Littleton, in their official capacity,

Defendants.

COUNTY DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

COME NOW, Defendants April Woodard ("Defendant Woodard"), Christina Newbill ("Defendant Newbill"), Shirley Rhodus ("Defendant Rhodus"), Richard Bengtsson ("Defendant Bengtsson"), and the Board of County Commissioners of the County of El Paso ("BoCC"), (collectively "County Defendants"), by and through their

attorneys, the Office of the El Paso County Attorney, and hereby move this Honorable Court to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

I. BACKGROUND

Plaintiffs filed their First Amended Complaint [Doc. 34] on August 20, 2015. Plaintiffs allege the following relevant incidents:

- On November 22, 2013, DHS received a report that a teacher and behavioral health consultant at Oak Creek Elementary School (the "School") observed marks and bruises on I.B.'s bottom and back and reported the same to DHS.[1]
- The same day, another caseworker, Amanda Albert also observed I.B.'s bottom and back and found a linear welt and rash, which were not consistent with marks from a hand, belt, or other object; the November 22, 2013 DHS investigation ultimately closed as unfounded on January 30, 2014.[2]
- Jane Doe was not asked for permission or notified of the observations made by the School or caseworker Albert.[3]
- On December 9, 2014, DHS received another report from the school of bumps, bruises, a small red mark, two small cuts, and bruised knees on I.B.[4]
- Defendant Woodard responded to the school, received permission from her supervisor, Defendant Newbill, to view I.B.'s buttocks,

[1] Doc. 34, ¶¶ 24, 25.
[2] Doc. 34, ¶¶ 27, 28, 32.
[3] Doc. 34, ¶ 31.
[4] Doc. 34, ¶ 35, 36.

stomach/abdomen, and back, then, accompanied by the school's health paraprofessional, removed I.B.'s clothes and took photographs of those areas over I.B.'s objection.[5]

- Defendant Woodard concluded the marks were not consistent with abuse and that I.B. "gets pretend mixed up with reality;" the December 9, 2014 DHS investigation was closed as unfounded on January 5, 2015.[6]
- Defendant Woodard and Jane Doe discussed the December incident on January 28, 2015 and Jane Doe informed Defendant Woodard that she had called a lawyer.[7]
- On January 29, 2015, a different DHS caseworker contacted Jane Doe regarding allegations about I.B.'s younger brother, and the report was unfounded.[8]

As a result of these allegations, Plaintiffs Jane Doe and I.B., who are mother and daughter, bring various claims against twelve separate Defendants.

- Claim One is brought by I.B. against Defendants Woodard and Newbill for alleged violations of I.B.'s Fourth Amendment rights.[9]
- Claim Two is brought by I.B. against Defendants Rhodus and Bengtsson in their individual capacities for supervisory liability and failure to train or supervise, and against Defendants Bengtsson and Bicha in their official

[5] Doc. 34, ¶¶ 37-40.
[6] Doc. 34, ¶ 47.
[7] Doc. 34, ¶¶ 54, 60.
[8] Doc. 34, ¶¶ 61, 64.
[9] Doc. 34, ¶¶ 142-159.

capacities for "prospective relief," all based on Fourth Amendment theories asserted in Claim One.[10]

- Claim Three is brought by I.B. and Jane Doe against Defendants Woodard and Newbill for alleged violations of I.B.'s and Jane Doe's Fourteenth Amendment liberty interests. [11]
- Claim Four is brought by I.B. and Jane Doe against Defendants Rhodus and Bengtsson in their individual capacities for supervisory liability and failure to train or supervise, and against Defendants Bengtsson and Bicha in their official capacities for "prospective relief," all based on Fourteenth Amendment theories asserted in Claim Three.[12]
- Claim Five is a *Monell* claim brought by I.B. and Jane Doe against BoCC Defendant based on Fourth and Fourteenth Amendment theories asserted in Claims One and Three.[13]

II. LEGAL STANDARD

Dismissal of a Section 1983 claim is appropriate pursuant to Fed. R. Civ. P. 12(b)(6) where a plaintiff has failed to allege sufficient facts "to state a claim for relief that is plausible on its face." *Kansas Penn Gaming, LLC v. Collins,* 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)); *Perrian v. Coons*, No. 13-CV-02951-KLM, 2015 WL 1539022, at *18 (D. Colo. Mar. 31, 2015) (quoting *Ashcroft v. Iqbal,* 556 US 662 (2009) and finding that plaintiff's "conclusory allegations" against defendant regarding free-speech retaliation were insufficient to

[10] Doc. 34, ¶¶ 160-179.
[11] Doc. 34, ¶¶ 180-191.
[12] Doc. 34, ¶¶ 192-209
[13] Doc. 34, ¶¶ 210-220

state a claim for relief); *Fox v. City of Wichita, Kan.,* No. 12-1271-CM, 2012 WL 6217384, *4 (D. Kan. Dec. 13, 2012) (finding that dismissal was appropriate where "[t]he allegations in this case lack specificity and are inadequate to survive the *Twombly* inquiry"); *Jones v. Lehmkuhl*, No. 11-CV-02384-WYD-CBS, 2013 WL 6728951, at *15-16 (D. Colo. Dec. 20, 2013) (dismissing plaintiff's Section 1983 claim because the plaintiff's complaint contained "no well-pled facts . . . that substantiate" the "conclusory statements" provided by the plaintiff in her complaint); *Garland v. Bd. of Educ. of Denver Pub. Sch. Dist. No. 1*, No. 11-CV-00396-REB-KMT, 2012 WL 1018740, at *8 (D. Colo. Mar. 26, 2012) (explaining that "the United States Court of Appeals for the Tenth Circuit has held that claims under § 1983 based on … municipal liability remain viable under *Iqubal* [sic] only if [*Iqbal's*] specific pleading and proof requirements are met"); *Humood v. City of Aurora, Colorado*, No. 12-CV-02185-RM-CBS, 2014 WL 4345410, at *7 (D. Colo. Aug. 28, 2014) (explaining that, to satisfy the requirements of *Iqbal* and *Twombly,* a plaintiff bringing a Section 1983 claim must clearly explain in his or her pleadings "who is alleged to have done *what* to *whom*" with regard to each defendant); *Lee v. City & Cnty. of Denver, Colorado,* No. 14-CV-02574-RBJ, 2015 WL 249470, at *2-3 (D. Colo. Jan. 20, 2015) ("To plead a claim for relief under 42 U.S.C. § 1983, a plaintiff must show that the defendant, acting under color of state law, deprived him of a right secured by the United States Constitution or its laws." Such a claim cannot be premised upon "purely conclusory allegations."(internal citations and quotations omitted)).

In fact, the 10th Circuit has stressed the need for careful attention to particulars in the context of 1983 claims. *MAP v. Bd. of Trustees for Colorado Sch. for Deaf & Blind*, No. 12-CV-02666-RM-KLM, 2014 WL 3748642, at *14 (D. Colo. Apr. 28, 2014)

report and recommendation adopted sub nom. MAP v. Bd. of Trustees for Colorado Sch. for the Deaf & Blind, No. 12-CV-02666-RM-KLM, 2014 WL 3748185 (D. Colo. July 29, 2014) (citing *Pahls v. Thomas,* 718 F.3d 1210, 1225 (10th Cir.2013)); *C.G. v. City of Fort Lupton*, No. 13-CV-01053-REB-CBS, 2014 WL 2597165, at *7-8 (D. Colo. June 10, 2014) (explaining that Section 1983 cases "pose a greater likelihood of failures in notice and plausibility because they typically involve complex claims against multiple defendants … Without allegations sufficient to make clear the 'grounds' on which the plaintiff is entitled to relief, it would be impossible for the court to perform its function of determining, as an early stage in the litigation, whether the asserted claim is sufficiently clear."); *Humood v. City of Aurora, Colorado*, No. 12-CV-02185-RM-CBS, 2014 WL 4345410, at *7 (D. Colo. Aug. 28, 2014) (explaining that ensuring that a defendant is placed on notice of his or her alleged misconduct "is particularly important in § 1983 actions with multiple defendants"); *Kansas Penn Gaming, LLC v. Collins,* 656 F.3d 1210, 1215 (10th Cir. 2011) (explaining that "the *Twombly* standard" has "greater bite" in the context of a Section 1983 claim).

A court must look "to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Pace v. Swerdlow,* 519 F.3d 1067, 1072 (10th Cir. 2008). Although well-pled facts within a complaint will be accepted as true, "legal conclusions, bare assertions, [and] merely conclusory" allegations "are not entitled to the assumption of truth" and cannot defeat a motion to dismiss. *Havens v. Clements*, No. 13-CV-00452-MSK-MEH, 2014 WL 1213382, at *5-6 (D. Colo. Mar. 24, 2014); *Battles v. Russell Cnty., Ala*., No. 3:13CV196-CSC, 2013 WL 4029289, at *6 (M.D. Ala. Aug. 7, 2013) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 664 (2009) and

explaining that "[t]he tenet that, in considering a motion to dismiss, the court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *Lingenfelter v. Board of County Commissioners of Reno County, Kansas,* 359 F.Supp. 2d 1163, 1166, (D. Kan. 2005) (citing *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir. 1984) and explaining that well-pled facts are properly distinguished from "conclusory allegations" and not entitled to any weight in ruling on a motion to dismiss). Thus, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)); *see also Hall v. Witteman*, 584 F.3d 859, 863-64 (10th Cir. 2009).

Further, in order to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must "'nudge [his] claims across the line from conceivable to plausible." *Schneider*, 493 F.3d at 1177 (quoting *Twombly*, 550 U.S. at 570). "Plausibility . . . means that the plaintiff [has] pled ***facts*** which allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Havens v. Clements*, No. 13-CV-00452-MSK-MEH, 2014 WL 1213382, at *5-6 (D. Colo. Mar. 24, 2014) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007) (emphasis added)). "The mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient." *Schneider,* 493 F.3d at 1177 (quoting *Twombly*, 550 U.S. at 570). Thus, even where a plaintiff has plead some facts "consistent with" finding liability, this is insufficient unless the complaint gives "the court reason to be believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims"

against *these* defendants. *Haskett v. Flanders,* No. 13-CV-03392-RBJ-KLM, 2015 WL 128156, at *4 (D. Colo. Jan. 8, 2015) (quoting *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original) and *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). If the factual allegations in the complaint are “so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008) (citing *Twombly* 550 U.S. at 570). "[W]here the well-pleaded facts do not permit the court to infer more than the mere *possibility* of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, (2009) (emphasis added) (internal quotations omitted).

III. ARGUMENT

A. Law concerning caseworkers searching and photographing children

Federal case law, including that in the 10th Circuit, is currently unsettled on the applicable constitutional standard for photographing allegedly abused children by government human services caseworkers.

The law is clear that allegations of state interference with Fourteenth Amendment familial rights are held to a balancing test weighing the interests of the government against the asserted privacy interests. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242; 1247 (10th Cir. 2003). In classic Fourteenth Amendment liberty analysis, a determination that a party's constitutional rights have been violated requires “a balancing [of] liberty interests against the relevant state interests.” *Youngberg v. Romeo,* 457 U.S. 307, 321 (1982).

This balancing of interests has been applied in cases involving intimate association rights. *See Winston ex rel. Winston v. Children & Youth Servs.,* 948 F.2d 1380, 1391 (3d Cir.1991), *cert. denied,* —— U.S. ——, (1992); *Arnold,* 880 F.2d 305, 313 (11th Cir. 1989); *Franz v. Lytle,* 791 F.Supp. 827, 833 (D. Kan. 1992); *Aristotle P. v. Johnson,* 721 F.Supp. 1002, 1010 (N.D.Ill.1989); *Whitcomb v. Jefferson County Dep't of Social Servs.,* 685 F.Supp. 745, 747 (D.Colo.1987).

The standard is not as clear when a claim based on allegations such as those noted above are predicated by a search violating Fourth Amendment rights. Absent probable cause or an established well-delineated exception, a warrantless search of a person conducted *for law enforcement purposes* is *per se* unreasonable. *Franz v. Lytle*, 997 F.2d 784, 787 (10th Cir. 1993). The law is less certain, however, in the context of warrantless searches conducted by social workers. *See Darryl H. v. Coler*, 801 F.2d 893, 901-02 (7th Cir. 1986) (no probable cause or warrant requirement for social workers to visually inspect a child's unclothed body); *Franz v. Lytle*, 791 F. Supp. 827, 830 (D. Kan. 1992) *aff'd,* 997 F.2d 784 (10th Cir. 1993) (recognizing different standards for law enforcement officers and social workers). This lack of certainty has received scholarly attention; some law reviews urge courts to avoid adopting a child welfare exception to the Fourth Amendment: Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413. Some argue that child welfare issues are already subject to an intermediate "reasonableness" review (as opposed to the more rigid traditional fundamental rights analysis) that should be openly embraced and clarified. *The Paradox of Family Privacy*, 53 Vand. L. Rev. 527 (2000).

State statutes and regulations permit those investigating child abuse or neglect allegations to visually inspect and/or photograph evidence of abuse with little or no reference to court involvement or a review standard. Most relevant to this case, Colorado law clearly allows DHS caseworkers who reasonably believe a child has been abused or neglected to take "color photographs of the areas of trauma visible on the child." C.R.S. § 19-3-306. *See also*, Utah Code Ann. § 62A-4a-406; 10 A. Okla. Stat. Ann. § 1-2-105(B); Kansas Department for Children and Families Prevention and Protection Services Policy and Procedure Manual, Policy 2170; New Mexico Administrative Code § 8.10.3.11; Code of Wyoming Rules - Department of Family Services, Child Protection – Children & Family Services Chapter III, Section 2.

1. Administrative searches and the "special needs" doctrine.

Some courts, including the 7th Circuit,[14] consider a social worker's visual inspection of a child an administrative search. The administrative search exception hinges on a special need, the nature of which renders the warrant requirement impractical. *Roska* 328 F. 3d *at* 1241 (10th Cir. 2003). Long established examples include enforcing school discipline (*New Jersey v. T.L.O*., 469 U.S. 325, 333-10, (1985)), administrative searches of business premises of closely regulated industries (*New York v. Burger*, 482 U.S. 691, 700 (1987)), taking inventory of seized items for "caretaking" purposes (*Cady v. Dombrowski*, 413 U.S. 433, 447-48 (1973)), and searching a probationer's home for deterrent effect (*Griffin v. Wisconsin* 483 U.S. 868, 876, (1987).

If a special need exists, reasonableness of the search is determined by balancing the nature of the privacy interest upon which the search intrudes and the degree of

[14] *See Darryl H*. 1 F. 2d 80 at 902.

intrusion against "the nature and immediacy of the governmental concern at issue… and the efficacy of the means for meeting it." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660, (1995). The 10th Circuit has determined no special need permits a social worker to *enter a home to remove a child* without a warrant absent exigent circumstances because (1) individualized suspicion is necessary to enter and remove a child from a home, (2) there is no need for surprise or sudden action to enter and remove a child from a home, (3) there is no deterrent effect served by the threat of a sudden warrantless entry and removal when the family is not involved in the criminal justice system, and (4) there was no immediate need for a quick response. *Roska* 328 F 3d. at 1242. The 10th Circuit has not applied this standard to photographing or removing clothing of an allegedly abused child to investigate reported child abuse.

This Court should consider a social worker's visual inspection and photographing of a child, under the circumstances alleged, as an administrative search subject to the reasonableness balancing test discussed in *Vernonia Sch. Dist*. The 10th Circuit has not decided whether warrantless visual inspection of unclothed children, conducted by social workers for the purpose of confirming or dispelling suspicion of abuse or neglect, constitutes an administrative search. The factors considered in *Roska* do not apply in the same way when the home is not entered[15] and social workers do not seek to remove a child, but instead seek to visually inspect for injuries when a child is outside the home. In these circumstances, if a child has been abused, social workers have a compelling interest in expediting investigation in order to avoid returning the child to the abusive environment and to avoid an abusive or enabling adult interfering with the

[15] *See Payton v. New York*, 445 U.S. 573, 573 (1980).

investigation.[16] Further, finding actions similar to those alleged[17] to be administrative searches creates consistent precedent with the 7th Circuit, allowing courts to preserve governmental interests in child protection and privacy interests through a balancing test predicated on reasonableness.

2. Traditional Fourth Amendment analysis.

If the Court declines to consider the alleged search as administrative in nature, subject to the balancing test, it must determine an appropriate standard to which social workers' investigations should be held. While the 10th Circuit has held that a social worker who *seizes* a child is subject to the Fourth Amendment, it has not decided what Fourth Amendment test is appropriate to evaluate that seizure. *Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005). One consideration in *Jones* was derived from *Terry v. Ohio*, 392 U.S. 1, 20, (1968).[18] The test discussed would consider whether a seizure was "justified at its inception" by reasonable articulable suspicion. *Terry* 392 U.S. at 88. Applied to the allegations here, the test would require that the "search" was justified at its inception by reasonable articulable suspicion. It should be noted that reasonable suspicion that a child "has been abused or is in imminent peril of abuse" is also the standard for determining whether emergency circumstances justify the removal of a child from a home without notice and a hearing. *Gomes v. Wood,* 451 F.3d 1122, 1129

[16] The Supreme Court has recently recognized an emergency need in the context of Sixth Amendment Confrontation Clause, for teachers to be able to ask an allegedly abused child questions about visible injuries to the child and possible abuse of that child. The Court reasoned that the questions and subsequent testimony did not violate the confrontation clause "[b]ecause the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help." *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015).

[17] Facts here specifically involve examination accompanied by other same-gender adults at a child's school in response to a report of visible injury from a teacher.

[18] The trial court in *Jones* relied upon the *Terry* discussion from *New Jersey v. T.L.O.,* 469 U.S. 325, 337 (1985).

(10th Cir.2006), quoting *Hatch v. Dep't for Children, Youth & Their Families,* 274 F.3d 12, 20 (1st Cir.2001)).

Alternatively, the Court could impose upon social workers a more traditional probable cause analysis applicable to law enforcement officers as urged by Plaintiffs. Arguably, this higher standard could severely impede a child abuse investigation and pose risks to an allegedly abused child. The probable-cause standard is a "practical, nontechnical conception" that deals with factual and practical considerations of reasonable laypersons. *Illinois v. Gates,* 462 U.S. 213, 231 (1983). The basic definition of probable cause is a reasonable ground for the particularized belief of guilt with respect to the person to be searched. *Ybarra v. Illinois,* 444 U.S. 85, 91, (1979); *Maryland v. Pringle*, 540 U.S. 366, 370-71, (2003). If the Court requires a formal probable cause determination by a social worker prior to viewing a child's injuries, it must also determine whether the social worker's "search" must be conducted pursuant to a warrant or exception to the warrant requirement. *Franz v. Lytle*, 997 F.2d 784, 787 (10th Cir. 1993). If so, considering the fact allegations of the Complaint, the "exigent circumstances" exception is relevant; exigent circumstances exist when: "(1) the law enforcement officers ... have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search [is not] motivated by an intent to arrest and seize evidence, and (3) there [is] some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched. *United States v. Anderson,* 981 F.2d 1560, 1567 (10th Cir.1992). While generally addressed in the context of a law enforcement entering a home, the "emergency aid doctrine" may also be relevant. "[l]aw enforcement officers

may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, (2006) (emphasis added).

B. Qualified immunity shields individually named County Defendants from any claim.

1. Qualified Immunity law and purpose.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights that *every* reasonable government official in their position would have known. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error, if any, is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. Because qualified immunity is an immunity from suit, rather than a mere defense to liability, it is effectively lost if a case is erroneously permitted to go to trial. The "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery. Accordingly, qualified immunity questions must be resolved at the earliest possible stage in litigation. *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); *al-Kidd* 131 S. Ct. at 2083.

Traditionally, there has been a two-step process for resolving qualified immunity questions: "First, a court must decide whether the facts that a plaintiff has alleged (*see*

Fed. R. Civ. P. 12(b)(6), (c)) or shown (*see* Fed. R. Civ. P. 50; 56) make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Pearson* 129 S. Ct. *supra,* at 815-816, *quoting Saucier v. Katz*, 533 U.S. 194 (2001) (internal citations and quotation marks removed). The *Pearson* Court recently clarified, however, that the *Saucier* test need not be rigidly followed, and that the prongs can be considered in any order. The *Pearson* Court held that issues of clearly established law can be considered without first establishing a constitutional violation. *Pearson*, 129 S. Ct. at 818.

2. County Defendants are entitled to Qualified Immunity for all alleged Fourth Amendment Violations.

a. Fourth Amendment claims. Claim One and, to the extent they rely upon Claim One, Claims Two and Five, are subject to Fourth Amendment analysis. Plaintiffs do not allege violation of a *clearly established* Fourth Amendment right. A child's Fourth Amendment rights in the context of the incidents alleged are anything but clearly established. The standard of review for a search such as that alleged[19] is unsettled. Caseworkers conducted the alleged "searches" in an objectively reasonable manner relying upon C.R.S. § 19-3-306. *See Roska* 328 F. 3d at 1253. Plaintiffs have failed to allege violation of a clearly established Fourth Amendment right. Accordingly, any claim based upon a Fourth Amendment theory must be dismissed by operation of qualified immunity.

[19] Specifically, claims alleged involve suspicions of abuse by Jane Doe's live in boyfriend, actual marks on the child, and an apparent verbal indication of physical abuse from the child in confusing play with reality. Doc. 34, ¶¶ 24, 27, 29, 47.

b. Fourteenth Amendment claims. Claim Three and, to the extent they rely upon Claim Three Four and Five, are subject to Fourteenth Amendment analysis. While the standard of review for Plaintiff's Fourteenth Amendment claims is more clearly the balancing test,[20] the contours of Jane Doe's and I.B.'s reciprocal rights to care, custody, and control under the circumstances alleged are *not* well established, and may not exist at all. Under the facts alleged in the Complaint, it is appropriate to weigh Plaintiffs' asserted interest: the reciprocal right to care, custody and control of I.B. by Jane Doe, specifically including the right to have a physical examination (framed as a medical examination) conducted by Jane Doe and the expectation of privacy in the familial relationship against the government's interest in investigating reports of child abuse from the School in light of actual marks and a child's verbal reference to physical abuse in the home. The glaring problem with the interests asserted by Plaintiffs, however, is that they have not been recognized under circumstances remotely close to those alleged in the Complaint. First, the right of a parent to direct a child's medical care has arisen in cases involving termination of parental rights or otherwise involving alteration of a child's medical program. *Roska* at 1247; *In re J.P.*, 648 P.2d 1364 (Utah 1982). The undersigned is unaware of such a right being recognized in circumstances where photographs of visible injuries are taken while the child is at school to confirm or dispel allegations of abuse. Further, the Amended Complaint's allegations are insufficient to assert unjustified interference with, and imposition of an undue burden upon, associational rights[21] between I.B. and Jane Doe; in fact, one of Jane Doe's chief

[20] *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1242; 1247 (10th Cir. 2003).
[21] See *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

complaints is that she was not informed of I.B. being photographed until well after the two meetings had taken place.

C. Notwithstanding qualified immunity, the facts alleged fail to state a claim under the Fourth and Fourteenth Amendment.

1. Claim One: Fourth Amendment.

Claim One is attempted under the Fourth Amendment. As discussed above, the Court should view the "search" as an administrative search and apply the balancing test, wherein the privacy interests asserted by Plaintiffs are balanced against the child protection interests asserted by County Defendants, viewed from the perspective of reasonableness. Fact allegations supporting I.B.'s claims involve reports from I.B.'s school of marks and bruises. DHS responded and photographed visible marks on I.B.'s stomach, buttocks, and back on two occasions, ultimately closing their case as unfounded for abuse. The contacts with I.B. are not alleged to have involved examination of genitals or areas warranting involvement of a medical or mental health professional. The inconvenience to I.B. was minimal when weighed against the governmental interest of protecting children from abuse. Specifically, caseworkers, unaccompanied by law enforcement, took photographs of actual visible injury to a child after receiving a report from the school. Caseworkers' ability to do so outside the presence of, and without notice to, the potential abuser, is integral to both completing their investigation and to ensuring that a child is not returned to suffer more abuse following the report. Protecting children is clearly a compelling interest[22] and the photographs were taken in a manner designed to minimize intrusion to I.B.'s privacy

[22] *See Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 128 (1989).

while serving that compelling interest. Plaintiffs fail to state a claim under the balancing test standard.

If a Fourth Amendment analysis based on law enforcement precedent is applied, it should be from the standard of whether the "searches" were based on reasonable suspicion and justified at their inception. Applying the rules from *Terry*, the allegations clearly establish justification and reasonable suspicion: the school reported marks on I.B., and while the child abuse was ultimately unfounded, the child's marks did, in fact, exist. [Doc. 34 ¶¶ 24, 27, 29, 47] Any reasonable officer in the positions of Defendants Albert, Woodard, or Newbill would have reasonable suspicion to inspect for evidence of abuse based on the school's report and the actual, visible injury on the child. Plaintiffs fail to state a claim under the *Terry* standard.

On a similar note, the school's report and injuries visible on actual contact with I.B. support a finding of probable cause to search. While the probable cause standard is difficult to apply to social work investigations, it is clear that, considering the totality of the circumstances available to Defendants Albert, Woodard, and Newbill probable cause existed for them to search for evidence of child abuse on I.B.'s back, stomach, and buttocks. The fact that child abuse was ultimately unfounded in both circumstances should not undermine the probable cause determination. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham v. Connor*, 109 S. Ct. 1865, 1872 (U.S. 1989).

Finally, even if the Court imposes social workers with the requirement of both probable cause and a well established exception to the warrant requirement,[23] Claim One still fails to state a claim. The facts establishing probable cause leave caseworker defendants in a quandary: even with probable cause, they must determine whether "the circumstances or conditions of the child are such that continuing the child's place of residence or in the care and custody of the person responsible for the child's care and custody would present a danger to that child's life or health in the reasonably foreseeable future," in order to decide whether temporary protective custody is necessary. C.R.S. § 19-3-405. The caseworker must either develop the specific type and level of suspicion required by statute or release the child to his or her possible abusers. Under the circumstances alleged, caseworkers faced a type of exigency[24] in protecting I.B. from continued abuse. Plaintiffs have failed to state a claim under the probable cause standard.

2. Claim Three: Fourteenth Amendment

Under the Fourteenth Amendment to the United States Constitution, parents have a protected liberty interest in the care, custody and control of their children but that interest is "a counterpart of the responsibilities they have assumed." *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Lehr v. Robertson,* 463 U.S. 248, 257, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983). This liberty interest is not absolute; States have an interest in protecting children from abuse. *J.B. v. Washington County,* 127 F.3d 919, 927 (10th Cir.1997) (quoting *Maryland v. Craig,* 497 U.S. 836, 855, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)).

[23] As opposed to a warrant or court order.
[24] They may have also been under a requirement to administer emergency aid.

To the extent Plaintiffs have asserted some Fourteenth Amendment interest;[25] it is clearly outweighed by the government's interest in investigating reports of child abuse and protecting children from abuse. This is especially true when the interest asserted is based upon Jane Doe's right to choose whether I.B. is examined, when Jane Doe's live-in boyfriend[26] is suspected of committing the abuse. Put differently, the perpetrator or spouse or girlfriend/boyfriend of the perpetrator has a disincentive, either from self interest or interest of their significant other, to examine a child who was potentially abused. This is the reason caseworkers conduct child investigations based on reports instead of expecting people to self-police potential abuse of their own children. It should also be noted that the facts underlying the Fourteenth Amendment interest attempted in *Roska* involved a significantly greater interference than that alleged here; namely, *Roska*[27] involved removing the child from the home and inadvertently interfering with his prescription medications. The 10th Circuit found that *no* Fourteenth Amendment violation was articulated under those facts. The parental interest asserted here is much less significant than that attempted and denied in *Roska*. Plaintiffs have failed to state a claim under the Fourteenth Amendment.

D. Claim Five: Claim Five for Municipal Liability against Defendant BoCC.

Claim Five seeks liability against Defendant BoCC for unconstitutional customs, practices, or decisions leading to the Fourth and Fourteenth Amendment issues complained of in Claims One and Three.

[25] *See* Section III. (B), above.
[26] Doc. 34, ¶ 16.
[27] *Roska* 328 F. 3d at 1247.

1. To the extent Defendant BoCC sets policy, custom, or practice for County DHS, it does so as an arm of the State and is immune from suit pursuant to the Eleventh Amendment.

Plaintiffs have the burden of proving by a preponderance of the evidence that the court has subject matter jurisdiction. *See Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003). Plaintiffs sue Defendant BoCC as policy maker for County DHS, and seek monetary damages. [Doc. 34 ¶¶ 210-220; Prayer for Relief] The Eleventh Amendment bars federal courts from granting monetary damages or injunctive relief against state officials acting in their official capacities on the basis of state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S 89, 106 (1984). A County Department of Human Services (DHS) is an "arm of the state" for purposes of Eleventh Amendment immunity. *Crone v. Dep't of Human Servs.,* 2012 U.S. Dist. LEXIS 164025, 26-27 (D. Colo. 2012). *See also Schwartz v. Jefferson County Department of Human Services*, 2011 U.S. Dist. LEXIS 52068 (D. Colo. 2011); *Schwartz v. Booker,* 702 F.3d 573 (10th Cir. 2012). Further, individual DHS employees and supervisors sued in their official capacity are immune from liability under the Eleventh Amendment. *Id.*

To the extent Plaintiffs allege that the BoCC functions as supervisor or policymaker for County DHS, Eleventh Amendment Immunity insulates the BoCC from suit. BoCC Defendant submits that the Court lacks subject matter jurisdiction over the BoCC, considering such allegations. Therefore Claim Five should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

2. Notwithstanding Eleventh Amendment Immunity, Plaintiffs fail to state a claim based on municipal liability.

a. Law on municipal liability.

Under §1983, a local government or municipality may be held liable for an official policy or custom which gives rise to a violation of an individual's constitutional rights, but it cannot be held liable under the theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). *See also Dobbs* v. *Richardson*, 614 F.3d 1185, 1202 (10th Cir.2010) (there must be a direct causal link between adoption or implementation of a policy and the deprivation of federally protected rights). Rather, in order to establish municipal liability, the plaintiff must establish (1) the existence of a municipal policy or custom; and (2) a "direct causal link between the policy or custom and the injury alleged." *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006).(citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). As to the second requirement, a plaintiff must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Board of County Commissioners v. Brown*, 520 U.S. 397, 399 (1997)(emphasis in original). *See also*, *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1215 (10th Cir. 2003) (citing *Monell*, 436 U.S. at 691).

The existence of an unconstitutional policy, custom, or practice may be established in several ways, including identification of:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well

> settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by policymakers of the decisions of subordinates to whom authority was delegated subject to these policymakers' review and approval; and (5) failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3030 (2011) (internal quotations and citations omitted).

The first aspect of the affirmative link is the supervisor's own conduct; that he or she "actively participated or acquiesced in the constitutional violation." *Holland v. Harrington,* 268 F.3d 1179,1187 (10th Cir. 2001). This evidence may take various forms: "the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Serna v. Colorado Dep't of Corr.,* 455 F.3d 1146, 1152 (10th Cir. 2006)(citing *Holland,* 268 F.3d at 1187). In the end, however, supervisory liability "must be based upon active unconstitutional behavior" and "more than a mere right to control employees." *Id.* at 1153.

b. Plaintiff has failed to state a *Monell* claim.

Claim Five suffers a similar deficiency as Doc. 34 has not alleged any constitutional violation on which to base entity liability. For this reason alone, the claim should be dismissed. Claim Five also apparently relies upon allegations regarding evidence retention policies,[28] emotional responses to "strip searches,"[29] lack of

[28] Doc. 34, ¶ 215.
[29] Doc. 34 ¶¶ 71-79.

safeguards related to age, gender, or sexual orientation, accessibility of photographs,[30] and exposure to potential "severe danger."[31] To the extent these allegations are asserted as bases for an entity liability claim, similar to Claims Two and Four, Plaintiffs do not allege any actual constitutional violation. This is insufficient to state a claim. *See Suasnavas at* 657; *Patrick* at *2; *5 Borough Pawn, LLC at* 287. Claim Five should be dismissed for failure to state a claim as it cites no basis in any constitutional violation.

Even assuming allegations of some constitutional violation, Claim Five fails to state a claim. While Plaintiffs reference some of the "magic words" used in *Bryson*, they do so in a conclusory fashion, based upon the BoCC's *failure* to act, as opposed to actual actions taken. These conclusions are insufficient to state a claim. *See*, generally, Section F, below. In an attempt to create a pattern of unconstitutional policies, Plaintiffs allege that Defendant BoCC was aware of a "clear and persistent pattern of illegal strip searches of children being performed in accordance with local unwritten policy and custom in El Paso County by El Paso County DHS agents each year," based upon *Doe v. McAfee.*[32] While it would be fair to say that County Defendants are aware of Plaintiffs' theories, under which they were unable to state a claim, the same cannot be said for Defendant BoCC being on notice of an unconstitutional policy, custom, or practice. Plaintiffs have failed to state a *Monell* claim.

E. Claims against Defendant Bengtsson in his Official Capacity.

Claims Two and Four attempt claims against Defendant Bengtsson in his official capacity for "prospective relief." To the extent such claims are brought for anything other than an injunction, Defendant Bengtsson is immune pursuant to the Eleventh

[30] Doc. 34, ¶ 84.
[31] Doc. 34, ¶ 205.
[32] Doc. 34, ¶ 216.

Amendment. See Section III(D), above. To the extent Plaintiffs seek relief in the form of an injunction, they fail to state a claim.

The Court can assert jurisdiction against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996). The appropriate mechanism to claim an injunction is Fed. R. Civ. P. 65. Doc. 34, however, does not provide the Court with reasonable detail as to the type of injunction sought, the security Plaintiffs intend to provide, or the act or acts to be restrained or required. Further, Plaintiffs fail to plead irreparable injury and unavailability of alternative legal remedies. *Weinberger v. Romero–Barceló,* 456 U.S. 305, 312 (1982); *Bolivar v. Dir. of FBI*, 846 F. Supp. 163, 167-68 (D.P.R. 1994) *aff'd sub nom. Bolivar v. Dir. of F.B.I.*, 45 F.3d 423 (1st Cir. 1995). To the extent Plaintiffs seek a preliminary injunction, Doc. 34 is an unverified pleading and its allegations cannot be considered in support of such a request. *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 891 (N.D. Ill. 1975) *aff'd,* 540 F.2d 1062 (7th Cir. 1976) *on reh'g*, 548 F.2d 715 (7th Cir. 1977).

Even to the extent pleading deficiencies are overlooked, Plaintiffs have failed to allege constitutional violations. Plaintiffs have failed to state a claim for "prospective relief."

F. Claims Two, Four, and Five: Entity Claims.

1. Law of Supervisory Liability.

Claims Two and Four seek liability against Defendants Rhodus and Bengtsson in their individual capacities, for failure to train or supervise, based on Fourth and Fourteenth Amendment theories attempted in Claims One and Three.

For a failure to train § 1983 claim to be successful, "[t]he inadequacy of … training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). A municipality can be liable where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390, There are limited circumstances in which an allegation of a 'failure to train' can be the basis for [municipal] liability under § 1983." *Id.* at 387.

It is not sufficient that a plaintiff simply assert that an existing training program for employees represents a "policy" for which a municipality is responsible. *Id.* at 389. Under this deliberate indifference standard, that a particular officer is poorly trained; that an otherwise sound training program was negligently administered in a particular case; or that an incident could have been avoided if an officer had more or better training, does not suffice to impose liability on the municipality. *Id.* at 390-91. For liability to attach in a "failure to train" setting, the identified deficiency in a municipality's training program must be closely related to the ultimate injury; *i.e.* a plaintiff must establish that a deficiency in training actually caused the individual officer's deliberate indifference. *Id.*

Next, for a failure to supervise municipal liability § 1983 claim to be successful, a defendant must have a duty to supervise. *See Meade v. Grubbs,* 841 F.2d 1512, 1528 (10th Cir.1988). Further, "plaintiff must show an "affirmative link between the supervisor and the constitutional violation," by demonstrating (1) the supervisor's personal involvement, (2) causation, and (3) a culpable state of mind. *Schneider v. City of Grand*

Junction Police Dep't, 717 F.3d 760, 767 (10th Cir.2013) *Lemmons v. Clymer,* No. 14-5135, 2015 WL 1518072, at *5 (10th Cir. Apr. 6, 2015). These factors can be considered in any order. *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 768 (10th Cir. 2013). Conclusory allegations are not sufficient. *Lemmons* 2015 WL 1518072, at *5.

To establish the culpable state of mind of the supervisor – the state of mind for § 1983 is "predicated on the supervisor's deliberate indifference" and not "mere negligence." *Serna v. Colorado Dep't of Corr.,* 455 F.3d 1146, 1154 (10th Cir. 2006). Deliberate indifference requires that the official "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Verdecia v. Adams,* 327 F.3d 1171, 1175 (10th Cir.2003); *see also Self v. Crum,* 439 F.3d 1227, 1231 (10th Cir.2006).

2. Non-claimed potential violations.

Plaintiffs have failed to state a claim against Defendants Rhodus and Bengtsson because they have not alleged an actual constitutional violation. To the extent Plaintiffs rely on allegations of violations that *could, but have not* resulted in constitutional violations, namely those related to photograph storage and safeguarding[33] and those related to "possible" sexual abuse,[34] such allegations cannot form a basis for a failure to train or supervise claim. Plaintiffs merely allege violations that *might* happen, but do not allege any actual constitutional violation. This is insufficient to support any of Plaintiffs' claims. *See Suasnavas v. Stover*, 196 Fed. Appx. 647, 657 (10th Cir. 2006); *Patrick v.*

[33] Doc. 34, ¶¶ 69, 77, 79, 86, 116-124, 126, 127, 133, 156, 163, 164, 171, 178, 194, 208, 215.
[34] Doc. 34, ¶¶ 68, 112, 169, 172, 218.

U.S., 99 F.3d 1139 at *2 (6th Cir. 1996); *5 Borough Pawn, LLC v. City of New York*, 640 F.Supp. 2d 268, 287 (S.D.N.Y. 2009).

3. Failure to train.

To the extent Plaintiffs attempt a claim for failure to train, Plaintiffs merely stack conclusion upon conclusion by labeling County DHS' training program "inadequate," then alleging that inadequate training and supervision led to the violations alleged.[35] Plaintiffs have failed to allege facts supporting a deficiency in training that actually caused Defendants Woodard and Newbill to violate Plaintiffs' rights under either the Fourth or the Fourteenth Amendment. No "need" for training has been alleged and, therefore, County Defendants cannot be said to have been deliberately indifferent to such a need. *City of Canton* 489 U.S. at 387. To the extent claims for failure to train and failure to supervise are considered as a single claim, such claim is addressed in Section III. (E)(4), below.

4. Failure to Supervise.

While Plaintiffs reference some of the elements from *Lemmons*, they do so in a conclusory and inconsistent fashion. First, in alleging Defendants Rhodus' and Bengtsson's personal involvement, Plaintiffs allege Defendants' knowledge of "clearly established law" and the allegations contained in *Doe v. McAfee et al,* 13-CV-01287*,* a case in which *all* of Plaintiff's search-based claims were dismissed pursuant to Fed. R. Civ. P. 12(b). *See Doe v. McAfee*, Doc. 91; *see also* Doc. 34, ¶¶ 135, 136, 165, 173, 174, 197, 203, 204. As discussed in Sections III(A) and (B), above, the law regarding applicability of the Fourth and Fourteenth Amendment to social workers under facts such as those alleged is anything but "clearly established." An attorney's inability to

[35] Doc. 34, ¶ 169, 174, 175, 176, 197, 201, 204, 206.

state a claim based on legal similar theories only underscores that the rights asserted are not clearly established, if they exist under these facts at all. Accordingly, Defendants Rhodus and Bengtsson cannot be said to have been on personal notice of a likely or even a possible constitutional violation. Doc. 34 suffers from similar deficiencies in applying the elements of causation and culpable state of mind on the part of Defendants Rhodus and Bengtsson in that their entire theory relies upon failed claims from a lawsuit and a baseless assertion of "clearly established law." Accordingly, Plaintiffs fail to state a claim for failure to train or supervise.

IV. CONCLUSION

WHEREFORE, it is respectfully requested that this Honorable Court dismiss County Defendants with prejudice, and enter such other and just relief to include costs and reasonable attorney's fees for defending this action.

Respectfully submitted this 2nd day of September 2015.

By: s/ Diana Kay May
Senior Assistant County Attorney
Office of the County Attorney
of El Paso County, Colorado
200 S. Cascade Ave.
Colorado Springs, CO 80903
(719) 520-6485
Fax: (719) 520-6487
Email: dianamay@elpasoco.com

By: s/ Kenneth Hodges
Senior Assistant County Attorney
Office of the County Attorney
of El Paso County, Colorado
200 S. Cascade Ave.
Colorado Springs, CO 80903
(719) 520-6485
Fax: (719) 520-6487
Email: kennethhodges@elpasoco.com

Attorneys for Defendants Woodard, Newbill, Rhodus, Bengtsson, and BoCC.

CERTIFICATE OF SERVICE

I hereby certify that on September 2nd, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Theresa Lynn Sidebotham
Jessica Ross
Autumn Ascano
Telios Law PLLC
P.O. Box 3488
Monument, CO 80132
E-mail: tls@telioslaw.com

Elizabeth J. McCarthy,
Assistant Attorney General
Tanya Wheeler,
First Assistant Attorney General
Human Services Unit
State services Section
1300 Broadway, 6th Floor
Denver, CO 80203

By: s/ Edi Anderson