IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-CV-1165-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 and as an agent, employee, and representative of El Paso County,

CHRISTINA NEWBILL, Supervisor, El Paso County Department of Human Services caseworker, individually and as an agent, employee, and representative of El Paso County,

SHIRLEY RHODUS, Children, Youth and Family Services Director, El Paso County Department of Human Services caseworker, individually and as an agent, employee, and representative of El Paso County,

RICHARD BENGTSSON, Executive Director, El Paso County Department of Human Services caseworker, individually and as an agent, employee, and representative of El Paso County,

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 Glenn, Dennis Hisey, Amy Lathen, and Peggy Littleton, in their official capacity.

Defendants.

DEFENDANT BICHA'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT

DEFENDANT Reggie Bicha, Executive Director of the Colorado Department of Human Services (Defendant Bicha), by and through undersigned counsel, hereby moves this Honorable Court for an order dismissing Defendant Bicha from the above-referenced matter, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

I. Introduction

On August 20, 2015, Plaintiffs I.B. (I.B.) and Jane Doe (Jane Doe) (collectively "Plaintiffs") filed their First Amended Complaint (Amended Complaint) [ECF No. 34] against Defendants April Woodard, Christina Newbill, Shirley Rhodus, Richard Bengtsson, the El Paso County Board of County Commissioners (collectively the "County Defendants") and Defendant Bicha. Plaintiffs allege that on at least two occasions, a caseworker from the El Paso County Department of Human Services (DHS[1]) "strip-searched" and/or photographed private areas of I.B., a minor child, without the consent of her mother, Jane Doe. ECF No. 34 at ¶ 1. Additionally, according to Plaintiffs, the "strip-searches" were conducted as a result "of a statewide DHS policy" and a local "El Paso County unwritten, but well-established, policy and custom." ECF No. 34 at ¶ 2.

As a result of these alleged "strip searches," Plaintiffs claim to have suffered harm for which Defendant Bicha should be held liable, including: 1) violation of I.B.'s rights under the Fourth Amendment to be free from unreasonable searches and to personal privacy; and 2) violation of Jane Doe and I.B.'s Fourteenth

[1] Plaintiffs define the term "DHS" as referring to the El Paso County Department of Human Services. For purposes of this Motion to Dismiss, Defendant Bicha has construed the term in the Amended Complaint as defined by Plaintiffs.

Amendment liberty interests and rights to familial privacy[2]. ECF No. 34 ¶¶ 25, 31. Plaintiffs seek prospective relief against Defendant Bicha on both claims. ECF No. 34 ¶¶ 179, 209. Specifically, in their Prayer for Relief, Plaintiffs request injunctive relief against Defendant Bicha that: 1) DHS may not apply its unconstitutional policies to I.B., and any searches or seizures of I.B. must be performed in compliance with the Fourth Amendment; 2) all photographs of I.B. in the possession of DHS must be destroyed or securely stored with limited access; and 3) El Paso County DHS must institute policies and training that will protect I.B.'s constitutional rights and her privacy. ECF No. 34 ¶ 36.

Plaintiffs have failed to state a claim for relief against Defendant Bicha for a violation of either their Fourth or Fourteenth Amendment rights. Additionally, Plaintiffs' claims for prospective relief are barred by Eleventh Amendment immunity applicable to states and their agencies. As such, Defendant Bicha respectfully requests that Plaintiffs' Second and Fourth Claims for Relief against him be dismissed.

II. Background

Plaintiffs' general allegations consist of one-hundred and twenty-six statements in support of their five claims of relief. Relevant to the claims against Defendant Bicha, Plaintiffs allege that the Colorado Department of Human Services (CDHS) has instituted and approved unconstitutional policies and customs. ECF No. 34 ¶ 88. CDHS stated, "[t]here is no limitation on the taking of the photographs

[2] The Amended Complaint asserts five claims. Only two are asserted against Defendant Bicha; this motion to dismiss is limited to those claims.

because the purpose is to document injuries, regardless of where the injuries may be." ECF No. 34 ¶ 89. "Workers are trained to collect photographic evidence of physical abuse whenever it is encountered whether it is in 'private areas' or areas not covered by clothing." *Id.* CDHS has not developed specific oversight procedures regarding obtaining photographic evidence of abuse. *Id.*

As of November 2014, CDHS had a written "policy" entitled "Practice Guidance: the Use of Photography During the Course of a Child Abuse/Neglect Assessment" (Practice Guidance). ECF No. 34 ¶ 90. Pursuant to the Practice Guidance, CDHS takes the position that if a caseworker has a BSW, MSW, or DSW, Colorado Revised Statute § 19-3-306 further clarifies their role by allowing a social worker "who has in front of them a child believed to be abused or neglected…to take color photographs." ECF No. 34 ¶ 91. The Practice Guidance does not mention a child's or parent's rights. ECF No. 34 ¶ 91. The Practice Guidance states that parental consent for photographs is not required. ECF No. 34 ¶ 92. The Practice Guidance notes that if a child welfare worker is faced with a situation where the area of the child that needs to be photographed is normally clothed, the worker should "consult local policy regarding the use of photograph." ECF No. 34 ¶ 93.

To date, no local written policies or guidelines about "strip searching" and photographing the portion of the body normally clothed have been developed in El Paso County. ECF No. 34 ¶ 94. All policies, customs, and practices developed as local policy are either in accordance with, or specifically endorsed by the Practice Guidance. *Id.* DHS personnel rely on statute, C.R.S. § 19-3-306, which provides

that any social worker who has before him a child he reasonably believes has been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child. ECF No. 34 ¶ 100. Defendant Bicha has provided no constitutional limitation on how DHS interprets the statute. ECF No. 34 ¶ 101. Defendant Bicha is responsible for CDHS policies. ECF No. 34 ¶ 128.

III. Legal Standard

In reviewing a Rule 12(b)(6) motion to dismiss, the court assumes as true all well-pleaded facts, and construes any reasonable inferences from these facts in favor of plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009); *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006). The court will grant a Rule 12(b)(6) motion to dismiss only when the factual allegations fail to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the factual allegations need not be detailed, they must contain facts sufficient to state a claim that is plausible, rather than merely conceivable. *In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d 1214, 1216 (D. Kan. 2008). Although the court considers all well-pleaded facts to be true and construes them in plaintiff's favor, the court need not accept conclusory allegations. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The court's "function in ruling on motion to dismiss for failure to state claim is not to weigh potential evidence that parties might present at trial, but to assess whether the complaint alone is legally sufficient to state claim for which relief may be granted." Swoboda v. Dubach, 992 F.2d 286 (10th Cir. 1993).

IV. Plaintiffs Have Failed to State A Claim Against Defendant Bicha.

The facts stated above form the basis for Plaintiffs' claims against Defendant Bicha. The pleading standard under Rule 8(a)(2) is relatively low—a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P 8(a)(2). However, a complaint may be dismissed pursuant to Rule 12(b)(6) if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To achieve this, "factual allegations must be enough to raise a right to relief above the speculative level." *Id*. at 555. Ultimately, a plaintiff must provide the grounds of his or her "entitlement to relief" beyond mere labels and conclusions. *Id*.

Furthermore, to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must "nudge [his or her] claims across the line from conceivable to plausible." *Id*. at 570. In assessing plausibility, there must be a showing that the plaintiff has "pled facts which allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "The mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). Even if a plaintiff has pled some facts "consistent with" a finding of liability, the complaint cannot survive a motion to dismiss unless there is "reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims" against *these* defendants. *Schneider*, 493 F.3d at 1177; *Ashcroft*, 556 U.S. at 678.

Plaintiffs' recitation of facts fails to meet the standard for surviving a Rule 12(b)(6) motion to dismiss. The Amended Complaint is fraught with conclusory statements and unsupported legal conclusions. Because Plaintiffs have failed to state a claim against Defendant Bicha upon which the relief sought may be granted, Claims Two and Four against him should be dismissed.

a. Plaintiffs fail to state a claim against Defendant Bicha for violation of I.B.'s Fourth Amendment right to be free from unreasonable searches and to personal privacy.

Plaintiffs' first claim against Defendant Bicha (Claim Two) is based on I.B.'s Fourth Amendment right to be free from unreasonable searches and to personal privacy. This claim arises from "the unconstitutional search of I.B." and the "statewide policy, and local policy and custom encourage[ing] strip searching children whenever injuries are alleged." ECF No. 34 ¶¶ 161, 162. Plaintiffs assert that "the statewide policy…[was a direct cause] of the deprivation of I.B.'s constitutional rights," and is "causing a continuing violation of I.B.'s constitutional rights in that she may again be subjected to an unreasonable search." ECF No. 34 ¶¶ 177, 178.

Pursuant to the Fourth Amendment, people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend IV. As interpreted by the United States Supreme Court, the "touchstone of the Fourth Amendment is reasonableness" and "the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to

which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Furthermore, a demand, threat, or an attempt to coerce cannot form the basis for valid claim if an actual constitutional violation does not result. *See Jackson v. City of Overland Park, Kan.*, 2012 U.S. Dist. LEXIS 51085, 12-13 (D. Kan. 2012); *King v. Olmstead Cty.*, 117 F.3d 1065, 1067 (8th Cir., 1997) (citing *Bishop v. Tice,* 662 F.2d 349, 354 (8th Cir. 1980)(a threat constitutes an actionable constitutional violation only when the threat exerts coercive pressure on the plaintiff and the plaintiff suffers the deprivation of a constitutional right).

Plaintiffs have not alleged, nor can they in good faith, that Defendant Bicha was personally involved in any stage of the DHS child abuse investigations that led to "searches" of I.B. He was not present at Oakwood Elementary School during the caseworkers' November 2013 or December 2014 investigative searches. He was not part of any conversations between the DHS caseworker and her supervisors regarding whether the caseworker could conduct the searches in question. He was not involved in any training or supervision of the DHS caseworkers who were involved in the investigatory searches of I.B. Thus, Plaintiffs' have failed to state any facts that support the conclusion Defendant Bicha was involved in an unreasonable search of I.B. in violation of her Fourth Amendment rights.

Even presuming that Defendant Bicha's role as Executive Director of CDHS somehow imputes his involvement in a search of I.B., Plaintiffs' claim against him still cannot stand. Defendant Bicha does not dispute that the counties administer

child welfare services on behalf of the state. In furtherance of the relationship between the two entities, and in order to create legal parameters around the counties' administration of child welfare services, Colorado statute requires CDHS to promulgate and adopt rules to establish programs of child welfare services supervised by the state department and administered by the county departments. C.R.S. § 26-5-102(1)(a) (2014).

Those rules are found at 12 C.C.R. 2509-1 through -7. CDHS rules are the formal "policies" from the state to the counties that set forth requirements for conducting abuse and neglect investigations. The only reference to photographing a child during the course of a child abuse investigation in CDHS' rules is found at 12 C.C.R. 2509-2 § 7.104.14.D ("[a]ny specific evidence gathered [during a child abuse or neglect assessment], such as electronic media, photographs or videos shall be filed in the case record and referenced in the state automated case management system."). There are no references to "strip searching" children during an investigation.

Additionally, the Practice Guidance is not a "statewide policy" as Plaintiffs suggest. It is exactly what it purports to be: practice guidance to advise child welfare workers on the use of photography during the course of a child abuse and/or neglect assessment, which repeatedly directs caseworkers to state statutes, local policy and supervisor instruction for direction regarding the use of photography in child abuse and/or neglect assessments, including photography of areas that are usually clothed.

Because CDHS' rules do not direct caseworkers to "strip search" or photograph unclothed children, Plaintiffs' allegation that there is a statewide policy which caused or is causing violation of I.B.'s constitutional rights is unsupported. Even assuming *arguendo*, that the Practice Guidance is a "statewide policy," it does not contain any requirement or directive from the state to the counties regarding photographing children, clothed or unclothed, during child abuse and/or neglect assessments. At best, then, Plaintiff may attempt to construe the Practice Guidance as a demand by CDHS and Defendant Bicha for the use of photography during child abuse and/or neglect assessments.

Regardless, the codification of a social worker's ability to photograph children whom they suspect have been abused, and the absence of liability for doing so, demonstrates a legitimate government interest in investigating allegations of child abuse and/or neglect. *See* C.R.S. §§ 19-3-306 and 309 (2014). For these reasons, Plaintiffs' Amended Complaint does not meet the threshold for a Fourth Amendment violation of I.B.'s right to be free from unreasonable searches and to personal privacy. As such, Plaintiffs' Claim Two against Defendant Bicha should be dismissed.

b. Plaintiffs fail to state a claim against Defendant Bicha for violation of Jane Doe and I.B.'s Fourteenth Amendment liberty interests and rights to familial privacy.

Plaintiffs' Fourteenth Amendment claim (Claim Four) against Defendant Bicha for violation of Jane Doe and I.B.'s liberty interests and rights to familial privacy is based on the allegations that the Practice Guide "encourages strip

searching children whenever injuries are alleged, viewing and photographing areas of their bodies normally covered by clothing, without consent by parents or a court order, and often even without notification." ECF No. 34 ¶ 194. According to Plaintiffs, the Practice Guide caused or is causing a violation of "Plaintiffs' constitutional rights that I.B. may be again searched without Jane Doe's consent." ECF No. 34 ¶ 208.

Pursuant to the Fourteenth Amendment of the United States Constitution, parents have a protected liberty interest in the care, custody and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). However, a parent's interest is not absolute; in considering a Fourteenth Amendment claim, "a determination that a party's constitutional rights have been violated requires 'a balancing [of] liberty interests against the relevant state interests.'" *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993)(quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). The court must weigh: 1) the state's interests in investigating reports of child abuse; and 2) a plaintiff's interests in the familial rights of association. *Griffin*, 983 F.2d 1544, 1547 (10th Cir. 1993); *see also Hodgson v. Minnesota et al.,* 497 U.S. 417, 446 (1990).

The state's "generalized interests in investigating cases of alleged child abuse" are well established. *See Griffin*, 983 F.2d at 1548 (citing *State v. Jordan*, 665 P.2d 1280, 1285 (Utah); *Maryland v. Craig*, 497 U.S. 836 (1990) (The state has a "traditional and 'transcendent interest'" in protecting children from abuse and from situations where abuse might occur) (quoting *Ginsberg v. New York*, 390 U.S.

629, 640 (1968)); *accord New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). "Investigating these crimes deserves no less attention." *Id.* Additionally, when evaluating a parent and the states competing interests, not every statement or act that *results* in an interference with familial rights is actionable. Griffin, 983 F.2d at 1548. The conduct or statement must be directed "at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship." *Id.*

The Colorado General Assembly has declared the safety and protection of children to be matters of statewide concern. C.R.S. § 19-3-100.5(1) (2014). CDHS is statutorily obligated to administer or oversee child welfare services, in furtherance of this legitimate state interest. C.R.S. § 26-5-102(1)(a) (2014). This includes promulgation of rules that provide direction counties in investigating allegations of child abuse and/or neglect. *Id.*

Here, neither CDHS nor Defendant Bicha was involved in the specific investigation of alleged abuse and/or neglect of I.B., nor did they direct DHS to perform the assessment of I.B. in a particular manner. CDHS was asked to provide guidance to county child welfare workers on the use of photography during the course of a child abuse and/or neglect assessment, but that Practice Guidance was also created in furtherance of the state's compelling interest in conducting child abuse and/or neglect investigations. Any impact on Plaintiffs' interest in familial privacy caused by implementation of the Practice Guidance does not outweigh

Defendant Bicha's interest as Executive Director of CDHS in investigations of child abuse and/or neglect. Furthermore, the Practice Guidance cannot be reasonably be inferred to have been intended by Defendant Bicha to be directed at I.B. and Jane Doe's familial relationship with knowledge that the Practice Guidance would adversely affect that relationship. As stated above, CDHS' rules concerning the conduct of child abuse and/or neglect investigations are found at 12 C.C.R. 2509-1 through -7. Nowhere do those rules dictate photographing children nor "strip searching" children during a child abuse and/or neglect investigation. Defendant Bicha's expectation is that county caseworkers conduct child abuse and/or neglect investigations in accordance with those rules, and with Colorado statutes, neither of which are at issue here.

Because Plaintiffs have not alleged any set of facts demonstrating that their liberty interest or interest in familial privacy outweighs Defendant Bicha's interest in the state conducting child abuse and/or neglect investigations, Claim Four must be dismissed as to Defendant Bicha.

V. Subject Matter Jurisdiction Against Defendant Bicha is Lacking.

Plaintiffs filed this action against Reggie Bicha, Executive Director of the Colorado Department of Human Services, in his official capacity, for prospective relief. The claims against Defendant Bicha must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), as this Court lacks subject matter jurisdiction. The determination of subject matter jurisdiction is a threshold question of law. *Madsen v. U.S. ex rel. U.S. Army Corp of Engineers*, 841 F.2d 1011, 1012 (10th Cir. 1987). "[T]he party

invoking federal jurisdiction bears the burden of proof." *Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999). Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter."

States are protected by Eleventh Amendment immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Meade v. Grubbs*, 841 F.2d 1512, 1525-26 (10th Cir. 1988). "It is well established that absent an unmistakable waiver by the state of its Eleventh Amendment immunity, or an unmistakable abrogation of such immunity by Congress, the amendment provides absolute immunity from suit in federal courts for states and their agencies." *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 588 (10th Cir. 1994), *overruled on other grounds by Ellis v. University of Kansas Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998). Here, the State of Colorado has not waived its Eleventh Amendment immunity. *Griess v. Colorado*, 841 F.2d 1042, 1044-45 (10th Cir. 1988). "If the Eleventh Amendment applies, it confers total immunity from suit, not merely a defense to liability." *Ambus v. Granite Board of Education*, 995 F.2d 992, 994 (10th Cir. 1993).

I.B. is suing Defendant Bicha in his official capacity[3]; therefore, I.B. is in reality attempting to impose liability on the State of Colorado. *See Meade v. Grubbs*, 841 F.2d 1512, 1529 (10th Cir. 1988). I.B. names, "Reggie Bicha, is a natural person, the Executive Director of the Colorado DHS, and is sued in his official capacity, for prospective relief only." ECF No 34 ¶ 13. A suit against a state official

[3] Plaintiffs do not seek damages against Defendant Bicha, nor do they sue him in his individual capacity. Therefore, Defendant Bicha does not assert qualified immunity at this time. *See Beedle v. Wilson*, 422 F.3d 1059, 1069 (10th Cir. 2005) (Qualified immunity is available only in suits against officials sued in their individual capacity).

in his or her official capacity is treated as a suit against the State. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Defendant Bicha may also assert Eleventh Amendment immunity as an "arm" of the State in that he assumes the identity of CDHS. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). Official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 56 (1978).

Plaintiffs do not seek monetary relief from Defendant Bicha; therefore, the only applicable exemption to Eleventh Amendment immunity in this case is that referred to as the *Ex Parte Young* exception. The exception permits "suits against state officials seeking to enjoin alleged ongoing violations of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Ex Parte Young*, 209 U.S. 123 (1908). In determining whether the *Ex Parte Young* exception applies, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1155 (10th Cir. 2011).

The exception may not be used to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past. *Puerto Rico Aqueduct v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Nor is a hypothetical that the plaintiff may in the future be subject to violations sufficient. *See Starkey ex rel Starkey v. Boulder County Soc. Servs.*, 2006 U.S. Dist. LEXIS 84768 (D. Colo. Nov. 21, 2006) (finding that a conclusory assertion that defendants will act in the future to violate plaintiffs

rights "overly broad, speculative, and is not narrowly tailored to end an alleged violation of federal law"); *See Rinehart v. Smart*, 2006 U.S. Dist. LEXIS 35764 (W.D. Okla. May 25, 2006) (dismissing plaintiffs' request to enjoin the defendant social workers "from violating the constitutional rights of plaintiffs and other Oklahoma parents in the future . . . [as s]uch a request is not narrowly tailored to end an alleged violation of federal law"). A claim will be "deemed moot unless a proper judicial resolution settles some dispute which affects the behavior of the defendant toward the plaintiff." *McAlpine v. Thompson*, 187 F.3d 1213, 1216 (10th Cir. 1999).

Here, there is no current behavior to address; there is no ongoing violation of federal law. Plaintiffs allege, "[o]n at least two occasions, a caseworker from the El Paso County Department of Human Services (DHS) strip searched and/or photographed private areas of I.B's person …" ECF No. 34 ¶ 1. Plaintiffs brought this action "[a]s a result of one search in particular …" ECF No. 34 ¶ 3. Plaintiffs allege,"[f]rom 2012 through 2014, DHS investigated I.B.'s home around half a dozen times …" ECF No. 34 ¶ 15. In fact, Plaintiffs' last alleged contact with El Paso County DHS was on January 29, 2015. *See* ECF No. 34 ¶ 61. No ongoing violation of federal law is alleged. *See Root v. Owens*, 2005 U.S. Dist. LEXIS 47429 (D. Colo. Sept. 20, 2005) (holding no ongoing violation where plaintiff was no longer incarcerated at the prison); *See Faircloth v. Schwartz***,** 2014 U.S. Dist. LEXIS 126384 (D. Colo. July 24, 2014) (holding no ongoing violation where plaintiff did not

allege that he continued to be held in segregation, or that he continues to be denied access to the courts).

Plaintiff I.B. does not allege that Defendant Bicha continues to violate her rights. I.B. alleges, "she may again be subjected to an unreasonable search…" (ECF No. 34 ¶ 178), and "I.B. may again be searched without Jane Doe's consent." These claims are hypothetical and speculative. Therefore, because I.B.'s claims all involve past incidents and do not allege ongoing violations of federal law, she does not seek prospective relief here.

A prospective injunction instructing state officials to comply with the law, without something more, serves no useful purpose beyond the law itself, which such officials are already bound to obey. *Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1235 (10th Cir. 2010). That is exactly the relief Plaintiffs seek from Defendant Bicha; therefore, Claims Two and Four against Defendant Bicha must be dismissed under F.R.C.P. 12(b)(1).

VI. Conclusion

Wherefore, Defendant Bicha requests that this Honorable Court dismiss all claims against him with prejudice, and enter such other and just relief to include costs and reasonable attorney's fees for defending this action.

Respectfully submitted this 3rd day of September 2015.

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of September, 2015, I electronically filed the **DEFENDANT BICHA'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF which will send notification of such filing to the following e-mail addresses:

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

Defendants.

[PROPOSED] ORDER GRANTING DEFENDANT BICHA'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

This matter comes before the Court on the Defendant Bicha's Motion To Dismiss First Amended Complaint.

IT IS ORDERED that all counts against Defendant Bicha are dismissed with prejudice.

Dated this _____ day of September, 2015.

_____
United States District Court Judge