IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01165-KLM

JANE DOE, and

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

Defendants,

PLAINTIFF'S COMBINED RESPONSE TO COUNTY DEFENDANTS' MOTION TO DISMISS [#40] AND DEFENDANT BICHA'S MOTION TO DISMISS [#41]-

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Plaintiffs Jane Doe and I.B., by and through undersigned counsel, Telios Law PLLC, hereby submit their combined response to County Defendants' Motion to Dismiss [#40] and Defendant Bicha's Motion to Dismiss [#41], and in support of said response, state as follows:

I. FACTUAL BACKGROUND

I.B.'s experience

In late 2014, I.B. was attending her Head Start preschool when a report that I.B. could be the victim of child abuse was filed with El Paso County Department of Human Services (DHS). *First Amended Complaint* [#34] ¶¶ 22, 35, 38. Shortly thereafter, child welfare worker Defendant Woodard strip searched and photographed the four-year-old child, upon the direction of supervisor Defendant Newbill, at I.B.'s school. [#34] ¶¶ 37-39. They did not seek parental consent or even provide notice. [#34] ¶¶ 154-55. No court order authorized the search. [#34] ¶ 154. They were well aware that multiple false reports had been filed on this child and that she had been strip searched before without notice to the parent. *See* [#34] ¶¶ 15, 22-34. Their sole reason for doing a strip search was the report of minor cuts, scrapes and bruises on I.B., of the type found on most small children. [#34] ¶ 36. The report of abuse ultimately was determined to be unfounded. [#34] ¶¶ 47, 64.

After I.B. was strip searched and photographed, Defendant Woodard followed up with Jane Doe, I.B.'s mother, inspecting the family's home and speaking with Jane Doe. [#34] ¶ 42. Defendant Woodard did not mention the strip search or photographs she had taken to Jane Doe. [#34] ¶¶ 42-44.

Sometime later, I.B. told Jane Doe that someone had come to her school and taken off all her clothes and taken pictures of her, though she had told them not to, and she did not like it. [#34] ¶¶ 48, 52. When Jane Doe attempted to learn what had happened, she had difficulty getting an answer from DHS. [#34] ¶ 53. Defendant Woodard originally lied to Jane Doe and told

her no search had been performed. [#34] ¶ 51. A DHS supervisor did not return her phone call regarding the incident. [#34] ¶ 50. Defendant Woodard eventually admitted to Jane Doe she had performed the search, but insisted she was well within her right to do so. [#34] ¶ 54.

Because of these experiences with DHS, I.B. suffered trauma similar to that suffered by children who are sexually abused, and no longer felt safe at school. [#34] ¶ 66.

Defendants' policies are unconstitutional and endanger children.

Plaintiffs alleged the reason Defendant Woodard subjected I.B. to such a search was related to improper guidance and direction from both state and county DHS. *See, e.g.*, [#34] ¶¶ 80-124, 177. The search and photography was completed in accordance with statewide practice guidance from the Colorado Department of Human Services. *See* [#34] ¶¶ 89-93. The state agency approved of and tacitly endorsed and encouraged El Paso County DHS's local unwritten policy and custom of strip searching and photographing children suspected of abuse without parental notice or consent, or a court order. [#34] ¶¶ 95, 88-124.

Defendants speak at length about their "compelling interest" in the safety of children. Yet they do not even acknowledge the ways that uncontrolled strip searches endanger children. Children experience the searches as degrading and even as sexual abuse. [#34] ¶¶ 73-76. Taking photographs—and handling and storing them carelessly—creates risk of children's images being used as child pornography. [#34] ¶¶ 77-79. Improper policies expose children to the possibility of intentional sexual abuse. [#34] ¶ 76. Yet County Defendants' primary argument in its brief is that this Court should create, for the first time ever, a broad administrative search exception that would give caseworkers almost unlimited latitude to search and photograph children's private areas.

Defendants' pointing at each other explains why they should all be in the lawsuit.

The interplay between the Colorado DHS and the El Paso County DHS, and El Paso County's involvement, complicates a straightforward pleading. A careful review of Defendants' motions demonstrates why this was obviously necessary. Although Defendant Bicha does not dispute that the counties administer child welfare services on behalf of the state, he emphasizes that the only statewide policies for which he is responsible are CDHS formal rules. *See Defendant Bicha's Motion to Dismiss First Amended Complaint* [#41] at 8-10 ("Defendant Bicha's Motion"). County Defendants argue that the head of El Paso County DHS is a state official, pointing back to state DHS. *See County Defendants' Motion to Dismiss First Amended Complaint* [#40] at 24-25 ("County Defendants' Motion"). El Paso County, represented by the BOCC, argues that it too is an arm of the state, apparently pointing to state DHS to take responsibility. *See* [#40] at 21 ("Eleventh Amendment Immunity insulates the [BOCC] from suit.").

Though Defendants try to duck responsibility for this compelling interest, each Defendant is properly sued for various reasons. Plaintiffs filed this action under section 1983 for vindication of their Fourth and Fourteenth Amendment rights, to remedy the past violations, continuing injury, and to prevent future harm. *See generally First Amended Compl.* [#34].

County Defendants, comprised of Defendants Woodard, Newbill, Bengtsson (individually and in his official capacity), Rhodus, and the BOCC, filed a motion to dismiss [#40]; Defendant Bicha also filed a motion to dismiss [#41].

II. LEGAL ARGUMENT

Plaintiffs respond and address the following broad topics raised by both Defendants' motions: (A) subject matter jurisdiction and Eleventh Amendment immunity; (B) qualified immunity; (C) Fourth Amendment rights; (D) Fourteenth Amendment rights; (E) municipal liability; (F) supervisory liability; and (G) official capacity liability.

A. Subject Matter Jurisdiction and Eleventh Amendment Immunity

Both County Defendants and Defendant Bicha have asserted that Plaintiffs' Amended Complaint should be dismissed, at least in part, because this Court lacks subject matter jurisdiction to hear the case. While their arguments are different, both motions address Eleventh Amendment immunity, and (liberally construed) Article III Standing—namely whether Plaintiffs' claims seeking prospective relief establish an injury-in-fact or are only for past violations of federal law. These arguments are addressed in turn.

Eleventh Amendment Immunity

The Eleventh Amendment generally bars a suit against a state in federal court without its consent because of concerns over sovereign immunity. *See, e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54-55 (1996). A well-established exception to this general principle is the landmark case of *Ex parte Young*, 209 U.S. 123 (1908), which held that a lawsuit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. *Green v. Mansour*, 474 U.S. 64, 68 (1985). This exception is available, however, only when a plaintiff seeks prospective injunctive relief as a remedy against the state official. *See Green*, 474 U.S. at 68; *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("[A] state official in his or her official

capacity, when sued for injunctive relief, would be a person under § 1983 because 'official capacity actions for prospective relief are not treated as actions against the State.'") (citations omitted). Accordingly, Plaintiffs may proceed against Defendants named in their official capacity for injunctive relief and the Eleventh Amendment does not divest this Court of subject matter jurisdiction.[1]

Defendants acknowledge *Ex parte Young*'s application to this case. They have, however, raised related arguments: (1) because Defendant BOCC is sued for money damages, County Defendants urge it should be dismissed on Eleventh Amendment grounds; and (2) Defendants claim Plaintiffs have failed to adequately demonstrate they are entitled to the prospective relief required by the official capacity doctrine. Both these arguments should be resolved in favor of Plaintiffs.

Eleventh Amendment immunity is not available to Defendant BOCC.

Under black-letter law, a municipality is subject to suit for its responsibility for unconstitutional customs. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010). "Although *Monell* holds that municipalities and other local governmental bodies are persons within the meaning of section 1983, the *Monell* court limited its holding to 'local government units which are not considered part of the State for Eleventh Amendment purposes.'" *Pierce v. Delta Cnty. Dep't. of Soc. Servs.*, 119 F. Supp. 2d 1139, 1147 (D. Colo. 2000) (quoting *Monell*, 436 U.S. at 689 n.55). Some courts in

[1] Although it is not clearly established that County DHS employees are arms of the state when sued in their official capacity, *see Buckley v. Bd. of Cnty. Commr's*, 2005 WL 2359475, *4 (D. Colo. 2005) (treating suit against County DHS employees in official capacity as one against the County), Defendant Bengtsson is sued in his official capacity for prospective relief only, as the representative of El Paso County DHS (to the extent that Defendant Bicha is not).

Colorado have held that a county department of human services (such as El Paso County DHS), though arguably a local government unit, is an "arm of the state" for the purposes of Eleventh Amendment immunity. *See, e.g.*, *id.* at 1148; *Wigger v. McKee*, 809 P.2d 999, 1004 (Colo. App. 1990). But unlike El Paso County DHS, BOCC is subject to a different standard and may appropriately be held liable for its responsibility for the unconstitutional customs that led to the violations alleged in this case. *See Wigger*, 809 P.2d at 1003; *see also Buckley v. Bd. of Cnty. Comm'rs*, 2005 WL 2359475, *5 (D. Colo. 2005) (permitting a section 1983 claim against El Paso County BOCC for inadequate training and supervision by the DHS Director).

County Defendants have not cited a single case that stands for the proposition that a Board of County Commissioners—which is the appropriate way to bring suit against a County—is an arm of the State of Colorado. The weight of authority is contrary to such a proposition. *See, e.g.*, *Robertson v. Morgan Cnty. Bd. of Cnty. Comm'rs*, 166 F.3d 1222 (10th Cir. 1999) (unpublished) ("[A] county is not considered an arm of the state for Eleventh Amendment immunity purposes."); *Wigger*, 809 P.2d at 1003 (holding a county is not an arm of the state for purposes of the Eleventh Amendment in section 1983 action). Indeed, *Wigger*, which is the seminal Colorado case that courts in this circuit have used as persuasive authority for the proposition that a County Department of Human Services is an arm of the state of Colorado, specifically rejected the argument that a board of county commissioners is an arm of the state. *See* 809 P.2d at 1003.

Defendant BOCC's argument also fails when the following factors are considered: "(1) the characterization of the governmental unit under state law; (2) the guidance and control

exercised by the state over the governmental unit; (3) the degree of state funding received; and (4) the governmental unit's ability to issue bonds and levy taxes on its own behalf." *Pierce*, 119 F. Supp. 2d at 1147 (citing *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999)). Colorado state courts do not consider BOCC an arm of the state. *See Wigger*, 809 P.2d at 1003. Plaintiffs' have alleged BOCC performs an oversight function of the county agency and provides more than a quarter of its funding. *First Amended Compl.* [#34] ¶¶ 130-132. BOCC's Advisory Commission reviews DHS programs and funding and monitors the implementation of DHS initiatives. [#34] ¶ 131. BOCC "has the power to sue and be sued, to enter into contracts, and to levy certain taxes." *See Wigger*, 809 P.2d at 1003 (citing § 30-11-101, C.R.S. 1986). Any judgment against BOCC will not come from the state treasury, but from the County's own funds. *See id.* BOCC is not the state's alter ego in this matter, but has separate responsibility for the young citizens of El Paso County and their parents. *See id.*

Plaintiffs have alleged that BOCC should be liable for these constitutional violations because of its knowledge, deliberate indifference, and ability to control the widespread custom of strip searching and photographing children in violation of their constitutional rights, through its ability to recommend policy, and its ability to withhold the funding from the County which it controls. *First Amended Compl.* [#34] ¶¶ 131-134, 210-220. These allegations are classically categorized as municipal liability. Defendants admit that BOCC was aware of Plaintiffs' "theories"; they just argue their actions were not unconstitutional.[2] *See County Defendants'*

[2] Plaintiffs alleged County Defendants were made aware of these policy issues at least by April 2013 in *Doe v. McAfee*, 13-cv-01287-MSK-MJW. County Defendants comment several times that the plaintiffs there were "unable to state a claim." It is worth noting that the court provided no

Motion [#40] at 24. For the reasons stated above, subject matter jurisdiction is not lacking as to the claim against Defendant BOCC.

Eleventh Amendment Immunity Does not Bar Suits Against Defendants Bicha and Bengtsson for Prospective Injunctive Relief.

Defendant Bicha appears to concede that *Ex parte Young* governs this case, but argues that Plaintiffs have not demonstrated that prospective relief is warranted. *Defendant Bicha's Motion* [#41] at 15-16. County Defendants seem to similarly concede that prospective injunctive relief can be sought against Defendant Bengtsson in his official capacity, but contend that Plaintiffs "fail to state a claim," [#40] at 25, mainly because they did not use Fed. R. Civ. P. 65, which County Defendants state is "[t]he appropriate mechanism to claim an injunction," [#40] at 25. County Defendants' argument is without merit, as injunctive relief may be raised in a complaint and was appropriately done here, and should be rejected without more from this Court. Defendant Bicha has essentially raised an issue of Article III standing in his facial attack on the sufficiency of the Complaint's allegations as to subject matter jurisdiction, so Plaintiffs address it now.

Though neither motion raises the issue of standing directly, Plaintiffs agree that the injury-in-fact element of Article III standing is satisfied differently depending on whether they seek prospective or retrospective relief. *See Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004). "To seek prospective relief," Plaintiffs "must be suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Id.*; *see also Dias v. City & Cnty.*

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approval for the constitutionality of Defendants' policies. The defendants in *McAfee* had made a spirited effort to strip search a teenager and failed, and the court did not find a claim for an attempt to coerce a constitutional violation.

of Denver, 567 F.3d 1169, 1177 (10th Cir. 2009) ("Only by alleging a continuing injury can a plaintiff seeking prospective relief establish an injury in fact.") "'[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

But while past wrongs cannot alone form the basis for prospective relief, they "are evidence bearing on whether there is a real and immediate threat of repeated injury." *Tandy*, 380 F.3d at 1283. Plaintiffs' burden of demonstrating injury in fact is different at each stage of the litigation, and "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs' First Amended Complaint [#34] alleges facts that demonstrate an ongoing violation of federal law such that injunctive relief is properly pleaded in two main ways: (1) photographs taken of I.B. during the unconstitutional search, and improperly stored, serve as a continuing violation of her Fourth Amendment right to privacy in her person; and (2) there is more than a hypothetical chance that I.B. will again be subjected to a strip search without Jane Doe's consent or a court order. Each is addressed in turn.

First, Plaintiff I.B. has alleged that her Fourth Amendment right to personal privacy was violated by the unconstitutional strip search and photographing of her unclothed body. *First Amended Compl.* [#34] ¶¶ 142-159, 160-179. The photographs that were taken allegedly remain in existence and are insecurely stored. [#34] ¶¶ 69, 163. The existence of the photographs, and the fact that anyone who works for DHS can access them, is a continuing violation of I.B.'s Fourth

Amendment right to privacy. *See* [#34] ¶ 178. As a remedy for that violation, Plaintiffs requested that this Court enter injunctive relief against Defendants Bengtsson and Bicha in their official capacities to the effect that "all photographs of I.B. in the possession of DHS must be destroyed or securely stored with limited access." [#34] at 36.[3] These facts—which must be taken as true at this stage of the litigation—demonstrate the basis for I.B.'s irreparable harm in that she is suffering a continuing, present injury from DHS's possession for its own use of the photographs that were taken of her unclothed body during the unconstitutional search. This is enough to provide the Court with subject matter jurisdiction over the official-capacity Defendants for I.B.'s Fourth Amendment claim.

Second, Plaintiffs have pleaded facts demonstrating an ongoing violation of federal law in that there is more than a hypothetical chance that I.B. will again be subjected to a strip search without Jane Doe's consent. Again, the allegations are as follows:

- I.B. was a frequent target of DHS involvement: "From 2012 through 2014, DHS investigated I.B.'s home around half a dozen times, based on false reports that I.B. was being abused." *First Amended Compl.* [#34] ¶ 15.
- When Jane Doe "asked the caseworker what she could do to stop the persistent false reporting and the intrusive investigations . . . . [t]he DHS caseworker simply responded, 'The more it happens, the more it will keep happening.'" [#34] ¶ 63.
- Defendant Woodard "did undress and photograph I.B. without asking for permission" and "insisted that she was well within her right to do so." [#34] ¶ 54.
- Local policy and custom, to which the statewide practice guidance directs caseworkers, allows minors suspected of abuse to be strip searched without parental notice or consent, a court order, or exigent circumstances. *See, e.g.*, [#34] ¶¶ 96, 106, 162.
- The search of I.B. without Jane Doe's consent was done in accordance with statewide and local policy and custom. *See, e.g.*, [#34] ¶¶ 92-93, 96, 196.
- The strip search by Defendant Woodard was not the only time such a search had been conducted by El Paso County DHS on I.B. *See* [#34] ¶¶ 22-33.

[3] To be clear, they should be securely stored with limited access while they are the subject of litigation, and then destroyed.

- Jane Doe and I.B. are fearful that I.B. will again be subjected to searches of this character "primarily based on Jane Doe being told that the more reports of abuse are lodged against I.B.—false or otherwise—the more DHS will be involved in their lives." [#34] ¶ 70.
- As of the date of the First Amended Complaint, "Jane Doe and I.B. currently live in Colorado," and remain subject to Defendants' policy and custom. [4] [#34] ¶ 70.
- Plaintiffs alleged that Defendant Bicha had responsibility for DHS policies as Executive Director of the agency, and that Defendant Bengtsson had responsibility for those policies at the local level. *See* [#34] ¶¶ 126, 128, 179.
- Plaintiffs sought injunctive relief enjoining Defendants Bicha and Bengtsson from applying the statewide policy and custom to I.B; they also sought declaratory relief that the policies and customs are unconstitutional. [#34] at 36.

I.B. has been repeatedly investigated by DHS based on false reports of abuse, and repeatedly subjected to the unconstitutional custom in the past, which is evidence supporting a real and immediate threat of repeated injury. *See Tandy*, 380 F.3d at 1283. Also, her mother has been told that the more it happens, the more it will keep happening, which is evidence relevant to future enforcement of the custom. At the time of the Amended Complaint, I.B. and Jane Doe lived in Colorado and remained subject to the policies and custom, and will frequently visit in future. Presuming all these allegations to be true at this stage, Plaintiffs have alleged "a 'good chance of being injured in the future.'" *Dias*, 567 F.3d at 1177 (internal alterations omitted) (quoting *PeTA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002)).

Defendants take the position in this litigation that they should be able to broadly strip search and photograph minors like I.B. without parental consent or a court order because of their interest in investigating allegations of child abuse and protecting children. *See County Defendants'*

[4] In all candor to the Court and Defendants, Plaintiffs disclosed their plans to relocate out-of-state, but noted their plans to return to Colorado for frequent visits and in connection with this lawsuit. *See* [#34] ¶ 70. Currently, "[s]tanding must be analyzed from the facts as they existed at the time the complaint was filed." *See Tandy*, 380 F.3d at 1284.

Motion [#40] at 11-12, 16, 17, 19-20; and *Defendant Bicha's Motion* [#41] at 16-19. They provide nothing approaching an "affirmative assurance" that this behavior will not happen again. *See Dias*, 567 F.3d at 1178 n.9 (noting affirmative assurances of non-prosecution from a governmental actor may be a basis for concluding that plaintiff lacked standing to seek prospective relief). On the contrary, because Defendants suggest that they must be able to strip search and photograph children without parental consent or a court order to uphold their duties to protect children, and even ask the court to further broaden their supposed powers, I.B.'s plans for future presence in the state makes it all the more likely that she will again be subjected to the aggressive application of these policies. *See PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1198 (10th Cir. 2010) (States have a duty "to protect the lives and health of children within their borders"). Under these circumstances of an ongoing violation with the photographs, and the aggressive strip search policy and custom suggesting a threat of future injury, this case requires a different outcome than those cited by Defendant Bicha and others finding no injury in fact. *Cf. Camreta v. Greene*, ____ U.S.____, 131 S. Ct. 2020, 2034 (2011) (plaintiff was no longer in need of any protection from the challenged practice because she had moved out of state and had no intention of relocating back to the state, and was nearly about to graduate such that there was not "the slightest possibility of being seized in a school . . . as part of a child abuse investigation").

B. Qualified Immunity

Plaintiffs agree that because County Defendants have raised qualified immunity as a defense, this Court must decide whether the facts they have alleged "make out a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). If they satisfy this step, this

Court must also decide "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* These steps are not a rigid formula, however, and this Court has discretion to consider them in any order. *See id.* at 236.

Law is "clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains." *Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003). "There need not be precise factual correspondence between earlier cases and the case at hand . . . ." *Mink v. Knox*, 613 F.3d 995, 1001 (10th Cir. 2010). General statements of the law may also give "fair and clear warning. The right must only be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* The Tenth Circuit has commented that there "will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern." *Shroff v. Spellman*, 604 F.3d 1179, 1189 (10th Cir. 2010) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)). The Court also uses a sliding scale, where "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Becker v. Bateman*, 709 F.3d 1019, 1023 (10th Cir. 2013).

Finally, as both Defendant Bicha and County Defendants appear to concede, even if qualified immunity shields the individual defendants, it does not bar claims against the governmental entity (or the individual in his or her official capacity) for the same actions. *See Milligan-Hitt v. Bd. of Trs.*, 523 F.3d 1219, 1223 (10th Cir. 2008).

County Defendants raise qualified immunity as to both the Fourth and Fourteenth Amendment claims, arguing that there were no constitutional rights violated, let alone ones that were clearly established. This requires addressing the merits of the case.

C. Fourth Amendment Law was Clearly Established and Violations were Adequately Alleged.

Defendants contend that Plaintiffs' Fourth Amendment claims are barred either by qualified immunity, or because they do not allege a violation. Defendants' motions should be denied because the law governing the Fourth Amendment claims was clearly established at the time of the violation, and the facts in the Complaint adequately allege a violation of I.B.'s Fourth Amendment rights.

It was clearly established that the Fourth Amendment applies to caseworkers and searches of children.

County Defendants' contention that Plaintiffs do not allege a violation of clearly established Fourth Amendment law is simply wrong. The strip search and photography of I.B. without parental notice or consent, or a court order, took place in 2014. It was clearly established at that time that "'[s]earches conducted without a warrant are *per se* unreasonable under the Fourth Amendment—subject only to a few "specifically established and well-delineated exceptions."'" *Dubbs v. Head Start*, 336 F.3d 1194, 1204 (10th Cir. 2003); *also Roska*, 328 F.3d at 1248. It was also clearly established—and Defendants do not appear to argue otherwise—that the examination of I.B.'s unclothed body for injuries was a "search" under the Fourth Amendment. *See, e.g.*, *Dubbs*, 336 F.3d at 1204-07 (physical examinations performed by county health department workers constituted "searches" within the meaning of the Fourth Amendment).

Contrary to County Defendants' suggestion, it was clearly established by the date of the search in question that the Fourth Amendment applies to state social workers or caseworkers in the context of child abuse investigations. *See Jones v. Hunt*, 410 F.3d 1221, 1225 (10th Cir. 2005) ("We have held that the Fourth Amendment subjects state social workers to its requirements."); *see also Dubbs*, 336 F.3d at 1205 ("There is no 'social worker' exception to the Fourth Amendment."); *Roska*, 328 F.3d at 1250 n.23; *Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1316 (10th Cir. 1999) (social worker violated the Fourth Amendment by procuring a seizure order through material omissions); *Snell v. Tunnell*, 920 F.2d 673, 676 (10th Cir. 1990) (social worker violated the Fourth Amendment when intervention persisted in light of known false allegations of child abuse).

The Tenth Circuit has not always been clear in its application of the Fourth Amendment to social workers in child abuse investigations, and County Defendants try to rely on a 1993 case drawing distinctions between social workers and law enforcement officers. *See County Defendants' Motion* [#40] at 9 (citing *Franz v. Lytle*, 791 F. Supp. 827, 830 (D. Kan. 1992), *aff'd*, 997 F.2d 784 (10th Cir. 1993)). However, County Defendants' attempt to capitalize on the Tenth Circuit's past "inject[ion] of uncertainty into an otherwise simple rule of Fourth Amendment jurisprudence," is no longer tenable. *Roska*, 328 F.3d at 1249. As cited above, Tenth Circuit law has developed and clarified the Fourth Amendment's application to state social workers. Specifically, the Tenth Circuit has stated that physical examinations performed by county health department workers violate the Fourth Amendment "unless they were performed with warrant or parental consent, or fall within the 'special needs' exception to the warrant

requirement." *Dubbs*, 336 F.3d at 1207; *see also Jones*, 410 F.3d at 1230 (applying a similar analysis to seizure cases). This case law, announced in 2003—over ten years before the conduct in question in this case—is difficult to ignore.

Therefore, at the time of I.B.'s strip search, Defendants were on notice that the Fourth Amendment's requirements applied to them, that the examination of I.B.'s unclothed body was a search within the meaning of that Amendment, and that it was unconstitutional unless it met certain standards. This was all clearly established.

In an obvious case such as this one, general Fourth Amendment standards can "'clearly establish' the answer, even without a body of relevant case law." *Jones*, 410 F.3d at 1230 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). Officials committing outrageous constitutional violations "ought not to shield their behavior behind qualified immunity simply because another official has not previously had the audacity to commit a similar transgression." *Id.*

Plaintiffs have alleged a constitutional violation of I.B.'s Fourth Amendment rights.

The next inquiry is whether Plaintiffs have alleged a constitutional violation of I.B.'s Fourth Amendment rights. Both sets of Defendants argue that Plaintiffs have failed to plead facts that establish a violation of I.B.'s Fourth Amendment rights. However, Plaintiffs have alleged the following facts:

- Around November or December 2014, Defendant Woodard with Defendant Newbill's direction, searched I.B.'s person by viewing I.B.'s unclothed or partially clothed body, taking color photographs of what she observed. *First Amended Compl.* [#34] ¶¶ 35-40, 152-153.
- The photographs of that search are insufficiently secured and stored. [#34] ¶¶ 69, 156.
- Jane Doe did not consent to the search, nor was there a court order authorizing the search. [#34] ¶¶48-54, 154.

These facts, which must be taken as true at this stage, establish a *per se* unconstitutionzal search "unless it fits within certain narrow exceptions to the general rule." *See Dubbs*, 336 F.3d at 1212.

The "special needs" or "administrative search" doctrine does not apply here.

"One of those exceptions is the so-called 'special needs' doctrine." *Id.* County Defendants' first argument is that this Court should create an expanded special needs doctrine by considering a social worker's visual inspection and photography of a child as an administrative search. *See County Defendants' Motion* [#40] at 11.[5] "In special needs cases," referred to in County Defendants' motion [#40] as "administrative searches," "the Court replaces the warrant and probable cause requirement with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest." *Dubbs*, 336 F.3d at 1213.

However, in the context of Fourth Amendment searches and seizures by social workers, and as County Defendants acknowledge, the Tenth Circuit has never applied the special needs exception to allow a warrantless search or seizure by a child welfare worker, despite having had the opportunity to do so on at least three separate occasions. *See Jones*, 410 F.3d at 1228; *Dubbs*, 336 F.3d at 1214; *Roska*, 328 F.3d at 1242. Indeed, after *Jones*, it is extremely doubtful whether the doctrine is at all viable in this Circuit. *See Jones*, 410 F.3d 1228 (district court erroneously

[5] Although County Defendants' Motion contends that the administrative search doctrine applies in the Seventh Circuit, the Seventh Circuit applies a lower standard only for searches on public school property and has held "that it is a violation of a child's constitutional rights to conduct a search of a child at a private school without a warrant or probable cause, consent, or exigent circumstances." *Michael C. v. Gresbach*, 526 F.3d 1008, 1018 (7th Cir. 2008). The Complaint does not allege facts regarding the public or private nature of I.B.'s school.

concluded that relaxed Fourth Amendment standard of *New Jersey v. T.L.O.*—the case that coined the term "special needs"—applied to seizure of child by a social worker at school).

Doubtless, the Tenth Circuit has never applied the special needs exception to social workers searching or seizing children because this doctrine simply does not fit these circumstances. Special needs cases typically involve the following features:

> (1) an exercise of governmental authority distinct from that of mere law enforcement—such as the authority as employer, the *in loco parentis* authority of school officials, or the post-incarceration authority of probation officers; (2) lack of individualized suspicion of wrongdoing, and concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing.

Dubbs, 336 F.3d at 1213-14.

Applying these factors here, "[i]t is not clear, therefore, that the 'special needs' doctrine has any place in this case." *Id.* at 1214. DHS was not *in loco parentis* the way the school would be. "In all 'special needs' cases, the nature of the need addressed makes particularized suspicion impossible or otherwise renders the warrant requirement impractical." *Roska*, 328 F.3d at 1241. Searching or seizing children in the course of child abuse investigations does not meet these criteria, as the entire focus is particularized suspicion. Because of the specific allegation of abuse of I.B., there was no "lack of individualized suspicion of wrongdoing." *Dubbs*, 336 F.3d at 1213.

Finally, while one of the purposes of the search was investigating child abuse, DHS took photographs pursuant to a statue for gathering evidence of abuse, presumably to use for future criminal prosecution or civil dependency and neglect proceedings, if warranted. And, similar to

the case in *Dubbs*, this case involves lack of consent rather than the compelled consent typical of special needs cases. *Id.* at 1214.

However, this Court need to not even resolve whether the "special needs" doctrine applies here because it is plain that the search of I.B. was unconstitutional even if the doctrine is employed. Looking first to the nature of the privacy interest, Plaintiffs have alleged that I.B. was strip searched. It is well-established that "[a] search of a child's person . . . is undoubtedly a severe violation of subjective expectations of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985). When that search is of the child's unclothed body, the privacy interests are heightened. *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008) ("[t]here can be no doubt that a strip search is an invasion of personal rights of the first magnitude."); *Poe v. Leonard*, 282 F.3d 123, 138 (2d. Cir. 2002) ("We cannot conceive of a more basic subject of privacy than the naked body.") (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)).

Plaintiffs have further alleged that I.B. was photographed during this examination of her unclothed or partially clothed body. Photographing normally clothed portions of a child's body raises even more serious concerns than a visual inspection and clearly implicates a great privacy concern. *See Franz v. Lytle*, 997 F.2d 784, 790 (10th Cir. 1993); *see also Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395 (5th Cir. 2002). The privacy interest here was high.

The character of the intrusion is also not minimal as Defendants suggest. *See County Defendants' Motion* [#40] at 17. Defendants did not simply ask I.B. about a bruised knee; I.B. reported that Defendant Woodard took off all of her clothes and took pictures at her school. Such a procedure, in a non-medical setting, and performed by a stranger, is extremely intrusive. It is

troubling that Defendants treat strip searches as trivial. Strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Roe*, 299 F.3d at 404 n.11. The intrusion here was significant.

The immediacy of the government's interest is similarly unavailing. From both Defendants' arguments, the sole special need invoked is the general interest in investigating allegations of abuse to protect children. This need is no doubt important. But it is no justification for proceeding without parental notice and consent or a court order under these facts, and in light of the weighty interests previously discussed: "society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family or caretaker setting." *Franz*, 997 F.2d at 792-93. The government has no interest in recklessly subjecting children to sexual and emotional trauma when many more appropriate ways exist to get information.

Further, as the Tenth Circuit has noted, the special needs exception is typically reserved for situations where obtaining consent or a warrant is impractical. *See Dubbs*, 336 F.3d at 1212. But there is no reason to think that parental notice and consent—or if the circumstances are as urgent as County Defendants imply, a court order—are "impractical" in this context. Parental notice and consent was deliberately avoided in this case, so it is difficult to see how it would have been impractical to obtain.

Truly, the "impracticability" of obtaining parental notice and consent is purely County Defendants' desire to conduct the examination without obtaining parental consent. County

Defendants' suggestion that "[c]aseworkers' 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," is unpersuasive. *See County Defendants' Motion* [#40] at 17. First, they are barred from taking this position, because it is contrary to the state statutory procedure governing the investigation of reported abuse, which states "the alleged perpetrator shall be advised as to the allegation of abuse and neglect and the circumstances surrounding such allegation and shall be afforded an opportunity to respond." § 19-3-308(3)(a), C.R.S. 2015.

Second, this position does not apply factually, because nothing in the Complaint indicates that Jane Doe was herself suspected of abusing I.B. But more importantly, Defendant Woodard disclosed the allegations to Jane Doe, and involved Jane Doe in other aspects of the investigation, including searching her home. *See First Amended Compl.* [#34] ¶¶ 42-46. Jane Doe did not withhold consent for that search. *See id.* These facts render Defendants' need suspicious. Defendants can carry out their job without violating Fourth Amendment rights or needing to expand Fourth Amendment jurisprudence.

Defendants misstate the standard for "reasonable suspicion."

County Defendants discuss the Fourth Amendment standards for seizure and possible tests. *County Defendants' Motion* [#40] at 12. They propose "reasonable suspicion" as one test, but they significantly misstate the Tenth Circuit's holding on how to balance the interests of the parents, child, and state in this test. County Defendants confusingly point to *Jones v. Hunt*, the case where the Tenth Circuit rejected application of the *T.L.O.* standard (which borrowed its

standard from *Terry*) for which they advocate that the search be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 410 F.3d at 1228. But the Tenth Circuit has already clarified that searches and seizures on school property, when they are not connected to efforts by school administrators to preserve order on school property, do not merit application of the *T.L.O.* standard. *See id.* ("Because the case before us does not involve efforts by school administrators to preserve order on school property, it does not implicate the policy concerns addressed in *T.L.O.* and therefore does not merit application of the *T.L.O.* standard.") Said another way, the Tenth Circuit has essentially already rejected County Defendants' argument that this standard should apply to its behavior and it would be reversible error to use the *T.L.O.* standard here. *See id.*

The *Gomes* standard misstated by County Defendants' motion [#40] at 12, is actually this: "we conclude that state officials may remove a child from the home without prior notice and a hearing when they have a reasonable suspicion of an **immediate threat to the safety of the child** if he or she is allowed to remain there." *Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006) (emphasis added). This analysis includes the "objective nature, likelihood, and immediacy of danger to the child." *Id.* at 1131. Thus, "reasonable suspicion" is not defined as County Defendants say it is.

But like in *Jones,* even if DHS's proposed minimal standard were applied in this case, the search of I.B. would not pass constitutional muster. First, the search must be justified at its inception by reasonable articulable suspicion—as previously argued, the facts in this case did not justify strip searching and photographing I.B. without parental notice and consent, or a court

order. No emergency circumstances prevented Defendant Woodard from obtaining permission for the search.[6] But even if the search had been justified at its inception, the scope of that search was not reasonably related to those circumstances. Again, the search was a strip search, where I.B. states that all her clothes were removed and that photographs were taken. *See First Amended Compl.* [#34] ¶ 39. Allegations of "little bumps on I.B.'s face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees" would not justify such an intrusive search simply to substantiate the reported abuse. *See* [#34] ¶ 36. Moreover, given that the strip search also took place before less intrusive methods of substantiating any claim of abuse were performed, such as interviewing Jane Doe, or examining I.B.'s home environment, the scope of the search was not reasonably related to the circumstances which justified the search in the first place. *See* [#34] ¶¶ 35-47. The search violated the Fourth Amendment even under this minimal and incorrect standard. The search certainly does not meet the real standard of an immediate threat to the safety of the child.

Defendants ask this court (unnecessarily) to reconsider a probable cause standard.

County Defendants also ask this court to consider a "probable-cause standard," which would generally require a warrant. *County Defendants' Motion* [#40] at 13. In child abuse investigations, the equivalent to a warrant would be a court order obtained by the mechanisms in

[6] County Defendants note 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 hearing." *County Defendants' Motion* [#40] at 12. Because no one seems to argue that there was enough suspicion to remove I.B. from her home without notice and a hearing, Defendants' arguments that their search was supported by reasonable suspicion is severely weakened.

place under Colorado law for child abuse investigations. Contrary to County Defendants' suggestion, these orders are easier to obtain than, say, a warrant obtained from a neutral and detached magistrate by a law enforcement officer that must be supported by probable cause. In fact, Colorado has several well-established judicial mechanisms available to caseworkers to enable them to complete their investigations. *See, e.g.*, § 19-3-308(3)(b), C.R.S. 2015 (court order to responsible person to cooperate with child abuse investigation). In addition to this mechanism, if a report of abuse that a child's welfare may be endangered means that a medical evaluation is reasonably necessary, the court may issue ex parte emergency orders verbally and by telephone for a medical evaluation to be completed. *See* § 19-1-104(3)(b), C.R.S. 2015. Notably, however, a court-ordered medical examination prior to a dependency and neglect petition being filed is reserved under Colorado law for appropriate situations: emergencies, and after reasonable efforts are made to notify the parents for the purpose of gaining consent. *See id.* ("Prior to the entry of any emergency order, reasonable effort shall be made to notify the parents, guardian, or other legal custodian for the purpose of gaining consent for such care; except that, if such consent cannot be secured and the child's welfare so requires, the court may authorize needed medical evaluation . . . ."). Per Colorado law, prior notice "for the purpose of gaining consent" to a child's parent is required even for a court-ordered medical examination on the basis of a report that a child's welfare may be endangered. *See id.* Thus, DHS's position of ad hoc strip searches not only violates the Fourth Amendment, but actually flouts this Colorado statute.

In addition, if a caseworker truly believes that the child is in danger "in the reasonably foreseeable future," because the parent will not consent to an examination, and DHS faces a

situation where the child would be released to their potential abuser, a mechanism also exists to provide DHS with temporary custody, *see* § 19-3-405(2)(a), C.R.S. 2015, or to allow the child to remain in the parent's custody, but for the court to issue an emergency protection order to prevent further harm, § 19-3-405(2)(b), C.R.S. 2015. Both orders can be issued verbally and by telephone. § 19-3-405(1), C.R.S. 2015. Each judicial district in the State is responsible for making an authorized individual available by telephone **at all times** to act with the authorization and authority of the court to issue such orders. *See id.* In light of this well-established system in Colorado, County Defendants' argument that it is impractical to comply with the Fourth Amendment by obtaining a court order to perform these searches is unavailing. Colorado law surrounding court orders is well-established and gives Defendants several options.

Exigent circumstances do not exist here.

County Defendants seem to argue that the exigent circumstances exception to the warrant requirement might apply here. Based on the law and facts alleged, this is an unjustifiable argument. 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.

Roska, 328 F.3d at 1240 (quoting *United States v. Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992)). "The government bears the burden of proving exigency." *Id.*

As previously noted, a mechanism already exists to allow County DHS caseworkers to obtain a court order to obtain temporary custody of the child in circumstances where there is

reason to believe that the child's life or limb is in immediate jeopardy. *See, e.g.*, § 19-3-405(2), C.R.S. 2015. No such order was sought in this case, which makes sense, given that the child was simply enjoying a normal day in class.

Exigent circumstances did not justify the search of I.B. Plaintiffs alleged that no exigent circumstances existed, [#34] ¶ 154, and no facts in the First Amended Complaint and no reasonable inferences from those facts demonstrate an immediate need to protect I.B.'s life through strip searching her body and taking photographs without consent or a court order. Simply put, there was no immediate risk to her safety that would give rise to exigent circumstances. *See Roska*, 328 F.3d at 1250 n.24.

Moreover, because photographs were taken of I.B.'s body during the search, County Defendants cannot say that the search was not motivated by an intent to seize potential evidence. *See id.* at 1240. County Defendants cannot meet their burden as to this factor.

The "emergency aid doctrine" also does not apply because there was no emergency that created probable cause. Under this doctrine, state officers may effect a warrantless entry into a home without violating the Fourth Amendment if they are doing so to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). First, County Defendants have cited no case where the emergency aid exception has ever been used to justify a warrantless strip search, as opposed to warrantless entry into a home. Second, no facts in the Complaint indicate that the strip search and photography was performed without Jane Doe's notice and consent or a court order in order to provide emergency aid to I.B. Again, the allegations of abuse were of minimal bruises, cuts and

scrapes, not life-threatening injuries. *First Amended Compl.* [#34] ¶ 36. Defendant Woodard concluded the injuries observed were inconsistent with alleged abuse (and many would have been visible without a strip search). *See* [#34] ¶ 47. Jane Doe was later informed of the allegations and willingly participated in other aspects of the investigation. [#34] ¶¶ 42-48. I.B. herself was four years old at the time, and verbal. *See* [#34] ¶¶ 35, 48. No facts alleged suggest that any emergency existed, or even that I.B. was in any distress (other than the trauma created by Defendants). [#34] ¶ 154; *see also Michael C. v. Gresbach*, 526 F.3d 1008, 1016 (7th Cir. 2008) (noting that in non-exigent circumstances exempting child welfare workers from adhering to basic Fourth Amendment principles would be imprudent because "[i]n these circumstances, caseworkers can take preliminary steps short of searches, such as interviewing the child and a parent, or obtaining a warrant either personally to conduct a search or to have a doctor perform the search").

County Defendants have utterly failed to explain why the strip search had to be performed without consent or a court order in order to render emergency aid to I.B. Further, Defendants' stated interest in protecting children from abuse has no connection with taking photographs of I.B.'s private areas that did not show abuse.

The standard for Fourth Amendment intrusions is much higher than Defendants argue.

A higher standard applies for a Fourth Amendment intrusion, and that standard is consent, a warrant or court order, or a clearly delineated exception to those requirements. *See Dubbs*, 336 F.3d at 1207. County Defendants do not pretend to have the first two, and have not been able to present any clearly delineated exception.

Indeed, failure to even attempt to obtain parental notice and consent or a court order appears to be due to a deliberate effort to search I.B. without Jane Doe's knowledge "so that [Jane Doe] would not interfere," "rather than to any inherent 'impracticability' of compliance with ordinary Fourth Amendment norms." *See id.* at 1215 & n.12. This inference is supported because Defendant Woodard lied to Jane Doe about the search and only later reluctantly confessed to performing it without permission. *First Amended Compl.* [#34] ¶¶ 51-56, 155. As the Tenth Circuit has noted, "[t]hat possibility [of deliberately avoiding interference] would raise Fourth Amendment issues of a different order." *Dubbs*, 336 F.3d at 1215 n.12.

Indeed, County Defendants' plea that some exception should apply because they could not meet their burden to obtain a court order to perform the search under these facts (where visual inspection or an interview could have provided the information needed to substantiate any claims of abuse) simply serves to emphasize the constitutional violation here. *See County Defendants' Motion* [#40] at 19 ("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."). If they cannot meet the burden required by statute, they should not be able to expose the child to the risk of sexual trauma and perpetrate clear violations of the Fourth Amendment.

There is no constitutional salvation in the Colorado photography statute.

County Defendants, and to some extent, Defendant Bicha, also argue that the strip search and photography of I.B. were reasonable under the Fourth Amendment because they relied upon section 19-3-306(1), C.R.S. 2015. That statute provides in pertinent part: "Any . . . social worker . . . or local law enforcement officer 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." *Id.*

Where the language of a statute is plain, courts "give effect to the plain language of the statute." *In re Woods*, 743 F.3d 689, 694 (10th Cir. 2014) (internal quotations omitted). The "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* The court avoids constructions that would render words of the statute superfluous, void, or insignificant. *Genova v. Banner Health*, 734 F.3d 1095, 1100 (10th Cir. 2013).

The statute says that photographs may be taken "of the areas of trauma." The minor marks observed were not consistent with a report of child abuse. *First Amended Compl.* [#34] ¶ 47. And the Complaint alleges that DHS has a practice of taking pictures of "no-marks," including of private areas. [#34] ¶ 115. It also alleges that photos of I.B.'s private areas were taken, despite the fact that the report of abuse was unfounded. [#34] ¶¶ 40, 47. Thus, Defendants violated the statute by taking pictures that were not of "areas of trauma."

Next, the statute says that the photos may be taken of areas "visible on the child." The word "visible" must have some meaning. DHS argues that the meaning is that an area is "visible on the child" after a caseworker takes off the child's clothes. But that renders the word meaningless, because what would then be "invisible on the child"? Internal injuries, for instance, could not be photographed by a caseworker, and such an interpretation would render the statute absurd.

More logical is to interpret the statute according to normal Fourth Amendment jurisprudence and the "plain view" doctrine. The "mere observation by government officials of that which is plainly visible to anyone does not constitute a search for constitutional purposes."

Hoffman v. People, 780 P.2d 471, 473 (Colo. 1989). What a person knowingly exposes to the public is not a subject of Fourth Amendment protection. *Id.* at 474. Thus, if the child's injuries are "visible," generally, they may be photographed without any violation of the constitution. If they are not visible by looking at the clothed child, they are not covered by the statute and are more suited to the privacy of a medical examination.

Also, the statute on its face applies to both law enforcement officers and social workers, though perhaps not to Defendant Woodard, as DHS has no requirement that caseworkers be licensed social workers.[7] *See First Amended Compl.* [#34] ¶ 102. Even County Defendants admit that a warrantless search is *per se* unreasonable when conducted for law enforcement purposes, [#40] at 9, and do not attempt to argue that this statute somehow trumps that well-established Fourth Amendment standard. Given that the Tenth Circuit has clearly established that the Fourth Amendment applies equally to social workers, there is no principled reason to apply the statute to provide social workers with an exemption from basic Fourth Amendment limits.

And this is precisely the case here because it appears that the purpose of the statute is to enable collection of evidence for later criminal prosecution or dependency and neglect proceedings. *See* § 19-3-306(1). The purpose of taking a photograph of an injury on a child can reasonably be assumed to be for later evidence. Indeed, the title of the statute is "Evidence of abuse – color photographs and X rays." *Id.* Not only does this increase the likelihood that the

[7] DHS through its practice guidance interpreting the statute, maintains that the statute applies only if the caseworker has specific qualifications; no facts currently demonstrate Defendant Woodard had such qualifications. Thus, the statue may not even provide them with protection at all.

search of I.B. was unconstitutional, but it belies Defendants' assurance that primary (or only) purpose of photographing I.B. is for her safety. Obtaining evidence for later use in a criminal prosecution of child abuse or a dependency and neglect proceeding should certainly be subject to Fourth Amendment strictures.

Defendants have chosen an interpretation that causes the Colorado state statute to violate federal constitutional law. Even in the unlikely event that the Colorado legislature meant this, the statute would then have to be struck down. No reasonable state officer would believe that this state statute could transform a *per se* unreasonable search into a reasonable constitutional search.

In sum, because Plaintiffs have alleged that I.B. was strip searched and photographed without parental notice and consent, or a court order, and no well-established exception to these requirements apply, Plaintiffs have stated a claim for which relief can be granted as to their Fourth Amendment claims. Because these rights are clearly established, qualified immunity is unavailable, the claims are adequately pleaded, and Defendants' motions should be denied as to these claims.

D. Fourteenth Amendment Law was Clearly Established and Violations were Adequately Alleged.

Defendants contend that Plaintiffs' Fourteenth Amendment claims are barred either by qualified immunity, or because they do not allege a violation. Defendants' motions should be denied because the law governing the Fourteenth Amendment claims was clearly established at the time of the violation, and the facts in the Complaint adequately allege a violation of Plaintiffs' Fourteenth Amendment rights.

The Fourteenth Amendment protects parental rights and the reciprocal rights of the child.

It is undisputed that the Due Process Clause of the Fourteenth Amendment "generally provides constitutional protection for parental rights." *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010). The right that Plaintiffs are asserting is Jane Doe's "fundamental right or liberty interest" in the care, custody, and control of I.B, and the reciprocal right that I.B. has to have decisions made by her natural parent. *See Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008). This general right is well-established and deeply engrained in our case law. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

County Defendants admit, as they must, that Plaintiffs' broadly stated Fourteenth Amendment rights are clearly established. As County Defendants note, "[t]he law is clear that allegations of state interference with Fourteenth Amendment rights are held to a balancing test weighing the interests of the government against the asserted privacy interests," [#40] at 8, and "[t]he standard of review for Plaintiff's Fourteenth Amendment claims is more clearly the balancing test," [#40] at 16. No other position is tenable in light of the clearly established law from the United States Supreme Court and the Tenth Circuit. *See, e.g.*, *Hollingsworth v. Hill*, 110 F.3d 733, 738-39 (10th Cir. 1997) ("Parents have a fundamental liberty interest in the 'care, custody, and management' of their children." (quoting *Santosky v. Kramer*, 455 U.S. at 753)).

County Defendants contend, however, that the contours of Plaintiffs' Fourteenth Amendment rights are not clearly established under the circumstances alleged. The Tenth Circuit has analyzed the issue of whether the law was clearly established by reviewing the right to direct medical care as an aspect of the general right. *See, e.g.*, *Jensen*, 603 F.3d at 1197 (analyzing

whether the right to direct medical care as a part of the general right to make decisions concerning the care of a child was clearly established).

To this latter point, Jane Doe has a clearly established Fourteenth Amendment right to consent to what is essentially a medical procedure—a physical examination of I.B.'s naked body, or portions of it, for injuries—just as I.B. has a reciprocal right to have such a decision made by—or at minimum, after consultation with—her mother, Jane Doe. First, the Tenth Circuit has acknowledged "that a parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care." *Id.*; *see also Dubbs*, 336 F.3d at 1203 (reversing district court's dismissal of parent's Fourteenth Amendment claim where children were physically examined without their prior notice or consent, and noting "[i]t is not implausible to think that rights invoked here—the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child—fall within [the Due Process Clause's] sphere of protected liberty"). Noting that the U.S. Supreme Court has similarly alluded to such a right, the Tenth Circuit held in 2010 that its precedent, along with the U.S. Supreme Court's, "reasonably suggests that the Due Process Clause provides some level of protection for parents' decisions regarding their children's medical care." *Id.*; *see also Thomas v. Kaven*, 765 F.3d 1183, 1194-95 (10th Cir. 2014) ("The Fourteenth Amendment protects the right of parents to make decisions 'concerning the care, custody, and control of their children.' This right provides 'some level of protection for parents' decisions regarding their children's medical care.'"). Defendants cannot duck this right by performing the same evaluation without medical training or safeguards. Accordingly, the right asserted by

Plaintiffs (which must be balanced with the government's legitimate interest in overriding it) was clearly established at the time of the examination and photography of I.B.

The Fourteenth Amendment standards balance the constitutional rights with the government's interests.

This right is, as Defendants point out, not absolute, and "when a child's life or health is endangered by her parents' decisions, in some circumstances a state may intervene without violating the parents' constitutional rights." *Jensen*, 603 F.3d at 1198.

Plaintiffs agree that in performing the balancing test, this Court first looks to the state's generalized interest in investigating cases of alleged child abuse. *Griffin v. Strong*, 983 F.2d 1544, 1548 (10th Cir. 1993). Plaintiffs do not dispute that investigating allegations of child abuse is an important government interest. *See id.* But courts do not evaluate constitutional rights in a vacuum and ultimately, must examine the parties' interests in light of the facts of the particular case. *See id.* at 1547.

Here, interests must be balanced. On the one hand, Plaintiffs have interests in Jane Doe's directing the care and management of I.B. in a physical examination where her clothes are removed and photographs taken, and in protecting her from sexual trauma and potential sexual abuse. Defendants claim they have an interest in proceeding without parental notice and consent, or a court order, for this portion of the investigation.

County Defendants' argument appears to be less about whether the right was clearly established, and more about the merits of the issue, as to whether there was a violation of that right under the circumstances here. But to confront Plaintiffs' allegations, County Defendants have twisted the facts far beyond what the Complaint actually alleges, into a fact-pattern that

might more strongly support their position. For example, County Defendants state "Jane Doe's live-in boyfriend is suspected of committing the abuse." *County Defendants' Motion* [#40] at 20].This fact is not alleged in the Complaint, and the paragraph to which County Defendants cite to support it states: "I.B. lives in a home with her mother, Jane Doe, her younger brother, and her live-in stepfather, mother's boyfriend, who is a military veteran." *See id.* (citing *First Amended Compl.* [#34] ¶ 16). But even if such a fact were ultimately established after discovery, it would not justify the conclusion that a parent loses constitutional rights because someone they care about could have (but was ultimately found to have not) abused the child.

County Defendants also argue that no area (such as genitals) was examined that warranted involvement of a medical or mental health professional, because they looked at stomach, buttocks, and back on two occasions. *County Defendants' Motion* [#40] at 17. This is a frightening position to take, given that the Colorado statute "Unlawful Sexual Behavior" defines "intimate parts" as the "external genitalia or the perineum or the anus or the buttocks or the pubes or breast of any person." *See* § 18-3-401(2), C.R.S. 2015. In any case, County Defendants' statement contradicts I.B.'s allegation that they took all her clothes off. *First Amended Compl.* [#34] ¶ 39. But even more to the point, the supposed purpose of the strip search was to examine I.B. for evidences of injuries, and to analyze those injuries to determine whether they were innocuous, or the product of abuse. Such an analysis clearly implicates medical expertise.

Perhaps even more frightening, they characterize their actions as a "minimal" inconvenience to I.B. *County Defendants' Motion* [#40] at 17. Again, Plaintiffs alleged that I.B. indicated all of her clothing was removed. Their actions are precisely the same (though without

sanction of the government) as those prosecuted in other circumstances as a sexual offense, such as the undressing and photography that children undergo in the creation of child porn. DHS would never claim that those victims of these sexual offenses had suffered a minimal inconvenience.

Each of these attempts by County Defendants to argue the facts of the case to skew the balancing test in their favor must be rejected. On a motion to dismiss, the circumstances of the case must be established from the well-pleaded facts as alleged by Plaintiffs, with all reasonable inferences drawn in their favor. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). At this stage, "The court's function . . . is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

Because of the facts alleged, County Defendants' strip search and examination of I.B. to look for signs of injury from abuse (an obviously medical procedure) without Jane Doe's notice or consent or a court order—and without any involvement of a medical professional—unreasonably interfered with Jane Doe's parental rights to make decisions for the care of her daughter. *Cf. Jensen*, 603 F.3d at 1198 (no violation of this right where seven qualified and competent doctors recommended the disputed treatment over parental objection).

No facts in the Complaint demonstrate that I.B.'s life or health was in immediate danger or that the facts were such that the decision had to be made without Jane Doe's consultation. Indeed, the facts allege the following:

- I.B. had previously been a victim of multiple false allegations of abuse. *First Amended Compl.* [#34] ¶ 15.
- A previous strip search had taken place at her school. [#34] ¶¶ 25-27.

- The allegations of abuse that prompted the search of I.B. at issue here did not involve allegations of abuse to her buttocks. [#34] ¶ 36.
- The allegations of abuse were minor and included "little bumps on I.B.'s face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees." [#34] ¶ 36.
- I.B., who was four years old at the time, stated that all of her clothes were taken off to "look for marks/bruises" and that photographs were taken. [#34] ¶ 35, 39-40.
- This happened at I.B.'s school and not in a medical setting. [#34] ¶ 38.
- Defendant Woodard did not seek Jane Doe's consent for this examination. [#34] ¶ 54, 154.
- The examination was done without seeking a court order. [#34] ¶ 154.
- Defendant Woodard is alleged to be a caseworker for DHS, but there were no allegations regarding her medical training, if any. [#34] ¶ 9, 37.
- Defendant Woodard later involved Jane Doe in the investigation, including examining her home; there are no allegations that Defendant Woodard did not ask for consent for this portion of the investigation. [#34] ¶¶ 42-43.
- When I.B. later told Jane Doe about the examination, and Jane Doe confronted Defendant Woodard, Defendant Woodard originally lied, denying the search was performed. [#34] ¶ 51.
- Defendant Woodard later admitted she did undress and photograph I.B. without asking for permission. [#34] ¶ 54.
- When Jane Doe told the caseworker she was contacting a lawyer, DHS again came to Jane Doe's home, this time to investigate I.B.'s younger brother; this allegation was also unfounded. [#34] ¶¶ 60-64.

As to their justification for proceeding without a court order, Defendants' arguments are significantly diminished by the existence of Colorado statutory law providing for the ability to obtain a court order for medical examinations if parental consent cannot be obtained and there is a report that a child's welfare may be endangered. *See* § 19-1-104(3), C.R.S. 2015. Also, the state's interest provides no justification for proceeding without parental notice and consent when the facts allege that: (1) the nature of the alleged abuse was minor; (2) the allegation of abuse was unfounded (as were past false allegations); (3) Jane Doe was compliant with the portion of the investigation in which she was involved; (4) the caseworker who performed the examination

involved Jane Doe in other aspects of the investigation (such as searching her home), but lied to Jane Doe when confronted about the examination and only reluctantly informed her later that the examination had taken place; and (5) Jane Doe was potentially retaliated against for questioning the legality of what had happened.

Defendants' arguments fail on a practical level as well. Contrary to County Defendants' suggestion that their interest in investigating alleged child abuse requires the examination be done without Jane Doe's knowledge and consent, "parental notice and consent for childhood physical examinations are of significant practical value." *Dubbs*, 336 F.3d at 1207. Because of County Defendants' failure to obtain Jane Doe's consent or provide her with notice of the examination of I.B., "no parents were present to provide medical histories, discuss potential issues . . . help explain the procedure" to I.B. or "reassure" her "about the disturbing and unfamiliar aspects of the exam" including "visual . . . inspection of" her unclothed body "by strangers." *Id.* There are no facts in the Complaint to suggest Jane Doe would have withheld consent for the search. County Defendants' suggestion that such an inference should be drawn in its favor must be rejected at this stage. And, in light of the fact that it could have actually been more helpful to involve Jane Doe in this examination or even request a real medical examination (to provide background, explanations for the sources of any injuries, or to simply reassure I.B. about the disturbing and unfamiliar aspects of the examination), Defendants simply had no justification for proceeding in the manner they did.

In fact, rather than helping prevent child abuse, Defendants' position may actually create more risk for children. By having untrained personnel regularly perform what is essentially a

medical examination, DHS puts children at risk in two ways. First, insufficient safeguards put children at risk for sexual abuse, either actual or as experienced. Second, untrained personnel are likely to incorrectly evaluate physical injuries, which can lead to missing danger signs and even death of the child, which happens far too often.

Under these circumstances, no reasonable state official could believe that his or her actions were in accordance with Plaintiffs' Fourteenth Amendment constitutional rights. Accordingly, Plaintiffs have adequately pleaded a violation of their Fourteenth Amendment constitutional rights sufficient to survive Defendants' motions to dismiss. Because these rights are clearly established, qualified immunity is unavailable, and Defendants' motions should be denied as to these claims.

E. Municipal Liability

County Defendants next contend that Plaintiffs have failed to state a claim for municipal liability against BOCC (referred to by County Defendants as *Monell* Liability).[8] Having already disposed of the argument that BOCC is immune from suit under the Eleventh Amendment, Plaintiffs now address County Defendants' contentions that (1) Plaintiffs have failed to allege a constitutional violation to underlie the municipal liability claim; and (2) BOCC was not on notice of the pattern of illegal strip searching being performed in accordance with local custom and policy.

First, as argued extensively above, Plaintiffs have stated a claim for both a violation of I.B.'s Fourth Amendment right to be free from unreasonable searches and to privacy, and of Plaintiffs' Fourteenth Amendment fundamental right to the care, control and management of a

[8] Plaintiffs address claims against Defendants Bengtsson and Rhodus under supervisory liability.

child. Based on those violations, which County Defendants understood were alleged to form the basis of the *Monell* claim, *see County Defendants' Motion* [#40] at 4, constitutional violations were not merely potential, but actually occurred and were alleged to have been done in accordance with local custom over which BOCC had responsibility through its oversight of policy and ability to withhold funding.

Second, Plaintiffs have alleged that BOCC was on notice of the pattern of illegal strip searching being performed in accordance with local custom and policy through specific facts in the Complaint. *See First Amended Compl.* [#34] ¶¶ 135-136, 216. At this stage, the Court's role is not to assess whether this allegation is true; if it is well pleaded (and it is), it is accepted as true and is sufficient to state a claim. *See, e.g.*, *Iqbal*, 556 U.S. at 680. Moreover, in its motion, County Defendants admitted that they were generally aware of Plaintiffs' "theories" that the practice of strip searching children in the context of child abuse investigations was occurring without parental consent or a court order. *County Defendants' Motion* [#40] at 24. County Defendants' argument, then, appears to be really about whether the practice is unconstitutional. As is clear from their motion, County Defendants attempt to argue it is not. But as has already been demonstrated, strip searching children without consent, a court order, or an exception thereto, violates both the Fourth and Fourteenth Amendments, and BOCC either knew or reasonably should have known this to be the case. BOCC is responsible for knowing clearly established law. Municipal liability has been adequately pled.

F. Supervisory Liability

Plaintiffs have also pleaded claims against Defendants Bengtsson and Rhodus in their individual capacities based on "supervisory liability."[9] *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013) ("We have referred to claims against supervisors as based on 'supervisory liability.'"). Section 1983 allows a plaintiff to impose liability upon a defendant-supervisor who possesses responsibility for the continued operation of a custom or policy, the enforcement of which subjects or causes to be subjected that plaintiff to the deprivation of any rights secured by the Constitution. *See Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010). Generally speaking, this liability is pled through three elements: (1) personal involvement; (2) causation; and (3) state of mind. *Schneider*, 717 F.3d at 767. Analyzing them in turn, Plaintiffs have adequately pleaded facts to support each element of their supervisory liability claims against Defendants Bengtsson and Rhodus.

As to the first element, personal participation, while some uncertainty exists as to what is enough to meet the post-*Iqbal* personal involvement standard, the Tenth Circuit has stated that a plaintiff may meet this element by demonstrating the defendant "promulgated, created, implemented or possessed responsibility for the continued operation of a policy . . . ." *See Dodds*, 614 F.3d at 1199. Said another way, "the establishment or utilization of an unconstitutional policy or custom can serve as the supervisor's 'affirmative link' to the constitutional violation." *Davis*

[9] The claims against Defendant Newbill can also be analyzed under this rubric. Though County Defendants do not argue otherwise, these elements are clearly met: Plaintiffs alleged Defendant Newbill personally directed the search be performed, it was performed upon her direction, and these actions were taken with deliberate indifference to Plaintiffs' rights.

v. City of Aurora, 705 F. Supp. 2d 1243, 1263 (D. Colo. 2010). Here, Plaintiffs have pleaded that Defendants Bengtsson and Rhodus possessed responsibility for the continued operation of the custom and local policy of strip searching children suspected of being abused, without parental consent or a court order, by virtue of their positions and job descriptions as Executive Director and Director of the Children, Youth and Family Services Division, respectively.

Further, it is reasonable to believe that even under post-*Iqbal* standards, facts demonstrating a defendant's failure to train and supervise in light of their responsibility to do so can demonstrate a defendant's personal participation. *See Dodds*, 614 F.3d at 1195. Plaintiffs have pleaded that Defendants Bengtsson and Rhodus were also responsible for training and supervising caseworkers and their supervisors and that they utterly failed to implement training and supervision that would conform the local custom and policy of strip searching children without consent or a court order to federal constitutional limits.

As to the second element, causation, *Iqbal* did not alter the Supreme Court's previously enunciated section 1983 causation analysis. *Schneider*, 717 F.3d at 768. Under that analysis, "[a] plaintiff must establish the 'requisite causal connection' by showing 'the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.'" *Id.* (quoting *Dodds*, 614 F.3d at 1185). Plaintiffs have clearly alleged violations of their constitutional rights by virtue of the unconstitutional search of I.B. in November/December 2014 as a violation of Plaintiffs' Fourth and Fourteenth Amendment rights that was caused by Defendants' responsibility for continued application of the local policy and custom in El Paso County.

Plaintiffs alleged that this search would not have occurred but for adherence to the local policy and custom allowing it, and but for Defendants' failure to supervise and train their employees that the Fourth Amendment applies to state child welfare workers to prevent consent-less, warrantless searches. Plaintiffs pleaded facts that showed what each Defendant was responsible for, based on their positions. The facts pleaded are that no written policies or training materials addressing the Fourth Amendment limits on social workers existed to constrain the well-established custom. It is not surprising then, that this failure and responsibility for the continued operation of the custom, led to Plaintiffs' injuries.

Defendants claim that some of Plaintiffs' allegations are only "non-claimed potential violations." *County Defendants' Motion* [#40] at 27. As previously explained, the insufficiently safeguarded photographs of I.B. that may be accessed by many people at DHS are an ongoing violation of her rights. Plaintiffs alleged actual trauma to I.B. akin to sexual abuse trauma. The fact that Defendants exposed I.B. to a risk of actual sexual abuse may not go to a constitutional violation, but definitely goes to the balancing of the interests of the government and individuals. The high potential of exposing children to actual sexual abuse, and the clear violation of current best practices in child protection, are also important in weighing the significance of the failure to supervise and train.

Finally, "[t]he third element requires the plaintiff to show that the defendant took the alleged actions with the requisite state of mind." *Id.* at 769. County Defendants seem to acknowledge, and Plaintiffs agree, that deliberate indifference is the proper standard. *County Defendants' Motion* [#40] at 27. Proceeding under this standard, deliberate indifference can be

shown when a defendant "deliberately or consciously fails to act when presented with an obvious risk of constitutional harm which will almost inevitably result in constitutional injury of the type experience by the plaintiff." *Schneider*, 717 F.3d at 769 (quoting *Hollingsworth v. Hill*, 110 F.3d 733, 745 (10th Cir. 1997)). Here, Plaintiffs alleged that Defendants Bengtsson and Rhodus were on notice that the custom of strip searching children suspected of abuse without consent or a court order had been developed, was unconstitutional, and endangered children. A past federal lawsuit alleged such practices were occurring on a routine basis.[10] *See First Amended Compl.* [#34] ¶¶ 135- 136. The allegations that this practice was taking place presented Defendants with an obvious risk of constitutional and practical harm. Though they argue that a persistent pattern of strip searching children suspected of abuse without consent or a court order is not illegal, Defendants concede, "it would be fair to say that County Defendants are aware of Plaintiffs' theories . . . ." *County Defendants' Motion* [#40] at 24.

In light of their awareness that this widespread practice existed and was problematic, Plaintiffs have alleged that Defendants Bengtsson and Rhodus developed no formal written policy to protect against the risk of constitutional harm from the informal custom and policy, did not adequately train their employees in how to proceed in accordance with the Fourth and Fourteenth Amendment, and did not adequately supervise them as they performed these searches. As is clear from their motion, they knew of the practice, but did nothing, allowing the custom to continue because they wanted caseworkers to be able to search any child suspected of being abused without

[10] Which was borne out by sworn deposition testimony from a caseworker and supervisor in El Paso County.

regard to basic Fourth Amendment principles; indeed, they have specifically advocated for this position. Their denial of constitutional harm and practical harm shows deliberate indifference on its face in light of clearly established law—if not criminal negligence for exposing children to sexual abuse—and Plaintiffs have sufficiently pleaded this element.

G. Official Capacity Liability

Defendant Bicha contends that Plaintiffs have failed to state a claim for which relief can be granted because they have not adequately alleged constitutional violations, or because the practice guidance is not actually statewide policy that caused the violations. Plaintiffs have adequately addressed the former argument above and have demonstrated that they have stated claims for the constitutional violations; they now address the latter.

As Defendant Bicha points out, Plaintiffs have not alleged that he personally participated in the search of I.B. *Defendant Bicha's Motion* [#41] at 8. They have pleaded, however, that he has responsibility for the policies of the Department of Human Services—whether those policies manifest as practice guidance interpreting statutes, or as the informal policies and customs that developed within DHS.

"[W]hen a party sues to enjoin or mandate enforcement of a statue, regulation, ordinance, or policy, it is not only customary, but entirely appropriate for the plaintiff to name the body ultimately responsible for enforcing that law." *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004); *see also Oten v. Colo. Bd. of Soc. Servs.*, 738 P.2d 37, 40 (Colo. App. 1987) ("The nature of the office held is the decisive factor in determining who is a proper party defendant in an official capacity action under § 1983. When, as here, the complaint attacks the validity of a statute, regulation,

ordinance, or policy, the executive officer who is primarily responsible for implementing or enforcing its provisions is the proper party defendant in an official capacity suit.").

Defendant Bicha acknowledges that he embodies the identity of the state Department of Human Services in his official capacity, and that the counties administer child welfare services on behalf of the state. *Defendant Bicha's Motion* [#41] at 8-9, 15. Defendant Bicha claims, however, that the only "formal 'policies'" of DHS are the rules it promulgates and none addresses strip searching children. [#41] at 9. He further argues that the Practice Guidance cited by Plaintiffs is not a "statewide policy" and even if it is, "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." [#41] at 9-10. However, Plaintiffs are entitled to the reasonable inferences from the facts as alleged in the Complaint, and the Complaint pleaded facts demonstrating that in response to inquiries by the Colorado General Assembly about the legality of this issue, state DHS issued the practice guidance to tell caseworkers and supervisors what to do and interpreted the statute on which they apparently relied to strip search I.B. in this case. *First Amended Compl.* [#34] ¶ 140-141. Indeed, County Defendants appear to maintain that the statute reference by the statewide practice guidance allows them to perform the searches. *See County Defendants' Motion* [#40] at 10. Accordingly, it is not an unreasonable inference that the practice guidance was a cause of the violations in that it could be deemed "a demand by CDHS and Defendant Bicha for the use of photography during child abuse and/or neglect assessments." *Defendant Bicha's Motion* [#41] at 10. More importantly, however, Plaintiffs alleged the practice guidance references and thus, endorses, local policy such as the one used in El Paso County. *See*

Defendant Bicha's Motion [#40] at 9 (noting the practice guidance "repeatedly directs caseworkers to . . . local policy . . . for direction regarding the use of photography . . . including photography of areas that are usually clothed"). By virtue of the practice guidance's reference to local policy, Defendant Bicha expects that local custom and policy developed by the County will fill in any gaps. Accordingly State DHS can rightly be said to have responsibility for how its county agencies—which Defendant Bicha admits administer child welfare services on behalf of the State—develop customs and policies which its practice guidance specifically directs them toward.

While Plaintiffs have alleged the official capacity claims against Defendant Bicha and Bengtsson in the alternative due to some uncertainty around whether Defendant Bengtsson can be separately enjoined, at minimum, it is clear that both Defendants cannot be dismissed because they have no responsibility for the policies and customs giving rise to the injuries alleged here. Defendants rely on case law holding that the El Paso County DHS is an arm of the state, and cannot be sued. El Paso County DHS and state DHS claim Eleventh Amendment immunity to prevent them from being sued in state court, even for injunctive relief. It follows that Defendant Bengtsson, as executive director of the local agency, and Defendant Bicha, as executive director of the state agency, are proper party defendants to enjoin continued application of statewide policy or local policy and custom, depending on how this Court resolves the issues raised. One or the other, and mostly likely both, are liable in this capacity for the constitutional violations against Plaintiffs that resulted because of a widespread custom of strip searching and photographing children suspected to be abused without consent or a court order, and in accordance with the practice guidance that supports such behavior.

III. CONCLUSION

In sum, Plaintiffs have adequately pleaded facts that state a claim for which relief can be granted. Subject matter jurisdiction is not lacking. The Eleventh Amendment does not bar the *Monell* claim against Defendant BOCC for their responsibility for the custom or policy attributable to El Paso County, or Defendants Bengtsson and Bicha in their official capacity because prospective relief has been adequately pled, and Plaintiffs have demonstrated an injury-in-fact to be remedied by that relief. Qualified immunity is unavailable to bar suit against the individual capacity defendants because Plaintiffs have demonstrated that their conduct violated the Fourth and Fourteenth Amendments, and that the law was clearly established at the time of the violation. All Defendants are liable for these violations in some capacity. BOCC is liable for the County's custom and policy. Defendant Bicha, as he assumes the identity of the Colorado Department of Human Services, may be enjoined in his official capacity from enforcing the polices and customs at issue here; and to the extent not otherwise enjoined, Defendant Bengtsson assumes the identity of El Paso County Department of Human Services and may be similarly enjoined in his official capacity. Plaintiffs have stated a claim against Defendants Newbill and Woodard stemming from the search of I.B., whereby Defendant Woodard searched and Defendant Newbill directed the search. Plaintiffs have adequately pleaded their claims against supervisors Defendants Bengtsson and Rhodus by demonstrating personal participation, causation and deliberate indifference. For these reasons, Defendants respectfully request that this Court DENY County Defendants' [#40] and Defendant Bicha's [#41] motions to dismiss.

Respectfully submitted this 14th day of October,

s/ Theresa Lynn Sidebotham
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that automatically sends notification of such filing to the following email addresses:

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