

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 15-CV-1165-KLM

JANE DOE,

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

Plaintiffs,

v.

APRIL WOODARD, El Paso County Department of Human Services caseworker, individually and as an agent, employee, and representative of El Paso County,

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

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

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

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

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

Defendants.

**DEFENDANT BICHA'S REPLY TO PLAINTIFF'S [sic] COMBINED
RESPONSE TO MOTION TO DISMISS [ECF NO. 48]**

DEFENDANT Reggie Bicha, Executive Director of the Colorado Department of Human Services (Defendant Bicha), by and through undersigned counsel, hereby submits this reply to Plaintiff's [sic] Combined Response to County Defendants' Motion to Dismiss [#40] and Defendant Bicha's Motion to Dismiss [#41], and states:

I. Introduction

Plaintiff's [sic] Combined Response to County Defendants' Motion to Dismiss [#40] and Defendant Bicha's Motion to Dismiss [#41] (Combined Response) sets forth seven arguments as to why the First Amended Complaint (Amended Complaint) should survive a motion to dismiss. Specifically, Plaintiffs assert that the County Defendants and Defendant Bicha's arguments fail as to 1) Eleventh Amendment immunity; 2) subject-matter jurisdiction; 3) qualified immunity; 4) Fourth Amendment violations; 5) Fourteenth Amendment violations; 5) municipal liability; 6) supervisory liability; and 7) official capacity liability.

The majority of Plaintiffs' arguments on these matters are directed at the County Defendants. This reply will only address those arguments specifically directed at Defendant Bicha¹. Plaintiffs have failed to state a claim for relief against Defendant Bicha for a violation of either their Fourth or Fourteenth Amendment rights. Additionally, Plaintiffs' claims for prospective relief are barred by Eleventh Amendment immunity applicable to states and their agencies. As

¹ Plaintiff repeatedly uses the term "defendants" and "DHS" throughout the Combined Response. This reply will only respond to arguments directed at these generic groups, if and when, they are specifically related to arguments raised in Defendant Bicha's Motion to Dismiss. All arguments not responded to are presumed to be directed at the County Defendants collectively, or an individual county defendant.

such, Defendant Bicha stands on the Motion to Dismiss Plaintiffs' Amended Complaint [ECF No. 41] and respectfully requests that Plaintiffs' Second and Fourth Claims for Relief against him be dismissed.

II. Plaintiffs Have Failed to Demonstrate Sufficient Allegations to Support a Fourth Amendment Claim Against Defendant Bicha.

The overwhelming majority of Plaintiffs' arguments in support of their Fourth Amendment claim focus on actions or inaction by the County Defendants. ECF No. 48, pp. 15-31. Relevant to Defendant Bicha, Plaintiffs contend that the Amended Complaint should survive dismissal for failure to state a Fourth Amendment claim because they alleged the following three specific facts:

- 1) 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;
- 2) The photographs of that search are insufficiently secured and stored; and
- 3) Jane Doe did not consent to the search, nor was there a court order authorizing the search.

ECF No. 48, p. 17. Plaintiffs' reliance on these discreet facts supports Defendant Bicha's position. None of these allegations implicate, or in any way involve, Defendant Bicha. Plaintiffs rely solely on the above three facts in support of their Fourth Amendment claim. Thus, Plaintiffs have failed to state a claim against Defendant Bicha.

Even if these facts are somehow stretched to apply to Defendant Bicha, Plaintiffs have not demonstrated that the state's interest in conducting child abuse investigations fails to pass constitutional muster. Plaintiffs summarily dismiss the state's interests, asserting that "the government has no interest in recklessly subjecting children to sexual and emotional trauma when many more appropriate ways exist to get information." ECF No. 48, p. 21. (emphasis added). Again, Defendant Bicha was not involved in the search at issue. Even assuming that the search was "reckless" and subjected I.B. to "sexual and emotional trauma," Plaintiffs do not allege, nor can they, that the Practice Guidance directed the County Defendants to engage in a reckless and impermissible search of I.B. Thus, Plaintiffs have failed to state a Fourth Amendment violation claim against Defendant Bicha.

Plaintiffs also rely on the absence of consent or a warrant as evidence that the search of I.B. violated her Fourth Amendment rights. ECF No. 48, p.21. However, neither Defendant Bicha, nor the Practice Guidance, required or directed the County Defendants to conduct a search without consent or a warrant. The Practice Guidance only points out that statute does not require parental consent for photographs. ECF No. 34 ¶ 92. It does not provide any mandate as to whether a county caseworker should obtain consent, or in what circumstances obtaining consent may be inappropriate. As a result, Plaintiffs have failed to demonstrate any connection between Defendant Bicha and the alleged Fourth Amendment violation.

Finally, Plaintiffs misstate Defendant Bicha's reliance on Colorado statute concerning the use of photography in child abuse investigations. Defendant Bicha did not argue that the alleged strip search and photography of I.B. were reasonable under the Fourth Amendment based on the application of section 19-3-306(1), C.R.S. (2015). ECF No. 48, p. 29. In actuality, Defendant Bicha relied on the aforementioned statute as further evidence of a legitimate government interest in investigating child abuse or neglect. ECF No. 41, p. 10. Defendant Bicha does not argue what is meant by "areas of trauma" or "visible on the child." *Id.* Plaintiffs' attempt to extrapolate more from Defendant Bicha's argument on this point is inappropriate.

As stated in Defendant Bicha's Motion to Dismiss, Plaintiffs' claim is based on I.B.'s Fourth Amendment right to be free from unreasonable searches and to personal privacy. In their Combined Response, Plaintiffs fail to demonstrate that "the statewide policy...[was a direct cause] of the deprivation of I.B.'s constitutional rights," and is "causing a continuing violation of I.B.'s constitutional rights in that she may again be subjected to an unreasonable search." ECF No. 34 ¶¶ 177, 178. As such, Claim Two against Defendant Bicha should be dismissed.

III. Plaintiffs Have Failed to Demonstrate Sufficient Allegations to Support a Fourteenth Amendment Claim Against Defendant Bicha.

As with the Fourth Amendment claim, Plaintiffs' arguments regarding alleged Fourteenth Amendment violations are focused on the County Defendants. ECF No. 48, pp. 33-40. Relevant to Defendant Bicha is application of the critical

balancing test. However, Plaintiffs' arguments on this point again focus exclusively on whether the county caseworker permissibly proceeded without parental consent and whether a health care professional should have conducted the alleged search. ECF No. 48, p. 35-40. Nowhere does Plaintiff allege, nor can they, that Defendant Bicha or the Practice Guidance required the search of I.B. to be conducted without consent. Nor do Plaintiffs allege that Defendant Bicha or the Practice Guidance required or excluded medical professionals from conducting the alleged search. Accordingly, Plaintiffs still fail to demonstrate any allegations against Defendant Bicha that constitute a Fourteenth Amendment violation. As such, claim four against Defendant Bicha should be dismissed.

Plaintiffs attempt to link Defendant Bicha to alleged Fourteenth Amendment violations by asserting official capacity liability. Plaintiffs' own arguments undermine their position. Plaintiffs contend that Defendant Bicha is properly sued here because he has "responsibility for the policies of the Department of Human Services." ECF No. 48, p. 46. In support of this position, Plaintiffs rely on *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004) and *Oten v. Colo. Bd. Of Soc. Servs.*, 738 P.2d 37 (1987), for the proposition that it is appropriate to name the body "ultimately responsible for enforcing that law" and "the executive officer is primarily responsible for implementing or enforcing" a statute, regulation, ordinance or policy. ECF No. 48, p. 46.

Both cases relied upon by Plaintiffs support Defendant Bicha's position. *Ainscough* concerned state employees' challenge to a Governor's Executive Order

and Department of Personnel, Personnel Policy that required a change to payroll deductions. *Ainscough*, 90 P.3d at 852-855. Similarly, *Oten* involved an individual's challenge to a change in the Board of Social Services (now known as the State Board of Human Services) rules regarding eligibility for low-income energy assistance payments. *Oten*, 738 P.2d at 38-39.

Unlike the Amended Complaint, both cases concerned challenges to formal executive branch policies or rules that required or mandated a course of action or change in practice. Here, the Practice Guidance does neither. The Practice Guidance does not mandate or require county employees to take a specific course of action, or to refrain from a specific course of action. The Practice Guidance does not contain any enforcement mechanisms related to the information it conveys. As stated in Defendant Bicha's Motion to Dismiss, the rules found 12 C.C.R. 2509-1 through -7 and Colorado statutes are the only state laws over which Defendant Bicha has implementation and enforcement authority. ECF No. 41, p. 9; *see also* § 26-5-102(1)(a), C.R.S. (2015) (CDHS obligated to implement rules regarding the provision of child welfare services.) Even if true that issuance of the Practice Guidance was in response to questions from the General Assembly, this does not lead to the "reasonable inference" that the Practice Guidance somehow constitutes a formal policy or enforceable law² as Plaintiffs suggest. ECF No. 48, p. 47. Nor does the Practice Guidance's reference to local county policies, confer responsibility on

² It is worth noting that, even if the Practice Guidance demanded a course of, albeit unenforceable, action by a county, it does not require that illegal strip searches be conducted, which conduct is the basis for Plaintiffs' claims. The use of photography itself, which is addressed Personnel in the Practice Guidance, is allowed by statute; Plaintiffs do not allege otherwise.

the Colorado Department of Human Service or Director Bicha for how county agencies develop any related local customs and policies. ECF No. 48, p. 48.

Plaintiffs provide no law in support of this proposition.

Ultimately, Plaintiffs fail to allege any facts in support of a Fourteenth Amendment violation against Director Bicha. Accordingly, Claim Four should be dismissed.

IV. Plaintiffs Continue to Allege Hypothetical Future Violations; Therefore, All Claims Against Defendant Bicha Must be Dismissed Pursuant to the Eleventh Amendment.

Plaintiffs' Combined Response further demonstrates the hypothetical and speculative nature of the alleged violations. With regard to the photographs of I.B., Plaintiffs state, "[t]he photographs that were taken *allegedly* remain in existence and are insecurely stored." ECF No. 48, p. 10. (emphasis added). Plaintiffs alleged in their First Amended Complaint that, "[p]hotographs of strip searches *can be, and sometimes are,* used as child pornography", and "careless handling of photographs under DHS policy *creates a real risk* that the photographs will enter the stream of child pornography." (emphasis added). ECF No. 34 ¶¶ 77, 79. None of these allegations support the existence of actual injury to Plaintiffs.

With regard to future child abuse investigations, Plaintiffs state, "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", and "the aggressive strip search policy and custom *suggesting a threat of future injury...*". ECF No. 48, p. 13. (emphasis added). Additionally, Plaintiffs' Combined Response suggests that

Plaintiffs are no longer residing in the State of Colorado; therefore, their claims of potential violations in the future are even more speculative and hypothetical than originally asserted. *See* ECF No. 48, pp. 12-13, p. 12 fn. 4.

In their Combined Response, Plaintiffs allege for the first time that I.B. 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.” ECF No. 48, p. 11. No such allegation was made in Plaintiffs’ Amended Complaint. Nor was any allegation made that these photos are in Defendant Bicha’s custody or control, or that he is the defendant responsible for destruction of the photos. Defendant Bicha must have notice of the claims against him in order to defend against the same; Plaintiffs cannot continually make new allegations in subsequent pleadings.

There are no ongoing violations of federal law asserted; therefore, there is no exception to Eleventh Amendment immunity, and Plaintiffs cannot proceed with this lawsuit against Defendant Bicha.

V. Conclusion

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

Respectfully submitted this 28th day of October 2015.

CYNTHIA H. COFFMAN
Attorney General

/s/ Tanya E. Wheeler
TANYA E. WHEELER*
First Assistant Attorney General
Elizabeth J. McCarthy*
Assistant Attorney General
Human Services Unit
State Services Section
Attorneys for the Department
*Counsel of Record

1300 Broadway, 6th Floor
Denver, Colorado 80203
Telephone: 720-508-6130
FAX: 720-508-6041
Email: tanya.wheeler@state.co.us;
libbie.mccarthy@state.co.us

CERTIFICATE OF SERVICE

I certify that on the 28th day of October, 2015, I electronically filed the
**DEFENDANT BICHA'S REPLY TO PLAINTIFF'S [sic] COMBINED
RESPONSE TO MOTION TO DISMISS [ECF NO. 48]** with the Clerk of the
Court using the CM/ECF which will send notification of such filing to the following
e-mail addresses:

Theresa Lynn Sidebotham
Jessica Ross
Telios Law PLLC
P.O. Box 3488
1840 Deer Creek Road, Suite 101
Monument, CO 80202
tls@telioslaw.com
jer@telioslaw.com
Attorney for Plaintiff I.B.

Diane Kay May
Kenneth Richard Hodges
El Paso County Attorney's Office-
Main Office
200 South Cascade Avenue
Colorado Springs, CO 80903
dianamay@elpaso.com
kennethhodges@elpasoco.com
*Attorneys for El Paso Department of
Human Services*

/s/ Kimberly Daley