

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN PURICELLI et al. : CIVIL ACTION  
:   
v. :   
:   
FEATHER HOUSTON et al. : 99-2982

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.**

**JUNE , 2000**

Presently before the Court is a Motion for Summary Judgment filed by the Defendants.<sup>1</sup> Also before the Court are numerous collateral motions filed by the parties including Defendants' Motion for Sanctions, Defendants' Motion to Strike certain affidavits and exhibits proffered by the Plaintiffs,<sup>2</sup> Plaintiffs' Motion for a Protective Order and to Strike certain affidavits proffered by the Defendants and Defendants' Motion to Compel. This bevy of motions arises from the Plaintiffs' civil rights law suit against the Defendants, brought pursuant to 42 U.S.C. § 1983 (1994). For the following reasons, the Defendants' summary judgment motion is granted in part and denied in part. The various discovery motions are ordered as set forth below.

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<sup>1</sup> The Defendants are Evelyn Miller ("Miller"), Annmarie Lodholz ("Lodholz"), Bucks County, Bucks County Children and Youth Social Services Agency ("Children and Youth Services"), James Wilkin ("Wilkin"), and County Commissioners Michael Fitzpatrick, Charles Martin and Sandra Miller (the "County Commissioners"). Throughout this memorandum, they will collectively be referred to as the "Defendants."

<sup>2</sup> The Plaintiffs are Brian Puricelli ("Puricelli"), Rhonda Ledbetter ("Ledbetter") and her children, Rebecca Boročaner ("Rebecca") and Daniel Boročaner ("Daniel"). Throughout this memorandum, they will collectively be referred to as the "Plaintiffs."

## **I. BACKGROUND**

The Plaintiffs support their claims by making the following factual allegations.<sup>3</sup>

According to the Complaint, in 1998, Andrew Boročaner (“Boročaner”), Ledbetter’s former husband and the natural father of Daniel and Rebecca, accused Puricelli, Ledbetter’s current husband, of child abuse. The allegation was investigated by Children and Youth Services pursuant to its authority under the Pennsylvania Child Protective Services Law (“CPSL”), 23 Pa. Cons. Stat. Ann. §§ 6301-6384 (West 1991), and determined to be “unfounded.”<sup>4</sup> The Plaintiffs claim that despite this finding, Puricelli’s name was placed on a list of suspected abusers whose allegations had been determined to be “founded” and “indicated,” as well as “unfounded.”

Then, on approximately May 23, 1999, while having visitation with the children and subsequent to a telephone dispute over noncourt scheduled visitation, Boročaner again accused Puricelli of abusing Daniel.<sup>5</sup> That day, Miller and Lodholz, both employees of Children and Youth Services, commenced an investigation into the allegations. On May 24, 1999, Lodholz went to see Daniel at Boročaner’s residence. The Plaintiffs allege that while she was there, she advised Boročaner to keep the children and made arrangements with Boročaner’s sister to

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<sup>3</sup> The Defendants dispute numerous aspects of the Plaintiffs’ version of the facts. While the Court notes any conflicts that so exist, they are resolved in favor of the Plaintiffs. See Warth v. Seldin, 422 U.S. 490, 501 (1975).

<sup>4</sup> Pursuant to the CPSL, there are three possible dispositions for allegations of abuse: “founded;” “indicated;” and “unfounded.” See 23 Pa. Cons. Stat. Ann. §§ 6337-6338.

<sup>5</sup> The Defendants acknowledge that an after-hours telephone call was received by Children and Youth Services. The on-call case worker who spoke with the caller registered the report. The Defendants do not, however, identify the accuser as Boročaner; pursuant to the CPSL, information concerning the identity of the person reporting suspected child abuse is confidential. See 23 Pa. Cons. Stat. Ann. § 6339.

bring Daniel to Children and Youth Services for additional interviewing in three days.<sup>6</sup>

The Plaintiffs sought to regain physical custody over Rebecca and Daniel, contacting both the Upper Makefield and Middletown Township police. They went to Boročaner's residence whereupon they discovered Boročaner had taken Daniel to his mother's house. They were able, however, to retrieve Rebecca.

The following day, May 25, 1999, Puricelli called Children and Youth Services requesting to be interviewed regarding the investigation. Meanwhile, Ledbetter filed an emergency petition to recover Daniel from Boročaner. She was able, however, to regain physical custody of the child from Boročaner the next day without court intervention.

When Puricelli and Ledbetter brought Daniel home, they received a call from the Middletown Township police inquiring as to the whereabouts of Daniel. The Plaintiffs responded that he was with them. Thereafter, the Makefield police arrived at the Puricelli residence and made the same inquiry. At the same time, Miller learned that Ledbetter again had custody over Daniel and that he was at the Puricelli residence, whereupon she telephoned the Plaintiffs. Puricelli answered the phone and attempted to speak with Miller, but she allegedly refused to speak with him. Instead, she demanded to speak with Ledbetter or would otherwise send the police into their home. Succumbing to Miller's alleged threat, Ledbetter answered the phone. Miller then proceeded, in what the Plaintiffs describe as an intimidating and angry voice, to ask Ledbetter whether she knew an investigation was ongoing. When Ledbetter replied "yes," Miller told her she had to return Daniel to Boročaner because the child could not be with or

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<sup>6</sup> The Defendants deny that they advised Boročaner to retain custody of the children. To the contrary, they contend that Boročaner kept the children as part of an ongoing custody dispute he was having with Ledbetter.

around Puricelli. Otherwise, Miller would take Daniel from her. When Ledbetter asked if there was anything else that could be done, such as leaving Puricelli and staying with her parents, Miller replied that that was alright, so long as Puricelli had no contact with them during the course of the investigation. Thereafter, Ledbetter left the home with Daniel and Rebecca.<sup>7</sup>

On May 26, 1999, Ledbetter brought Daniel to Children and Youth Services to be interviewed by a child psychologist, Ms. Blean (“Blean”). The Plaintiffs allege that Daniel was removed from her and taken behind a secure wall. Ledbetter was not informed that she could accompany Daniel or observe the interview. She also testified, however, that she did not object to the request to leave Daniel alone with the psychologist, did not ask to stay in the room and did not ask to speak with a supervisor about the interview. Following the interview, Ledbetter met with Miller. They discussed Ledbetter’s plans to go away for the Memorial Day weekend with her parents. Miller asked whether Puricelli was coming and Ledbetter replied that while he was originally supposed to go, now, in light of the situation, he was not.

Also following the May 26, 1999 interview, Miller arranged two additional times to interview Daniel: June 1 and June 3, 1999. At those interviews, Lodholz again took Daniel from Ledbetter and told her to stay in the waiting area. Ledbetter testified, however, that she did not ask to observe either interview. After the June 3, 1999 interview, the Plaintiffs claim the psychologist told them no additional interviews would be needed, but that Lodholz informed

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<sup>7</sup> According to the Defendants, on May 25, 1999, Miller called Ledbetter to discuss the investigation and to devise a safety plan for Daniel. The Defendants claim that Miller merely told Ledbetter that it was important for Daniel’s safety that he not be left alone with Puricelli while the investigation was ongoing. Miller claims that in response, Ledbetter called the allegation of abuse a fabrication, but nonetheless volunteered to take Daniel and Rebecca and live with her parents.

them immediately thereafter that in fact one more was required. Apparently Daniel was not being cooperative during the June 3, 1999 interview.<sup>8</sup> Accordingly, an interview was scheduled for June 10, 1999.

The Plaintiffs also claim that following the June 3, 1999 interview, Lodholz told Ledbetter, her brother and her mother that Children and Youth Services was investigating Puricelli's reputation and morals, noting that he had a bad reputation in the community.<sup>9</sup> Puricelli then had friends of his contact Lodholz and Miller, all of whom testified to his good character.

On June 7, 1999, Miller allegedly called the Puricelli residence looking for Ledbetter. Puricelli informed her that Ledbetter was not there and that she would not return because she was afraid Miller and Lodholz would take Daniel away from her. Also that day, Lodholz made arrangements to interview Rebecca at her school regarding the allegations of abuse and whether Puricelli had been left alone with Daniel. Specifically, Borochaner had advised Lodholz that Rebecca told him that, during the pendency of the investigation, Puricelli and Daniel had ridden the lawn tractor together alone for an hour. Rebecca was interviewed in the presence of her teacher but generally refused to answer any questions about her family. The Plaintiffs claim that this interview took place without their knowledge or permission.

Finally, on June 10, 1999, Ledbetter brought Daniel to Children and Youth Services for what would be the final interview. Ledbetter brought her attorney, Theodore Kravitz ("Kravitz"),

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<sup>8</sup> The Defendants contend that they intended this to be the last interview, but that Daniel would not separate from his mother, thus preventing them from conducting a proper interview.

<sup>9</sup> The Defendants deny that they made any such inquiry or the alleged comments to Ledbetter and her family.

who demanded to observe the interview. Kravitz insisted that Children and Youth Services had a room where they could watch the interview without Daniel being aware of such. Miller and Lodholz admitted that such a room existed and proceeded to allow the interview to be witnessed.

According to Ledbetter, during the interview Daniel was asked leading questions about the alleged abuse. He was also asked directly whether Puricelli touched him on the “dinkie.” Daniel stated, “No, no, no, I told you no, no, no.” Shortly thereafter, the interview ended. Lodholz then told Ledbetter and Kravitz that the investigation was over and the allegations of abuse would be reported as “unfounded.” Accordingly, later that day, Ledbetter, Daniel and Rebecca moved back in with Puricelli.

Four days later, on June 14, 1999, the Plaintiffs filed suit in this Court challenging the constitutionality of the CPSL and alleging that the Defendants infringed upon their constitutional rights to substantive and procedural due process, religious freedom and equal protection, as well as several state constitutional rights. The Court dismissed the Plaintiffs’ facial challenge to the CPSL by Memorandum and Order dated October 20, 1999. Following the close of discovery, the Defendants filed this timely motion for summary judgment. The Plaintiffs untimely responded. Thereafter, both parties filed the various discovery motions also before the Court. Significantly later, the Plaintiffs petitioned the Court for leave to file an untimely cross-motion for summary judgment which was granted by Order dated May 23, 2000. The Court will address each of these motions instantly.

## **II. STANDARD OF REVIEW**

Under Federal Rule of Civil Procedure 56(c), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant’s favor. See id. at 255. Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

### **III. MOTIONS FOR SUMMARY JUDGMENT**

Section 1983 provides a cause of action against those who, acting under color of state law, deprive another of rights, privileges or immunities guaranteed by the United States Constitution or federal law. See 42 U.S.C. § 1983. The Plaintiffs presently seek injunctive relief, as well as compensatory and punitive damages, alleging that their constitutional rights were, and continue to be, infringed upon in violation of § 1983.

#### **A. Claim for Injunctive Relief**

In Count II of their Complaint, the Plaintiffs seek injunctive relief against Children and Youth Services, Miller and Lodholz. The Court notes initially that the party invoking federal

jurisdiction has the burden of establishing the elements of standing. See O'Brien v. Werner Bus Lines, Inc., No. 94-6862, 1996 WL 82484, at \*3 (E.D. Pa. Feb. 27, 1996). In order to have standing to assert a claim for injunctive relief, the plaintiff must have an actual or imminent injury in fact that is causally connected to the challenged conduct which will likely be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). When a plaintiff seeks redress for a past wrong, there is not necessarily a present case or controversy unless accompanied by present adverse effects. See Lyons v. City of Los Angeles, 461 U.S. 95, 103 (1983).

The Plaintiffs allege in their Complaint that they are suffering immediate and irreparable harm from the investigation by Miller and Lodholz. Specifically, they argue that the Defendants are forcing them to live apart and that in conducting the investigation, Miller and Lodholz are imposing their definition of proper moral behavior on the Plaintiffs. The Defendants argue they are entitled to summary judgment on these claims because, upon the close of the investigation, the allegations became moot. The Court agrees and finds that the Plaintiffs have not demonstrated an actual or imminent injury necessitating injunctive relief.

First, the investigation that is the basis of this law suit is over. The parties do not dispute that Children and Youth Services informed Ledbetter on June 10, 1999 that the investigation was complete and that the report of abuse would be marked "unfounded." The same is reflected in the letters sent to Puricelli, Borocharner and Ledbetter dated June 29, 1999 informing them of the investigation's finding. See Pls.' Mot. for Summ. J. Ex. Nos. 276-78. Finally, Ledbetter testified that she moved back in with Puricelli on June 10, 1999. Therefore, the Plaintiffs allegations of ongoing constitutional violations by Children and Youth Services incurred during the course of

the investigation were mooted once the investigation ended, or approximately on June 10, 1999. Accordingly, the Plaintiffs are no longer in jeopardy of suffering immediate and irreparable harm as a result of the Defendants alleged investigation tactics.

The Plaintiffs' second argument in support of their claim for injunctive relief is that Puricelli continues to suffer harm to his reputation because his name continues to appear on a list of suspected child abusers. In support of this contention, they cite to the affidavit of Scott Fries ("Fries"), the Director of the Childline and Abuse Registry ("Childline") in the Office of Children, Youth and Families of the Pennsylvania Department of Public Welfare ("Department of Public Welfare"). See Defs.' Mot. for Summ. J. Ex. D. In his affidavit, however, Fries states that Childline maintains three types of files: (1) a pending complaint file of child abuse reports currently under investigation; (2) a statewide central register ("Central Register") of child abuse reports containing "founded" and "indicated" reports only; and (3) a file of "unfounded" reports awaiting expunction. See id. ¶ 5; see also 23 Pa. Cons. Stat. Ann. § 6331. According to Fries, Puricelli's name does not, nor has it ever appeared in the Central Register. It would, however, have temporarily appeared in the pending complaint file during the pendency of the investigation and it currently appears in the file of "unfounded" reports awaiting expunction. According to the CPSL, expunction occurs 120 days following the one-year anniversary of the "unfounded" determination, a date that has not yet arrived. See id. § 6337(a).

On this basis, Puricelli argues that he continues to suffer injury at the hands of the Defendants because his name appears on a list associated with child abusers. Puricelli's argument is deficient for several reasons. First, according to the affidavit of Fries, and uncontested by the Plaintiffs as to this fact, Childline is maintained by and under the control of

the Department of Public Welfare. See Defs.’ Mot. for Summ. J. Ex. D ¶ 1; see also 23 Pa. Cons. Stat. Ann. § 6332. The Department of Public Welfare, however, is not a party to this action. Therefore, even if the Court found an appropriate basis upon which to grant the Plaintiffs injunctive relief, it could not award such against any of the parties presently before it. The Court cannot order a party to control something over which it has no control.

Additionally, contrary to the Plaintiffs’ characterization of the facts, the uncontested affidavit of Fries indicates that Puricelli is not listed on the Central Register, a list of child abusers whose allegations of abuse have been determined to be “founded” or “indicated.” Instead, his name appears on a list of individuals whose allegations were determined to be “unfounded.” It seems, therefore, that the Plaintiffs are attempting to bring a facial challenge to the constitutionality of the disposition of “unfounded” reports under the CPSL. The defendants presently before this Court, however, have no control over the administration of “unfounded” reports and accordingly cannot be liable for any unconstitutionality related thereto.<sup>10</sup>

The third and final argument the Plaintiffs make in support of their claim for injunctive relief is that they are in danger of being subjected to future abuse investigations by Child and

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<sup>10</sup> The Court notes that the Plaintiffs named Feather Houstoun, the Secretary of the Department of Public Welfare, as a Defendant in this action, but that all claims against her were dismissed by Memorandum and Order dated October 20, 1999. In their Complaint, the Plaintiffs raised a facial challenge to certain aspects of the CPSL, including the disposition of his “unfounded” report of child abuse. The presentation of the facts and the nature of both parties’ arguments, however, was such that it appeared that even though the report of child abuse was determined to be “unfounded,” Puricelli’s name appeared on the Central Register, a list that is only supposed to contain the names of individuals whose reports were determined to be “founded” or “indicated.” Further briefing and additional uncontroverted evidence indicates this is not the case, but rather Puricelli’s name is listed only among individuals whose reports were determined to be “unfounded.” Because these are different, albeit related issues, the Plaintiffs are not precluded from pursuing them at a later date.

Youth Services. This argument is also deficient. First, the Plaintiffs have proffered no evidence to suggest that such an investigation is imminent. See Lujan, 504 U.S. at 560-61. Second, even in the event of another allegation of abuse against the Plaintiffs, it is undisputed that the CPSL imposes a duty upon Child and Youth Services to investigate that allegation. See 23 Pa. Cons. Stat. Ann. § 6334. Because the Court is clearly unable to enjoin nameless, faceless third parties from making allegations of abuse, and because Child and Youth Services has a statutorily-imposed duty to investigate, the Court will not enjoin it from investigating future allegations of abuse against the Plaintiffs, no matter from where they originate. Finally, should a future investigation become necessary, the Plaintiffs are free to seek an appropriate remedy at that time.

Accordingly, the Court finds there to be no genuine issue of material fact regarding the Plaintiffs' claim for injunctive relief. The Plaintiffs have presented no evidence of immediate and irreparable harm and in the absence of such, injunctive relief is inappropriate. The Defendants' motion is therefore granted as to this issue.

**B. Plaintiffs' Constitutional Claims**

In Count III of their Complaint, the Plaintiffs allege that the Defendants violated their substantive due process, religious liberty and equal protection rights.<sup>11</sup> In analyzing motions for summary judgment, generally the relevant inquiry is whether there is a genuine issue of material

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<sup>11</sup> The Court notes initially that the Plaintiffs have brought suit against the defendants in both their official and individual capacities. Although it is not explicitly stated, the Court surmises from the Complaint that the Plaintiffs sued Evelyn Miller and Lodholz in both capacities, and the remainder of the Defendants in their official capacities only. Because suits against persons in their individual capacity impose personal liability, while suits against persons in their official capacity impose liability against the municipalities themselves, the Court will include the official capacity liability discussion within the analysis for the municipality. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

fact as to any element of the Plaintiffs' claims. See Fed. R. Civ. P. 56(c). The Defendants here, however, have asserted the affirmative defenses of absolute and qualified immunity.<sup>12</sup>

Accordingly, the Court must first address whether they are entitled to either of those defenses.

See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1368 (3d Cir. 1992); Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319, 326 (E.D. Pa. 1994).

### **1. Absolute Immunity**

In determining the availability of the defense of immunity, courts utilize a functional approach. See Fanning v. Montgomery County Children & Youth Servs., 702 F. Supp. 1184, 1186 (E.D. Pa. 1988). Therefore, whether a public official can successfully raise immunity in a law suit arising out of the performance of his or her official duties depends on the nature of those duties. See id.; see also Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). Applying this approach, the Supreme Court has recognized that officials acting in prosecutorial roles are absolutely immune from suit under § 1983. See, e.g., Butz v. Economou, 438 U.S. 478, 515 (1978); Imbler, 424 U.S. at 427-28. Further, this rationale has largely been extended to social workers in performing the prosecutorial-like function of initiating child abuse investigations. See Meyers v. Contra Costa County Dep't of Soc. Servs., 812 F.2d 1154, 1157 (9th Cir. 1987); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984); Fanning, 702 F. Supp. at 1187. But

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<sup>12</sup> The Defendants have also asserted the good faith immunity defense set forth in the CPSL. See 23 Pa. Cons. Stat. Ann. § 6318. While this defense may immunize Children and Youth Services and its employees from state law causes of action, it is inapplicable to claims arising from alleged violations of federal law. See Good v. Dauphin County Soc. Servs., 891 F.2d 1087, 1091 (3d Cir. 1989). Therefore, the Court will limit its discussion of the Defendants' immunity defenses to those provided pursuant to § 1983.

see Rinderer v. Delaware County Children & Youth Servs., 703 F. Supp. 358, 361 (E.D. Pa. 1987); Doe v. Suffolk County, 494 F. Supp. 179, 183 (E.D.N.Y. 1980). While there is some disagreement as to what constitutes a social worker's prosecutorial role, courts have largely held that outside of the decision to initiate an investigation, social workers are only entitled to qualified immunity. Compare Fanning, 702 F. Supp. at 1188-89 (holding social worker was not entitled to absolute immunity for unilateral decision to remove child from parents' home prior to initiation of dependency proceedings or for refusing to allow child to contact her parents while in foster care); Meyers, 812 F.2d at 1158 (finding social worker's efforts to keep parent away from children prior to hearing in juvenile court to be nonprosecutorial); and Fogle v. Benton County SCAN, 665 F. Supp. 729, 734 (W.D. Ark. 1987) (holding social worker's attempt to influence parent-child relationship was not prosecutorial); with Mazor v. Shelton, 637 F. Supp. 330, 334 (N.D. Cal. 1986) (finding social workers absolutely immune for decisions pertaining to temporary custody of minors).

In the instant case, the parties do not challenge the Defendants' decision to initiate the abuse investigation. Indeed, when asked whether the Defendants should have investigated the allegation of abuse, Puricelli testified, "No. They can't do no investigation. The law is clear. No one is faulting the law to the extent that it states that an investigation has to be done. Clearly the law is set forth to protect children." Defs.' Mot. for Summ. J. Ex. G, at 151-52. Rather, the Plaintiffs challenge the manner in which the Defendants conducted their investigation. Therefore, the Court finds that while the Defendants likely would be absolutely immune for their decision to initiate the abuse investigation, for their challenged conduct, at most, they are entitled to qualified immunity.

## 2. Qualified Immunity

State officials performing discretionary functions are entitled to qualified immunity for civil damages so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. See Harlow, 457 U.S. at 818; Callahan, 880 F. Supp. at 326. As the Third Circuit has noted, “[t]he immunity is not absolute but rather balances the interest in allowing public officials to perform their discretionary functions without fear of suit against the public’s interest in vindicating important federal rights.” Lee v. Mihalich, 847 F.2d 66, 69 (3d Cir. 1988).

### a. Substantive Due Process Claim

Although the Complaint does not specify, the Court infers that the substantive due process rights the Plaintiffs allege were violated were the rights to familial integrity and privacy. It is well-established that parents have a constitutionally protected interest in the custody, care and management of their children. See, e.g., Lehr v. Robertson, 463 U.S. 248, 258 (1983); Fanning, 702 F. Supp. at 1190. This right, however, is not absolute. See Lehr, 463 U.S. at 256; Croft v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997). A parent’s liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children. See Croft, 103 F.3d at 1125. Ordinarily, then, what exactly constitutes a clearly-established right in the context of social workers investigating allegations of child abuse is a difficult question.

The Third Circuit, however, has clarified parents’ constitutional rights during child abuse investigations. See Croft, 103 F.3d at 1127. In Croft, the county social services agency received an anonymous report that the plaintiff was abusing his daughter. See id. at 1124. The defendant

social worker interviewed the alleged abuser who denied the allegations. See id. Nonetheless, the defendant gave the father an ultimatum: either leave the home and separate himself from his daughter until the investigation was over or she would take the child physically from his home that night and place her in foster care. See id. The child's parents argued that their liberty interest in the companionship of their daughter was violated by the defendant's conduct. See id. at 1125. The district court held that the defendant was entitled to qualified immunity for her conduct, and the parents appealed. See id. at 1124.

In determining whether the plaintiffs' substantive due process rights were violated, the Third Circuit balanced their fundamental interest in familial integrity with the state's interest in protecting children from abuse. See id. at 1125-26. The court noted that a child abuse investigation does not in itself constitute a constitutional deprivation. See id. at 1126. But, a constitutional deprivation can occur where there is no "reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." Id. In such cases, the court reasoned, the state has no interest in protecting children from abuse by their parents. See id. Therefore, the court inquired as to whether there was information available to the defendants sufficient to create an objectively reasonable suspicion of abuse noting that "[a]bsent such reasonable grounds, governmental intrusions of this type are arbitrary abuses of power." Id. In making the ultimatum, the defendant apparently relied on an uncorroborated anonymous report of abuse. See id. The court found this was insufficient for her to form an objectively reasonable suspicion of abuse and that therefore her ultimatum violated the parents' constitutional rights. See id. at 1127.

In the instant case, the Plaintiffs allege that during a telephone conversation on May 25,

1999, Miller told Ledbetter that she had to return Daniel to Borocharner otherwise she would take the child away. The Croft case, decided over two years prior to this incident, defines parents' rights under these circumstances and makes it clear that such conduct violates those clearly-established rights when there is no objectively reasonable suspicion of abuse. See id. at 1126.

The Defendants, however, deny that Miller ever made such an ultimatum. Instead, they aver that she merely told Ledbetter that it was important for Daniel's safety that he not be left alone with Puricelli during the pendency of the investigation and that Ledbetter volunteered to take her children and live with her parents. Accordingly, the Court finds that there is a genuine issue of material fact as to this aspect of the Plaintiffs' substantive due process claim. Further, while this case is similar to Croft in that Miller's alleged comments were based on an anonymous report of abuse, the Court finds there is a genuine issue of material fact regarding whether Miller had an objectively reasonable basis to believe Daniel was being abused. Thus, the Defendants' motion for summary judgment is denied as to this issue, as is the Plaintiffs' cross-motion for summary judgment.

Regarding the other substantive due process violation allegations by the Plaintiffs, the Court finds that the Defendants are entitled to summary judgment. Specifically, other than the alleged ultimatum, the Plaintiffs claim the Defendants violated their rights by removing Rebecca from her class at school and interviewing her without their knowledge or consent and unnecessarily extending the length of the investigation by improperly investigating Puricelli's reputation and morals and conducting their investigation in violation of the accepted standards for doing so. In analyzing these claims, the Court need not address the qualified immunity issue because the Defendants' conduct, as alleged by the Plaintiffs, simply does not rise to the level of

a constitutional deprivation. See Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 589 n.6 (3d Cir. 1998) (finding it unnecessary to consider qualified immunity issue because plaintiff failed to establish violation of constitutional right).

Turning first to Lodholz's questioning of Rebecca while she was at school, the District Court for the Middle District of Pennsylvania held under similar circumstances that the questioning of a student by school officials concerning potential child abuse did not amount to a constitutional violation. See Picarella v. Terrizzi, 893 F. Supp. 1292, 1302 (M.D. Pa. 1995). In Picarella, the plaintiffs' daughter was taken from class without their permission and questioned about potential abuse by her parents. See id. at 1296. The child denied the allegations made by the school administrators and ultimately the report of abuse was determined to be "unfounded." See id. The child's parents brought suit against the school officials pursuant to § 1983 alleging their Fourth Amendment rights had been violated. See id. The court held that the school administrator's intrusion into the parents' right to familial integrity was outweighed by the state's interest in protecting children and that the administrator's conduct was not in any way unreasonable. See id. at 1302. Therefore, the parents failed to state an actionable deprivation of a constitutional right and their complaint was dismissed. See id. at 1304.

Applying Picarella instantly, it is apparent that the Defendants' conduct did not amount to a constitutional violation. Similar to the circumstances in Picarella, Lodholz questioned Rebecca while at school about allegations of child abuse in her home. The state's interest in protecting children from that potential abuse is no less strong when it is a social worker, as opposed to a school administrator, who is doing the questioning, nor when it is a relative of, rather than the

victim himself, being questioned.<sup>13</sup> Therefore, the Defendants' motion for summary judgment is granted as to this issue.

The Plaintiffs argue secondly that the Defendants' violated their constitutional rights by unnecessarily extending the length of the investigation by improperly investigating Puricelli's reputation and morals and failing to comply with allegedly recognized standards for child abuse investigations. Specifically, the Plaintiffs claim that the Defendants should have known, based on their first interview with Daniel and knowledge of the prior unfounded report of abuse, that the allegations were unfounded, yet they needlessly prolonged the investigation. Further, they allegedly refused to interview Puricelli about the allegation and instead inquired as to his morals and reputation in the community. The Plaintiffs claim the Defendants' actions were motivated by malice and bad faith and in retaliation against Puricelli who apparently litigates cases against Children and Youth Services.

Because the Court must accept the facts in a light most favorable to the Plaintiffs and draw all reasonable inferences in their favor, the relevant inquiry is whether it is reasonable to infer that the Defendants' conduct was motivated by malice and a desire to retaliate against the Plaintiffs generally and Puricelli specifically. If, indeed, that were the case, then the Defendants would be abusing their official positions to harass the Plaintiffs, a clearly established constitutional violation. See Board of County Commissioners v. Umbehr, 518 U.S. 668, 673

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<sup>13</sup> The Picarella court also held that the school administrators' conduct did not violate the child's constitutional rights. See Picarella, 893 F. Supp. at 1301-02. Along these lines, the Court notes that while Rebecca is named as a Plaintiff in this matter, the Complaint fails to set forth any discernable manner in which her individual rights were violated. Nonetheless, to the extent the Plaintiffs intended to allege that Rebecca's rights were violated during her teacher's questioning at school, the Court finds this argument to be without merit. See id.

(1996).

The Court, however, finds that such an inference is not reasonable. First, the investigation, in total, lasted eighteen days. During this time, Miller and Lodholz interviewed Daniel a total of four times. The first time, according to Lodholz's uncontroverted affidavit and investigation notes, she was unable to conduct an appropriate interview with Daniel because he was drowsy from a nap, would not leave his father's lap and could not readily be understood because of a pacifier in his mouth. See Defs.' Mot. for Summ. J. Ex. C, ¶ 4; Pls.' Answer to Defs.' Mot. for Summ. J. Ex. Nos. 269-70. At the third interview, Daniel refused to separate from his mother and again could not be properly interviewed. See Pls.' Answer to Defs.' Mot. for Summ. J. Ex. No. 273.

Second, there is no evidence that either Miller or Lodholz were involved with or had any knowledge of the prior allegation of abuse made against Puricelli. See Defs.' Mot. for Summ. J. Ex. A, ¶¶ 21-23. Thus, the Plaintiffs' claim that they had reason to believe the present allegation was not true because of the prior unfounded report is simply unsubstantiated. Further, the Plaintiffs do not even allege that Miller and Lodholz knew that Puricelli litigated cases against Children and Youth Services.

Third, the Plaintiffs have offered no evidence of malice or bad faith on the part of the Miller and Lodholz.<sup>14</sup> This is true notwithstanding the Plaintiffs' proffer of purported standards for conducting child abuse investigations and their claims of noncompliance by the Defendants. Although it is not clear, the Court infers the crux of the Plaintiffs' argument to be that Miller and Lodholz's failure to comply with these standards implies bad faith on their part. Presumably, the

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<sup>14</sup> Indeed, the Plaintiffs did not even depose Miller and Lodholz.

Plaintiffs feel they were purposely singled out and treated more severely than other subjects of investigation as evidenced by the differences between their investigation and those conducted according to the Plaintiffs' proffered standards.

Investigations into allegations of child abuse are, by their very nature, fact specific and individually-determined processes. Techniques or time tables that may have worked in some circumstances may not work in others. The Court is not inclined, therefore, to constitutionalize certain child abuse investigation standards by imputing malice or bad faith to parties who do not rigidly adhere to them. This is particularly so when there is no other indicia of such on the part of the Defendants.

Therefore, in light of the significant interest in protecting children from potential abuse and lacking any evidence to support the claim that the Defendants needlessly prolonged their investigation to harass or retaliate against the Plaintiffs, the Court will not impute malicious intent to the Defendants simply because the investigation took longer or was conducted in a different manner than the accused's family would prefer. Accordingly, and in consideration of the foregoing analysis, the Plaintiffs have not presented sufficient evidence that this conduct by the Defendants violated their substantive due process rights. See Croft, 103 F.3d at 1126 (noting anonymous tip is sufficient to justify investigation). The Defendants' motion for summary judgment is accordingly granted as to this issue.

**b. Procedural Due Process Claim**

The Plaintiffs additionally claim that Miller and Lodholz violated their procedural due process rights. To state a procedural due process claim, parties must allege that the state deprived them of a constitutionally protected liberty interest without the benefit of

constitutionally required procedures. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

The gist of the Plaintiffs' argument seems to be that when Miller gave Ledbetter the alleged ultimatum, this constituted removal of Daniel by the state without court approval and without a subsequent hearing as required by the CPSL. See 23 Pa. Cons. Stat. Ann. § 6315. This provision of the CPSL, however, only applies where the state has taken actual physical custody over a child. It is undisputed that the Defendants never had physical custody over Daniel; he was under the care of Ledbetter or Borochaner at all relevant times. Therefore, the procedures set forth in the CPSL are inapplicable to the instant situation.

Further, to the extent the Plaintiffs argue that Miller's alleged ultimatum violated their rights, this is the basis for a substantive due process deprivation claim only. The nature of a procedural due process violation is a failure on the part of the state to follow the appropriate procedures before infringing upon an individual's rights. The cause of the alleged violation here, however, is the act alone as there is no procedure that can save the alleged act from violating an individual's constitutional rights. Therefore, the Plaintiffs have failed to allege a procedural due process claim and summary judgment is granted to the Defendants on this issue.

c. **Religious Liberty Claim**

The Plaintiffs also allege that their fundamental right to religious freedom was infringed upon during the course of the investigation. Again, the Plaintiffs' claim is not abundantly clear.

With regard to the religious liberty claim, the Complaint states, in its entirety, that:

Defendants, . . . while acting under color of state law denied the Plaintiffs their Due Process, Liberty and Religious Freedom rights as are afforded under the First and Fourteenth Amendment [sic] of the United States Constitution . . . . In that, Plaintiffs were denied their right to associate, live with, care for, raise children in a family setting or manner that was legal; to receive a prompt, fair, impartial investigation and investigator; to receive by fair minded and impartial investigator [sic], equal treatment of law as others in similar situation; and, non arbitrary and capricious application of the law.

Pls.' Compl. ¶ 43. The Plaintiffs elaborate in their response to the Defendants' instant motion that by investigating Puricelli's morals and reputation, Miller and Lodholz were somehow imposing their own values and beliefs on the Plaintiffs. Apparently the Plaintiffs were, at the time of the investigation, common law married. They claim that Miller and Lodholz allowed their beliefs on marriage and religion, and therefore presumably their disapproval of common law marriage, to influence the investigation, thereby infringing upon their right to religious freedom.

When bringing a claim for deprivation of religious freedom or liberty, two threshold requirements must be satisfied before the plaintiff's beliefs, which are claimed to be religious in nature, are afforded First Amendment protection. See Wilson v. Schillinger, 761 F.2d 921, 925 (3d Cir. 1985). A court must determine that the alleged beliefs are first, religious in nature and second, sincerely held. See id.; Africa v. Commonwealth of Pa., 662 F.2d 1025, 1029-30 (3d Cir. 1981). The Court finds that the Plaintiffs have not alleged that any belief that they hold is religious in nature.

The Third Circuit has adopted three indicia to determine the existence of a religion. See Africa, 662 F.2d at 1032. According to these criteria, a religion should: (1) address fundamental and ultimate questions having to do with deep and imponderable matters; (2) be comprehensive in nature, consisting of a belief-system as opposed to an isolated teaching; and (3) be recognized by certain formal and external signs. See id. Under a liberal reading of the Complaint and responsive pleadings filed by the Plaintiffs, the only belief they allege to hold is that of the merit of common law marriage as a moral way of life. The Third Circuit's criteria make it abundantly clear that the Plaintiffs' beliefs are not religious in nature and therefore do not qualify for First Amendment protection.<sup>15</sup> The Defendants' motion is accordingly granted as to this issue.

**d. Equal Protection Claim**

The Plaintiffs argue next that they were denied the constitutional right to equal protection of the law. They claim that the Defendants treated them differently than other targets of child abuse investigations. They offer anecdotal evidence of the manner and length of other investigations conducted by the Defendants purportedly to show that they were treated differently. Further, they allege that they were discriminated against on the basis of their common law, as opposed to religious or civil, marriage ceremony.

The Equal Protection Clause directs that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). In order to state a

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<sup>15</sup> This is not to say that there is no First Amendment protection for the decision not to believe in or follow a religious faith. See McGowan v. Maryland, 366 U.S. 420, 564 (1961). The Court merely holds here that the Plaintiffs' claim seems to have nothing to do with religion or religious freedom as those concepts have been defined by the Supreme Court and Third Circuit. It appears that the Plaintiffs' claim is more appropriately stated as one of a deprivation of due process, which the Court has addressed previously.

claim under § 1983 based on the Equal Protection Clause, the Plaintiffs must allege that they are members of a protected class who are similarly situated to members of an unprotected class and were treated differently than the unprotected class. See Wood v. Rendell, Civ. A. No. 94-1489, 1995 WL 676418, at \*4 (E.D. Pa. Nov. 3, 1995). Further, the Plaintiffs must show they were intentionally discriminated against because of their membership in a particular class, not just that they were treated differently as individuals. See Murray v. Pittsburgh Bd. of Pub. Educ., 919 F. Supp. 838, 847 (W.D. Pa. 1996); see also Huebschen v. Department of Health & Soc. Servs., 716 F.2d 1167, 1171 (7th Cir. 1983).

Applying these standards instantly, the Court finds there are no allegations from which the Court could conclude that the Plaintiffs were treated differently because of their membership in a protected class. First, the Complaint simply alleges that Puricelli and his family were treated differently than other individuals accused of child abuse. Under these facts, at most the Plaintiffs have established that they were treated in a discriminatory and arbitrary fashion. To the extent, though, that the Plaintiffs allege that they are members of a protected class, presumably accused child abusers, the Court finds that the Defendants' conduct did not violate the Equal Protection Clause. "Classifications based on race, national origin, alienage, sex, and illegitimacy must survive a heightened level of scrutiny in order to pass constitutional muster." City of Cleburne, 473 U.S. at 440-41. All other classifications need only be rationally related to a legitimate state interest. See id. The Court has previously recognized the state's compelling interest in protecting children from potential abuse as well as the individual nature of child abuse investigations. See Croft, 103 F.3d at 1125. Accordingly, to the extent the Defendants distinguished between alleged child abusers in conducting their investigations, that distinction is

rationality related to a legitimate state interest.

Although it is not mentioned in the Complaint, the Plaintiffs argue in response to the Defendants' summary judgment motion that they were also discriminated against on the basis of their common law marital status. The Plaintiffs fail, however, to set forth any evidence that the basis for the different treatment was the marital status of the parties. Assuming, then, that common law marriage constitutes a protected class, the Plaintiffs have nonetheless failed to show that they were treated differently from those outside of that class. Accordingly, the Defendants' motion is granted as to this issue.

**C. Claims Against Municipal Defendants**

In addition to the claims against Miller and Lodholz, the Plaintiffs have brought suit against Bucks County, Bucks County Commissioners Fitzpatrick, Martin and Miller, Children and Youth Services and Wilkin, the Director of Children and Youth Services. The Plaintiffs allege that the Defendants failed to train and/or supervise Miller and Lodholz, resulting in deprivations of their constitutional rights.

A public entity such as Bucks County, and its employees when sued for conduct in their supervisory capacity, may be held liable pursuant to § 1983 "only when the alleged unconstitutional action executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy." Reitz v. County of Bucks, 125 F.3d 139, 144 (3d Cir. 1997) (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978)). In the absence of an unconstitutional policy, a municipality's failure to properly train its employees and officers can also create an actionable violation of an individual's constitutional rights under § 1983. See City of Canton v. Harris, 489 U.S. 378, 388

(1989); Reitz, 125 F.3d at 145. This is the case, however, only “where the failure to train amounts to deliberate indifference to the rights of persons with whom the [municipal employees] come into contact.” City of Canton, 489 U.S. at 388. In making this determination, the relevant questions are whether the training program is adequate in relation to the tasks the particular employees must perform and whether there is a connection between the identified deficiency in the training program and the ultimate injury. See Reitz, 125 F.3d at 145. “To succeed on a § 1983 claim, the party must prove that the training deficiency actually caused the injury.” Id. This is a difficult burden as the plaintiffs “must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred.” Id.

In the instant case, the Plaintiffs have proffered no evidence to show that the alleged violations of their constitutional rights resulted from the Defendants’ “deliberately indifferent failure to train its officers.” Id. The Plaintiffs identify multiple ways in which, in their opinion, Miller and Lodholz were not properly trained or supervised. They fail to present any evidence, however, that these failures actually caused the deprivation of their rights. Indeed, interspersed in the Plaintiffs’ general averments of causation are allegations that Miller and Lodholz individually could have caused the constitutional deprivations. See Pls.’ Answer to Defs.’ Mot. for Summ. J., at 39 (“The Defendants did not train Miller or Lodholz on how to properly investigate a child abuse case, or she [sic] didn’t apply that training.”). Further, they have presented no evidence that similar conduct has occurred to other individuals. See Reitz, 125 F.3d at 145. To the contrary, the Plaintiffs’ anecdotal accounts of the Defendants’ conduct throughout

other abuse investigations reveals that theirs is the only investigation where alleged constitutional deprivations took place. Finally, the Plaintiffs did not offer any evidence tending to show the Defendants' conduct occurred "specifically because of insufficient training and not as a result of personal animus." *Id.* Rather, they allege openly that there was personal animus between themselves and Miller and Lodholz. "When a plaintiff alleges that a municipality has not directly inflicted an injury, but has caused an employee to do so, stringent standards of culpability and causation must be applied to ensure that the municipality in a § 1983 suit is not held liable solely for the conduct of the employee." *Id.*; *see Monell*, 436 U.S. at 694 (holding that municipalities cannot be held liable under respondeat superior theory). Under this test, the Court concludes that the record lacks sufficient evidence from which a jury could reasonably find that the Defendants were deliberately indifferent to the need to train its social workers and that this failure was the actual cause of the Plaintiffs' injuries. The Defendants' motion is accordingly granted as to this issue.

**D. Plaintiffs' Pendent State Law Claims**

The Plaintiffs' have also raised several state law claims alleging their rights, as guaranteed by the Pennsylvania Constitution, were infringed upon by the Defendants. Specifically, they claim the Defendants violated their rights to due process, liberty, religious freedom, equal protection and protection of reputation.

For the reasons stated in each previous analysis, the Court grants in part and denies in part the Defendants' motion as to the Plaintiffs' due process, liberty, religious freedom and equal protection claims. For each of these claims, the courts of Pennsylvania have held that challenges brought under the Pennsylvania Constitution are subject to the same analysis as those brought

under their federal counterparts. See Nicholson v. Combs, 703 A.2d 407, 413 (Pa. 1997) (recognizing previous holding that “in analyzing the equal protection provisions of the Pennsylvania Constitution we apply the same standards used by the United States Supreme Court when reviewing a claim under the Fourteenth Amendment”) (citing James v. Southeastern Pa. Transp. Auth., 477 A.2d 1302 (Pa. 1984)); Haller v. Commonwealth of Pa., 693 A.2d 266, 268 n.7 (Pa. Commw. Ct. 1997) (finding analysis of petitioner’s claim under first amendment to United States Constitution to be “equally apposite” to claim raised under article 1, section 3 of Pennsylvania Constitution), aff’d, 728 A.2d 351 (Pa. 1999); Pennsylvania Med. Soc’y v. Foster, 608 A.2d 633, 637 (Pa. Commw. Ct. 1992) (utilizing same due process analysis for claims under United States and Pennsylvania Constitutions); see also Kaehly v. City of Pittsburgh, 988 F. Supp. 888, 891 n.1 (E.D. Pa. 1997).

As for the Plaintiffs’ harm to reputation claim, Article 1, Section 1 of the Pennsylvania Constitution provides, in relevant part, that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. Art. 1, § 1. Based on this provision, reputation has been held to be a fundamental right which cannot be abridged by the government without due process. See Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 349 (Pa. 1987); Pennsylvania Bar Ass’n v. Commonwealth of Pa., 607 A.2d 850, 855-56 (Pa. Commw. Ct. 1992).

In support of their claim, the Plaintiffs make the same argument they made to support their claim for injunctive relief: that Puricelli has and continues to suffer harm to his reputation because his name appears on a list associated with suspected child abusers. They argue first that

Puricelli's name wrongfully remains on the list of suspected child abusers. According to them, it should have been removed 120 days from the day the abuse was reported, or approximately September 21, 1999. The Plaintiffs' argument, however, is based on a misinterpretation of the plain language of the CPSL. Section 6337 states:

When a report of suspected child abuse is determined by the appropriate county agency to be an unfounded report, the information concerning that report of suspected child abuse shall be maintained for a period of one year. Following the expiration of one year after the date the report was received by the department, the report shall be expunged from the pending complaint file, as soon as possible, but no later than 120 days after the one-year period following the date the report was received . . . .

23 Pa. Cons. Stat. Ann. § 6337. Therefore, a report of abuse is required by statute to be maintained for a period of at least a year, and may be held for as long as 120 days following that time. See id. Clearly, then, the Plaintiffs have failed to state a claim for harm to their reputation by the Defendants.

The Plaintiffs also argue that Puricelli's name should never have appeared on this list and that its mere presence violates his rights under the Pennsylvania Constitution. Essentially, then, the Plaintiffs are attempting to raise a facial challenge to this provision of the CPSL under the Pennsylvania Constitution. Similar to the Plaintiffs' claim under the United States Constitution, the Plaintiffs have no effective remedy against any of the parties presently before the Court. Therefore, the Defendants' motion for summary judgment is granted.

**E. Punitive Damages**

The Defendants argue next that the Plaintiffs' claim for punitive damages should be dismissed. Punitive damages are a type of damages arising out of an initial cause of action for compensatory damages. See Halstead v. Motorcycle Safety Found., Inc., 71 F. Supp. 2d 455, 463

(E.D. Pa. 1999). They are appropriate only where the acts committed, in addition to causing actual damages, constitute outrageous conduct resulting from the defendant's evil motive or reckless indifference to the rights of others. See Donaldson v. Bernstein, 104 F.3d 547, 557 (3d Cir. 1997); Doe v. William Shapiro, Esq., P.C., 852 F. Supp. 1246, 1255 (E.D. Pa. 1994).

The Court finds that with regard to the Plaintiffs' claim that Miller threatened to take Daniel into state custody if he was not removed from Puricelli's house, there is a genuine issue of material fact as to the outrageousness of her conduct. For the same reasons that qualified immunity and summary judgment were inappropriate for the Miller on that claim, it is similarly inappropriate with regard to punitive damages. As for the remainder of the Plaintiffs' claims, however, the Court has previously found that there is no initial cause of action for compensatory damages. Accordingly, to this extent, the Defendants' motion is granted.

#### **IV. DISCOVERY MOTIONS**

In addition to the cross-motions for summary judgment, presently before this Court are numerous discovery motions filed by the parties. The Court will address each motion in turn.

##### **A. Defendants' Motion for Sanctions**

The Defendants have filed a motion for sanctions against the Plaintiffs, seeking to preclude them from introducing expert testimony. They argue that the Plaintiffs have failed to comply with the Court's orders concerning expert discovery and that they would be prejudiced by the allowance of expert testimony at this late date.

On October 21, 1999, a preliminary pretrial conference was held on this matter. The resulting order stated that the Plaintiffs' expert reports, if any, shall be produced on or before December 15, 1999, with the Defendants' reports due on or before January 15, 2000. Discovery

was set to close on February 15, 2000. The Plaintiffs had, in their initial disclosure, indicated an intent to produce expert testimony on damages, but did not produce any reports by the December deadline. A telephone conference was then held on January 10, 2000 between the parties and the Court wherein the Plaintiffs were given an additional ten days to submit their expert reports. Again, the Plaintiffs did not submit anything.

In early March, the Plaintiffs claim they filed a motion to extend discovery. Neither the Clerk of Court, the Court nor opposing counsel ever received this motion. The Plaintiffs apparently claimed they needed additional time to produce their expert reports because they required certain documents not then available due to outstanding discovery motions. By Memorandum and Order dated March 14, 2000, however, the Court resolved those discovery motions and ordered all documents produced by March 22, 2000. Additionally, around March 17, 2000, according to the Defendants' uncontradicted statements, they made an effort to stipulate as to expert testimony which, in effect, was rejected by the Plaintiffs. Lastly, also around this time the Plaintiffs first mentioned their intent to produce expert testimony as to liability. To the Court's knowledge, the Plaintiffs have not, to date, produced any form of expert report.

Pursuant to Federal Rule of Civil Procedure 37(b)(2)(B), courts are authorized to impose sanctions for discovery violations, including barring certain evidence. See Fed. R. Civ. P. 37(b)(2)(B). Whether sanctions are appropriate is in the broad discretion of the district court over discovery matters. See Scaggs v. Consolidated Rail Corp., 6 F.3d 1290, 1295 (7th Cir. 1993).

In the instant case, because of the Plaintiffs' repeated and seemingly blatant disregard for

its scheduling orders, the Defendants' motion is granted. First, the Plaintiffs had two opportunities to timely produce their expert reports and failed to do so. Second, there is no evidence that on any occasion they sought an extension of the discovery deadlines. Third, even now, approximately four months past the close of discovery, to the Court's knowledge the Plaintiffs have not produced any kind of expert report. Fourth and finally, there is uncontradicted evidence that the Plaintiffs' effectively rejected the Defendants' attempt to resolve the expert discovery dispute. Accordingly, in consideration of the Plaintiffs' repeated and unexcused disregard for the Court's scheduling orders and the undue prejudice from which the Defendants would suffer, the Plaintiffs are precluded from introducing any expert testimony.

**B. Defendants' and Plaintiffs' Cross-Motions to Strike Affidavits**

The Defendants have also filed a motion to strike certain affidavits and exhibits included in the Plaintiffs' response to the Defendants' summary judgment motion. They allege that the Plaintiffs' affidavits do not meet the legal standard for such and that the exhibits are unauthenticated and irrelevant. No to be outdone, the Plaintiffs have filed their own motion to strike certain affidavits of the Defendants, claiming they too do not comply with the legal requirements for affidavits.

The Court notes initially that at the preliminary pretrial conference held on this matter, the parties were given the explicit instruction to make good faith efforts to resolve all discovery disputes prior to filing a motion. In neither the Plaintiffs' nor the Defendants' motions does the Court see any evidence of any attempt to resolve what appear to be superficial problems with their summary judgment exhibits.

That being said, as to the Defendants' motion, it is dismissed as moot. As set forth

previously, the only remaining issue for trial in this matter is whether Miller threatened to take custody of Daniel if Ledbetter did not either give him to Boročaner or leave the Puricelli residence. Based on the deposition testimony of the Plaintiffs and the affidavits of Miller and Lodholz, there is a genuine issue of material fact as to whether this ultimatum actually took place. As for the rest of the Plaintiffs' claims, even considering the Plaintiffs' exhibits the Court finds they have failed to state a claim for relief as a matter of law. Therefore, the Defendants' motion is dismissed as moot.

The Plaintiffs' motion is simply denied. After examining the affidavits attached to the Defendants' summary judgment motion, the Court finds that only that of Miller was not notarized. In opposition to the Plaintiffs' instant motion, defense counsel readily admits that it may have erred and attached an unnotarized copy of the affidavit to the summary judgment motion. As can be determined by the notary seal on Miller's affidavit, however, it was contemporaneously sworn to prior to its inclusion in the Defendants' motion. See Defs.' Response to Pls.' Mot. for Protective Order & to Strike Affs. Ex. E. In consideration of the fact that this matter could have been resolved had counsel for the Plaintiffs simply telephoned counsel for the Defendants, as well as the harmless nature of the error, the Plaintiffs' motion is denied.<sup>16</sup>

### **C. Defendants' Motion to Compel**

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<sup>16</sup> The Plaintiffs argue at the end of their motion to strike the Defendants' affidavits that "[o]nce the affidavits are stricken there is no evidence to support the Defendants' motion for summary judgment and that motion should be denied." Pls.' Mot. for Protective Order & to Strike Defs.' Affs., at 6. The Court rejects this argument for the reasons stated previously and notes that to grant the relief that the Plaintiffs seek would, in effect, reward them for their decision not to depose the only two defendants who, according to their allegations, actually had personal involvement in the instant matter.

Next, the Defendants seek to compel the records of Dr. Joan Feinstein Oppenheim, Ph.D. (“Oppenheim”) as they pertain to psychological treatment of the Plaintiffs. In their unopposed motion, the Defendants contend that the Plaintiffs placed their mental health in issue and therefore must release any relevant mental health records. According to the Defendants, they made several unsuccessful attempts to obtain the records, both by subpoena to Oppenheim and written request to Plaintiffs’ counsel. After receiving no response, they moved for an order compelling their disclosure.

Under the Federal Rules of Evidence, medical records held by a psychotherapist are generally privileged. See Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996) (holding “confidential communications between a licensed psychotherapist and [his or] her patients in the course of diagnosis or treatment are protected from compelled disclosure”). A party waives that privilege, however, by placing his or her mental condition in issue. See Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997). Here, the Plaintiffs allege that they suffered damage to their emotional well-being. Specifically, their Complaint states:

As a direct and proximate result of the Defendants actions and/or omissions, Plaintiffs Puricelli and Ledbetter have been injured. For example, but not limited to such, these Plaintiffs have been unable to sleep, each has been withdrawn, been depressed, suffered headaches, stomach pains, lost hair, gone through spells of sadness and anger, and been unable to work at there [sic] businesses. Plaintiffs have not enjoyed the company and companionship of the others, nor been able to enjoy and continue the family bonds that had formed between them. Further, as a direct and proximate result of the Defendants’ conduct and omissions[,] the children . . . have suffered extreme emotional distress . . . .

Pls.’ Compl. ¶ 34. Additionally, it appears from the Plaintiffs’ initial disclosures and pretrial memorandum that they intended to call Oppenheim as an expert witness regarding damages caused by emotional distress. See Defs.’ Motion to Compel Ex. B. Thus, the Court finds that the

Plaintiffs have placed their mental condition in issue thereby waiving the patient-psychotherapist privilege. Accordingly, the Defendants' motion to compel is granted. The Plaintiffs are ordered to produce signed authorizations for the release of Oppenheim's records on or before June 19, 2000.

**D. Plaintiffs' Motion for a Protective Order**

The Plaintiffs also move for a protective order, seeking to quash the Defendants' subpoenas to depose Richard Ledbetter and Artie Ledbetter. The Plaintiffs claim that the subpoenas are improper because they do not contain the requisite signatures and were not accompanied by the appropriate fee. See Fed. R. Civ. P. 45(b). Of the Plaintiffs' exhibits, however, only the subpoena of Richard Ledbetter is not signed. The Defendants claim in response that the subpoenas were properly served. They include signed copies of the subpoenas with accompanying checks as exhibits. The Court has no specific reason to doubt either party. In resolving this matter, however, the Court notes that again there is no indication by either party of an attempt to resolve this matter amicably. To the extent that the Defendant failed to serve signed copies of the subpoenas or similarly forgot to enclose witness compensation, it seems, once again, that had counsel merely attempted to resolve this issue personally, the instant motion could have been avoided. Nonetheless, in the interests of adequate and fair discovery, the Plaintiffs' motion for a protective order is denied. The Defendants may conduct the depositions of Richard Ledbetter and Artie Ledbetter on or before June 30, 2000.

**E. Plaintiffs' Motion for Order to Show Cause**

Last but not least, the Plaintiffs have filed an unanswered motion for an order to show

cause why Bleam, the psychologist that interviewed Daniel, should not be held in contempt of Court for failing to appear for a deposition. The Plaintiffs, however, subpoenaed Bleam on May 3, 2000. As noted previously, according to the scheduling order set forth by this Court, all discovery was to close on or before February 15, 2000. Therefore, the Plaintiffs' subpoena was approximately three months late. Further, to the extent certain discovery matters were extended beyond the February deadline per the Court's March 14, 2000 Memorandum and Order, the Plaintiffs' deposition of this individual was not included. Finally, even were the subpoena timely served, the Court does not see how Bleam's testimony is relevant to the issues remaining in this case, as are set forth previously. Therefore, because the Plaintiffs' motion is denied.

#### **V. CONCLUSION**

In sum, and for the aforementioned reasons, the Defendants' summary judgment motion is granted in part and denied in part. Summary judgment is denied as to whether Miller violated the Plaintiffs' substantive due process rights under the United States and Pennsylvania Constitutions. Specifically, the Court finds that there are genuine issues of material fact regarding whether Miller threatened to take Daniel unless Ledbetter removed him from Puricelli's home and whether the alleged ultimatum was based on an objectively reasonable suspicion of abuse. For the same reasons, the Plaintiffs' cross-motion for summary judgment is also denied.

As for the remainder of the Plaintiffs' claims, the Court finds there is no genuine issue of material fact and that the Defendants are entitled to judgment as a matter of law. Specifically, the Plaintiffs have not demonstrated the threat of actual or imminent injury at the hands of the Defendants and therefore are not entitled to injunctive relief. Further, the Plaintiffs have not

stated an actionable substantive due process violation for Miller and Lodholz's decision to speak with Rebecca while she was at school, nor for the manner in which they conducted their investigation. Similarly, Miller and Lodholz are entitled to judgment as a matter of law on the Plaintiffs' procedural due process, religious liberty, equal protection and protection of reputation claims.

Judgment is also entered in favor of Bucks County, the County Commissioners, Children and Youth Services and Wilkin. The Court finds there is no genuine issue of material fact as to whether these defendants failed to train Miller or Lodholz in deliberate indifference to the Plaintiffs' rights or whether such actually caused the alleged injury in this case.

Turning to the discovery motions, the Defendants' motion for sanctions is granted. The Plaintiffs are therefore precluded from introducing any expert testimony. The Defendants' motion to strike certain affidavits and exhibits of the Plaintiffs is dismissed as moot. The Plaintiffs' cross-motion to strike is denied. The Defendants' motion to compel is granted. The Plaintiffs' shall provide the Defendants with signed authorizations for the release of Oppenheim's records on or before June 19, 2000. The Plaintiffs' motion for a protective order is denied. The Defendants may conduct the depositions of Richard Ledbetter and Artie Ledbetter on or before June 30, 2000. Finally, the Plaintiffs' motion for an order to show cause is denied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN PURICELLI et al. : CIVIL ACTION  
: :  
v. : :  
: :  
FEATHER HOUSTON et al. : 99-2982

**ORDER**

**AND NOW**, this        day of June, 2000, in consideration of the of motions filed by both parties and the responses thereto, it is ORDERED:

- (1) The Motion for Summary Judgment filed by the Defendants, Bucks County, Michael Fitzpatrick, Charles Martin, Sandra Miller, Bucks County Children and Youth Services Agency, James Wilkin, Evelyn Miller and Annmarie Ledbetter (collectively referred to as the “Defendants”) (Doc. No. 18) is GRANTED IN PART and DENIED IN PART.
  - (A) The Defendants’ motion is DENIED with respect to the Plaintiffs’ claim that defendant Evelyn Miller violated 42 U.S.C. § 1983 by denying the Plaintiffs their substantive due process rights by threatening to take custody over Daniel Borochaner unless Ledbetter removed him from the Puricelli residence.
  - (B) The Defendants’ motion is GRANTED with respect to the Plaintiffs’ claim that defendant Evelyn Miller violated § 1983 by denying the Plaintiffs their substantive due process rights by interviewing Rebecca Borochaner without permission and by the manner in which she conducted the investigation. Judgment is ENTERED in favor of defendant Evelyn

Miller with respect to these claims.

- (C) The Defendants' motion is GRANTED with respect to the Plaintiffs' claims that defendant Evelyn Miller violated § 1983 by depriving them of their rights to procedural due process, religious freedom and equal protection. Judgment is ENTERED in favor of defendant Evelyn Miller on these claims.
- (D) The Defendants' motion is DENIED with respect to the Plaintiffs' claim that defendant Evelyn Miller deprived the Plaintiffs of their substantive due process rights as guaranteed by the Pennsylvania Constitution by threatening to take custody over Daniel Boročaner unless Ledbetter removed him from the Puricelli residence.
- (E) The Defendants' motion is GRANTED with respect to the Plaintiffs' claims that defendant Evelyn Miller deprived the Plaintiffs of their substantive due process rights as guaranteed by the Pennsylvania Constitution by interviewing Rebecca Boročaner without permission and by the manner in which she conducted the investigation. Judgment is ENTERED in favor of defendant Evelyn Miller with respect to these claims.
- (F) The Defendants' motion is GRANTED with respect to the Plaintiffs' claims that defendant Evelyn Miller deprived the Plaintiffs of their procedural due process, religious freedom, equal protection and protection of reputation rights as guaranteed by the Pennsylvania Constitution.

Judgment is ENTERED in favor of defendant Evelyn Miller on these claims.

(G) The Defendants' motion is GRANTED with respect to the Plaintiffs' claim that defendant Annmarie Lodholz violated § 1983. Judgment is ENTERED in favor of defendant Lodholz on all claims.

(H) The Defendants' motion is GRANTED with respect to the Plaintiffs' claim that defendants Bucks County, Bucks County Children and Youth Services, James Wilkin, Michael Fitzpatrick, Charles Martin and Sandra Miller violated § 1983. Judgment is ENTERED in favor of defendants Bucks County, Bucks County Children and Youth Services, James Wilkin, Michael Fitzpatrick, Charles Martin and Sandra Miller on all claims.

(2) The Cross-Motion for Summary Judgment filed by the Plaintiffs, Brian Puricelli, Rhonda Ledbetter, Rebecca Borochaner and Daniel Borochaner (collectively referred to as the "Plaintiffs") (Doc. No. 37) is DENIED.

(3) The Motion for Sanctions filed by the Defendants (Doc. No. 23) is GRANTED. The Plaintiffs are precluded from introducing any expert testimony.

(4) The Motion to Strike Affidavits and Exhibits filed by the Defendants (Doc. No. 27) is DISMISSED as moot.

(5) The Motion to Compel filed by the Defendants (Doc. No. 29) is GRANTED. The Plaintiffs are ordered to produce signed authorizations for the release of Dr. Joan Feinstein Oppenheim's records on or before June 19, 2000.

(6) The Motion for a Protective Order and to Strike Defendants' Lodholz and Miller's

Affidavits and Witness Scott Fries' Affidavit filed by the Plaintiffs (Doc. No. 31) is DENIED. The Defendants may conduct the depositions of Richard Ledbetter and Artie Ledbetter on or before June 30, 2000.

- (7) The Motion for a Show Cause Order filed by the Plaintiffs (Doc. No. 35) is DENIED.

BY THE COURT:

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JAMES McGIRR KELLY, J.