

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

<b>ALEXUS BENNETT,</b>	:	
<b>A MINOR, BY AND THROUGH HER</b>	:	
<b>GUARDIAN AD LITEM</b>	:	
<b>JONATHAN IRVINE, et al.,</b>	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>CITY OF PHILADELPHIA, et al.,</b>	:	<b>No. 03-5685</b>
<b>Defendants.</b>	:	

**MEMORANDUM AND ORDER**

**Schiller, J.**

**December 18, 2003**

Plaintiffs Alexis, Aliyaha, and Priscilla Bennett are three minor sisters who allege that Defendants Philadelphia Department of Human Services (“DHS”), the City of Philadelphia (“the City”), the Director of DHS Alba Martinez, and three individual DHS caseworkers<sup>1</sup> violated Plaintiffs’ constitutional rights by closing their DHS case files. Plaintiffs claim that as a result of the closure of their files, they suffered physical and mental abuse at the hands of one of their mother’s acquaintances. Presently before the Court is Defendants’ motion to dismiss. As discussed below, the Court grants the motion as to DHS and the individual caseworkers, denies it as to Ms. Martinez, and grants it in part and denies it in part as to the City.

**I. FACTUAL BACKGROUND**

The facts relevant to the instant motion are generally undisputed and are set out herein in the light most favorable to Plaintiffs. Plaintiffs’ mother, Tiffany Bennett, has had five children in total:

---

<sup>1</sup> These caseworkers are Defendants Iris DeJesus, Yolanda Grant, and Patricia Wilson.

the three plaintiffs—Alexus, Aliyaha, and Priscilla—and two other daughters, Iyannah and Portia. Iyannah was removed from her mother’s custody in 1997 and is not a party to this case. (Compl. ¶ 19.)

Although the Court is unclear regarding the exact details, it appears that DHS began monitoring all or most of the Bennett children for potential abuse early in their lives. In 1997, DHS became aware that Alexus had begun residing with her father in North Carolina. (*Id.* ¶ 22.) Accordingly, DHS closed her case file. (*Id.* ¶ 25.) On July 31, 1998, a family court judge ruled that in light of Tiffany Bennett’s drug dependency and itinerant vagrancy she would be required to reside in a shelter so that DHS could monitor and provide services to her children. (*Id.* ¶ 28.) Ms. Bennett initially complied with this order, living in a Salvation Army shelter with Aliyaha and Priscilla.<sup>2</sup> (*See id.* ¶ 31.) On May 10, 1999, however, DHS was informed that Ms. Bennett and her children had left the shelter in violation of the family court order. (*Id.* ¶ 31.) DHS caseworkers attempted to locate the children by conducting “computer searches,”<sup>3</sup> but they were unsuccessful, and on June 29, 1999, DHS closed Aliyaha and Priscilla’s case files. (*Id.*)

On September 14, 1999, a family court judge reversed DHS’s decision to close the children’s case files and ordered DHS to take the Bennetts into custody. (*Id.* ¶ 32.) In November 1999, a DHS caseworker responded to this order by again attempting to locate the children, but she re-closed the case files after her efforts failed. (*Id.* ¶ 33.) In April 2000, a family court judge permitted DHS to

---

<sup>2</sup> At this point, Portia was not yet born and Alexus still resided with her father.

<sup>3</sup> Plaintiffs allege that the caseworkers conducted a single computer search. Defendants respond that they “looked for the children for a number of weeks by conducting computer searches and checking Ms. Bennett’s prior residences.” For the purposes of the motion to dismiss, however, this dispute is immaterial.

discharge its supervisory responsibilities as to the Bennetts, apparently on the grounds that the children could not be located.<sup>4</sup> (*Id.* ¶ 35.)

At some point after departing the shelter, Tiffany Bennett began leaving Aliyaha, Priscilla, Portia, and Alexis—who, unbeknownst to DHS, had returned to her mother’s custody in 2000—in the care of Tiffany Bennett’s sister and her sister’s boyfriend. (*Id.* ¶ 36.) On August 16, 2003, a DHS caseworker responded to a report that children were being abused at the sister’s boyfriend’s home, but finding no one at the residence, the caseworker left a letter instructing the occupants to contact DHS. (*Id.* ¶ 38.) On August 17, 2003, Portia’s body was found by the Philadelphia police; she had apparently been beaten to death.<sup>5</sup> (*Id.* ¶ 41.)

On October 14, 2003, Plaintiffs filed this § 1983 suit alleging that the City, DHS, Director Martinez, and three individual caseworkers violated Plaintiffs’ constitutional rights under the “special relationship” and/or “state-created danger” doctrines. Plaintiffs seek monetary and injunctive relief. Specifically, Count I seeks an injunction requiring the City, DHS, and Ms. Martinez to create and enforce effective procedures for locating children missing from DHS’s care, Count II seeks damages from the City and DHS, and Count III seeks damages from three individual caseworkers. Defendants now move to dismiss the suit in its entirety. The proposed grounds for dismissal differ for each Defendant, as discussed below.

---

<sup>4</sup> The crux of the instant suit—although not relevant to Defendants’ motion to dismiss—is that the children allegedly were attending public school and receiving public benefits throughout this period, such that DHS should have been able to locate them easily.

<sup>5</sup> Tiffany Bennett, her sister, and the sister’s boyfriend all face criminal charges in state court relating to the death of Portia Bennett and the abuse of the other girls.

## **II. STANDARD FOR MOTIONS TO DISMISS**

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, courts must accept as true all of the factual allegations pleaded in the complaint and draw all reasonable inferences in favor of the non-moving party. *See Bd. of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272 (3d Cir. 2001). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

## **III. DISCUSSION**

### **A. DHS**

Plaintiffs' claims against DHS for monetary and injunctive relief must be dismissed because Pennsylvania statutes prohibit DHS from being a named party to a lawsuit. *See* 53 PA. CONS. STAT. ANN. § 16257 (“[N]o [municipal] department shall be taken to have . . . a separate corporate existence, and hereafter all suits growing out of their transactions . . . shall be in the name of the city of Philadelphia.”); *Burton v. Philadelphia*, 121 F. Supp. 2d 810, 812 (E.D. Pa. 2000) (“Neither DHS or YSC has an independent corporate existence from the City of Philadelphia; therefore, all claims against them must be brought in the name of the City.”); *Regalbuto v. Philadelphia*, 937 F. Supp. 374, 377 (E.D. Pa. 1995) (dismissing claims against Philadelphia police and fire departments under § 16257). Although Plaintiffs note correctly that Defendants did not specifically brief this issue, the Court will not allow a claim to proceed against a party that is legally incapable of being sued, *see Michaels v. New Jersey*, 955 F. Supp. 315, 331 (D.N.J. 1996) (“It is well established that, even if a

party does not make a formal motion to dismiss, the court may, sua sponte, dismiss the complaint where the inadequacy of the complaint is clear.”) (*citing Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980)), especially in light of the fact that Plaintiffs are not prejudiced by this dismissal.

## **B. City of Philadelphia**

Plaintiffs assert claims against the City under § 1983 and *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). Therefore, in order to survive the City’s motion to dismiss, Plaintiffs must allege facts sufficient to show that: (1) Plaintiffs suffered a constitutional violation; and (2) the City can be held liable for that violation. *See Brown v. Pa. Dep’t of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 482 (3d Cir. 2003) (“[F]or there to be municipal liability, there . . . must be a violation of the plaintiff’s constitutional rights.”) (*citing Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992)). Each of these issues is discussed below.

### *1. Underlying Constitutional Violation*

Plaintiffs proffer two different theories under which their Fourteenth Amendment substantive due process rights were violated: the state-created danger doctrine and the special relationship doctrine. These doctrines are exceptions to the general rule, set out by the Supreme Court in *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989), that there is no government liability under § 1983 for harm suffered by citizens at the hands of third parties.

#### **a. State-Created Danger**

The state-created danger doctrine has its origin in dicta from the Supreme Court’s decision in *DeShaney*. In *DeShaney*, the Court held that a county’s child protection agency could not be held

liable under § 1983 for failing to protect a child from abuse at the hands of his father. *Id.* at 203. The Court implied, however, that this holding was at least partially based upon the fact that the state “played no part in [the] creation [of the dangers faced by plaintiff], nor did it do anything to render [plaintiff] any more vulnerable to them.” *Id.* at 201. The Court also noted that the state “placed [plaintiff] in no worse position than that in which he would have been had it not acted at all.” *Id.*

The Third Circuit has built upon this dicta to recognize a cause of action under § 1983 in cases in which the state creates the danger that leads to plaintiff’s injury by placing him in a worse position than that in which he would otherwise have been. As the Third Circuit has interpreted *DeShaney*, there are four elements to a state-created danger claim: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actors acted with the requisite level of disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party to cause harm. *See Brown*, 318 F.3d at 479 (*citing Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996)).

Defendants argue that Plaintiffs have not alleged facts sufficient to meet the first element of this claim because the time gap between the closing of Plaintiffs’ case files in November 1999 and the discovery of the children’s injuries in August 2003 means that those injuries were not a “fairly direct” result of the closing of the files. Plaintiffs, however, have alleged that their injuries were sustained over a long period of time. (Compl. ¶ 36.) Thus, drawing reasonable inferences in Plaintiffs’ favor, it is possible that the abuse and neglect they suffered began soon after their case files were closed. Accordingly, for the purposes of Defendants’ motion, the Court cannot say that as a matter of law Plaintiffs’ injuries were not fairly direct. *Cf. 57A AM. JUR. 2D Negligence* § 465

(2003) (“Nearness in time or space is not the proper test of cause in fact; proximate cause is that which is nearest in causal relation to the effect, not necessarily that which is nearest thereto in space or in time.”). In addition, Plaintiffs have alleged that Tiffany Bennett had a history of child abuse and neglect (Compl. ¶ 13)—a fact which, if taken to be true, could render the harm suffered by her children a reasonably foreseeable result of the absence of external monitoring. Thus, Plaintiffs have stated a sufficient claim regarding the first element of the state-created danger theory.

The second element, however, involves a more complicated inquiry. The Third Circuit has held that in order to find a state actor liable for an action taken under urgent circumstances, that actor must have had a subjective disregard for the plaintiff’s safety that “shocks the conscience.” *Brown*, 318 F.3d at 480. Child welfare caseworkers making determinations regarding custody fall into this category of urgent actors, such that they are held to the “shocks the conscience” standard. *See Schieber v. City of Philadelphia*, 320 F.3d 409, 418 (3d Cir. 2003) (citing *Nicini v. Morra*, 212 F.3d 798, 800 (3d Cir. 2000) (en banc)); *Brown*, 318 F.3d at 481 (noting application of conscience-shocking standard to urgent actions taken to protect child); *Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (3d Cir. 1999) (applying “shocks the conscience” standard because although social worker does not act in “[a] hyper-pressurized environment [like] a prison riot or high-speed chase . . . he or she will rarely have the luxury of proceeding in a deliberate fashion”). Accordingly, Plaintiffs must allege, at a minimum, “that the defendants consciously disregarded, not just a substantial risk, but a great risk that serious harm would result” from their actions. *Schieber*, 320 F.3d at 423-23.<sup>6</sup> Importantly, however, *inactions*—even if conscience-shocking—cannot be grounds

---

<sup>6</sup> The alternate standard, applied to non-urgent actions, is “willful disregard” or “deliberate indifference.” *See Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995), *aff’d mem.* 116 F.3d 467 (3d Cir. 1997).

for § 1983 liability. *See DeShaney*, 489 U.S. at 200 (holding that only affirmative acts, not failure to act, can violate Due Process Clause); *see also Brown*, 318 F.3d at 478 (*citing DeShaney*); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992) (noting that line between action and inaction in state-created danger cases is not always clear). As the *Brown* court noted, a state-created danger claim arises “when the state, *through its affirmative conduct*, creates or enhances danger for an individual. . . . This ‘state-created danger’ exception applies when the state, *through some affirmative conduct*, places the individual in a position of danger.” *Brown*, 318 F.3d at 478 (emphasis added). Thus, in total, the pertinent question is whether Plaintiffs have pled facts sufficient to make out a claim that the caseworkers’ affirmative actions demonstrated a lack of regard for Plaintiffs’ safety that, under the circumstances, shocks the conscience. *See Schieber*, 320 F.3d at 418 (requiring analysis of circumstances surrounding government action).

Count III of Plaintiffs’ complaint states eighteen factual bases for liability under the state-created danger doctrine (Compl. ¶ 69(a)-(r)), but eleven of these allegations relate purely to the caseworkers’ failures to act, which, as discussed above, cannot give rise to liability. (*Id.* ¶ 69(d)-(e), (h)-(m), (o)-(q).) Of the remaining seven grounds for liability, three appear to be foreclosed by the plain holding in *DeShaney* that the state is not liable for failing to protect a child in her parent’s custody from abuse. (*See id.* ¶ 69(b) (alleging that caseworkers “[p]ermitt[ed] and/or otherwise caus[ed] minor plaintiffs to be exposed to physical and psychological abuse”); *see also id.* ¶ 69(a), (g).) Two of the remaining four allegations are merely vague boilerplate. (*Id.* ¶ 69(c), (r).) Thus, there are only two allegations that may state actionable claims: “causing minor plaintiffs to be placed in an obvious [sic] dangerous situation having been taken from a DHS approved shelter” (*Id.* ¶ 69(f)); and “closing minor plaintiffs’ files . . . despite knowing that minor plaintiffs . . . were at

grave risk of serious harm.” (*Id.* ¶ 69(n).) Although the first of these allegations is difficult to understand textually, the latter states a claim that, if taken to be true for purposes of the instant motion, may be seen as an affirmative act taken by caseworkers with conscience-shocking disregard for Plaintiffs’ safety. *Cf. Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995) (denying motion to dismiss state-created danger claim under “deliberate indifference” standard where state took child from foster parent and returned custody to abusive natural parent), *aff’d mem.* 116 F.3d 467 (3d Cir. 1997); *Tazioly v. City of Philadelphia*, Civ. No. 97-1219, 1998 WL 633747, \*11-12, 1998 U.S. Dist. LEXIS 14603, \*31-32 (E.D. Pa. Sept. 10, 1998) (same) (citing *Ford*). Therefore, without deciding whether the closing of Plaintiffs’ case files *does* constitute a conscience-shocking act given the totality of the circumstances, the Court holds that Plaintiffs’ Complaint states facts sufficient to give rise to inferences that could allow Plaintiffs to prevail on their claim. Accordingly, the Complaint survives the motion to dismiss under the second element of the state-created danger doctrine.

The third element of this doctrine has been interpreted to require “contact between the parties such that the plaintiff was a foreseeable victim in the tort sense.” *Brown*, 318 F.3d at 479. This element is met by Plaintiffs’ pleadings for the same reasons noted above regarding the first element, namely that the Complaint alleges a history of abuse and neglect on the part of Tiffany Bennett that rendered harm to her children foreseeable. (Compl. ¶ 13.) Finally, the fourth element is the subject of genuine dispute among the parties, with Plaintiffs alleging that they would not have been subjected to abuse if DHS had not closed their case files because they would not have remained in their mother’s custody. (*Id.* ¶ 44.) Although it is impossible to determine the accuracy of this claim at this stage in the proceedings, Plaintiffs’ allegation of facts that could reasonably satisfy the fourth element is sufficient to defeat the motion to dismiss. *See Hishon*, 467 U.S. at 73.

In summary, Plaintiffs have alleged facts sufficient to meet each of the elements of the state-created danger doctrine, and the Court accordingly denies Defendants' motion to dismiss this claim.

b. Special Relationship

In addition to the state-created danger doctrine, Plaintiffs put forward a claim under the special relationship theory. Like state-created danger, this theory is an exception to the general rule of *DeShaney* that the state is not liable for tortious injuries suffered at the hands of third parties. Under the special relationship theory, "when the State takes a person into custody against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. The Court explained this duty as follows:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—[including] reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause. The affirmative duty to protect arises . . . from the limitation which [the state] has imposed on his freedom to act on his own behalf . . . through incarceration, institutionalization, or other similar restraint of personal liberty . . . .

*Id.* at 200 (internal citations omitted). Accordingly, the Court rejected *DeShaney*'s claim of a special relationship because he was not in state custody when the harm occurred. *Id.* at 201. Courts have applied this holding to find that a "special relationship" exists between the state and foster children, *Nicini v. Morra*, 212 F.3d 798, 809 (3d Cir. 2000), but not former foster children, *Ford*, 899 F. Supp. at 227 (granting motion to dismiss special relationship claim where minor plaintiff was beaten by natural parent after being returned from foster parents), or students in public schools. *D.R.*, 972 F.2d at 1368-73. Thus, the cumulative result of these cases is that the state's liability hinges upon whether, before the tortious act occurred, the state had physical custody of the child. *See Nicini*, 212 F.3d at 808 (interpreting Third Circuit precedent as "setting out a test of physical custody").

Despite endorsing this relatively bright-line rule, however, the *Nicini* court later in its opinion described the physical custody standard as an inquiry into whether “the state, by affirmative act, render[ed] the individual substantially ‘dependent upon the state . . . to meet [his or her] basic needs.’” *Id.* (quoting *D.R.*, 972 F.2d at 1372). As the parties to this case have noted, there is a significant difference between the state having physical custody of a person and rendering that person “substantially dependent” upon the state. Thus, in order to properly address the instant Plaintiffs’ special relationship claim, this Court must first determine which of the above-quoted statements from *Nicini* sets out the applicable standard for such claims.

Although this Third Circuit precedent is somewhat unclear, the Supreme Court in *DeShaney* explicitly stated that a special relationship Due Process claim arises from a person’s “incarceration, institutionalization, or other similar restraint of personal liberty” at the hands of the state, rendering him “unable to care for himself.” *DeShaney*, 489 U.S. at 200. This language is more in concert with a physical custody standard—which by definition requires a situation similar to incarceration—than a standard of substantial dependence, which would greatly broaden the Supreme Court’s application of the special relationship doctrine from people “unable to care for” themselves due to government restrictions to those who are merely subject to state-imposed restrictions on the *manner* in which they care for themselves. *Id.* (emphasis added). Thus, this Court interprets *DeShaney* and *Nicini* to hold that in order to state a claim under the special relationship doctrine, a plaintiff must plead facts that would be sufficient to show that the state had physical custody of him prior to his injuries.

In light of this standard, Plaintiffs make an innovative legal argument. They argue that even though the City never had custody of the Bennett children, the family court order that required Tiffany Bennett to live in a city shelter with her children was the functional equivalent of such

custody. Plaintiffs note that by requiring Ms. Bennett to live in a shelter, the order also effectively required Plaintiffs to receive their food and lodging from the city, with no option of living elsewhere. Thus, Plaintiffs claim they were in a situation more analogous to that of foster children—who are similarly dependent—than to schoolchildren, such that a special relationship existed that renders the City liable for closing Plaintiffs’ case files after they were “abducted” from the shelter by their mother.

The flaw in Plaintiffs’ argument, however, is that they were never in the custody of the City prior to their injuries. Given that the lynchpin of liability under the special relationship theory is *physical* custody, as discussed above, this Court is not at liberty to adopt Plaintiffs’ proposed broadening of liability to cover situations that are merely similar to such custody. Doing so would contradict, in a very literal sense, the Supreme Court’s statement in *DeShaney* that “the state does not become the permanent guarantor of an individual’s safety by having once offered him shelter.” *DeShaney*, 489 U.S. at 201. Here, Tiffany Bennett retained both de facto and de jure custody of her children at all times, and the fact that she was tendered social services in a Salvation Army shelter did not vicariously, implicitly, or legally transfer that custody to the City. Thus, although it may be true that Plaintiffs were “substantially dependent upon the state to meet [their] basic needs,” *Nicini*, 212 F.3d at 808 (internal quotations omitted), this is not the standard by which special relationship claims are judged—instead, the lack of physical custody is fatal to Plaintiffs’ claim. Accordingly, the Court grants Defendants’ motion to dismiss Plaintiffs’ special relationship claim.

## 2. *Monell*

In addition to alleging a constitutional violation, Plaintiffs must also allege facts that would be sufficient to hold the City liable for that violation under *Monell*. In *Monell*, the Supreme Court

held that § 1983 may give rise to municipal liability when a constitutional violation occurs as a result of the municipality's custom, policy or practice. *Monell*, 436 U.S. at 691; *see also Brown*, 318 F.3d at 482. In this case, Plaintiffs allege that the City had a policy of closing the case files of missing children (Compl. ¶¶ 53(i), 61(i)), which—assuming that Plaintiffs can make out a case that such closures were a constitutional violation—is an allegation sufficient to state a claim under *Monell*. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 672 (3d Cir. 1988) (upholding denial of motion to dismiss where plaintiff alleged only “custom of laxity”). In addition, Plaintiffs' allegation that the City failed to train caseworkers to keep case files open also states a viable *Monell* claim. *See Brown*, 318 F.3d at 482 (noting that municipality may be liable under § 1983 for failure to train); *Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (same). Defendants' brief does not raise any specific *Monell* objections, instead relying entirely on the argument that there was no underlying constitutional violation. Thus, the Court will not dismiss the suit on *Monell* grounds.

### **C. Director Alba Martinez**

Defendants assert that the individual defendants—Ms. Martinez and the three caseworkers—should be dismissed from the suit on the grounds of qualified immunity. This argument is discussed at length below with regards to the DHS caseworkers, but it is clearly inapplicable to Ms. Martinez because, unlike the caseworkers, she is being sued only in her official capacity. *Mitros v. Cooke*, 170 F. Supp. 2d 504, 506 n.5 (E.D. Pa. 2001) (“In an official-capacity action, qualified immunity defenses are unavailable.”) (*citing Owen v. City of Independence*, 445

U.S. 622 (1980)).<sup>7</sup>

#### **D. Individual Caseworkers**

Plaintiffs seek damages from three individual DHS caseworkers under § 1983. These Defendants assert the defense of qualified immunity. The issue of qualified immunity is a “matter[] of law for the court to decide . . . at the earliest possible stage of the litigation.” *Bartholomew v. Pennsylvania*, 221 F.3d 425, 428 (3d Cir. 2000) (internal citation omitted).

The doctrine of qualified immunity provides that “[g]overnment officials performing discretionary functions are ‘shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir.1997) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). “For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [T]he very action in question [need not have] previously been held unlawful, but . . . in the light of pre-existing law the unlawfulness must be apparent.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation omitted). Importantly for purposes of the instant case,

[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . Although earlier cases involving ‘fundamentally similar’ facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. . . . Accordingly, . . . the salient question . . . is whether the state of the law [at the time of the incident] gave respondents *fair warning* that their alleged [action] was unconstitutional.”

---

<sup>7</sup> Defendants correctly note that a suit against a municipal officer in her official capacity is the same as a suit against the city. Accordingly, Plaintiffs may wish to dismiss Ms. Martinez voluntarily for the sake of administrative convenience.

*Id.* at 741 (emphasis added).

The individual defendants in this suit are entitled to qualified immunity because Plaintiffs' civil rights claims are not "clearly established." As discussed above (*see* Part III.B), the leading case regarding the civil rights of children in situations such as this is *DeShaney*, in which the Supreme Court held that a municipality was not liable for failing to prevent the death of a child in his parent's care. Accordingly, in light of the plain holding of *DeShaney*, Plaintiffs cannot successfully argue that the civil rights violations they allege are so "clearly established" that the individual caseworkers had "fair warning" that their actions were constitutional violations.

Plaintiffs point to no case where a city has been held liable for harm suffered by a child who was never in state custody, or where state custody was found on facts analogous to those in the instant case. Plaintiffs rely on *Tazioly* for the proposition that it is "clearly established" that it is unlawful for caseworkers to remove a child from foster care and return him to a parent's custody when doing so places the child at greater risk of harm. As discussed previously, however, this Court holds that Plaintiffs in the instant case were never in the City's custody, and so that portion of *Tazioly* is inapposite. In fact, even if the Court were to accept Plaintiffs' theory of liability, such a holding would be somewhat novel, rather than the mere application of precedent that was "clearly established" at the time of the incidents. Thus, the individual defendants are entitled to qualified immunity regardless of the ultimate outcome of Plaintiffs' underlying claims because these defendants did not have fair warning that their actions violated Plaintiffs' constitutional rights.

#### **IV. CONCLUSION**

For the reasons stated above, the Court grants the motion to dismiss as to DHS and the

individual defendants and denies the motion as to the City and Director Martinez. In addition, the Court grants the motion to dismiss Plaintiffs' claims under the special relationship doctrine. An appropriate Order follows.

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

<b>ALEXUS BENNETT,</b>	:	
<b>A MINOR, BY AND THROUGH HER</b>	:	
<b>GUARDIAN AD LITEM</b>	:	
<b>JONATHAN IRVINE, et al.,</b>	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>CITY OF PHILADELPHIA, et al.,</b>	:	<b>No. 03-5685</b>
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this 18<sup>th</sup> day of **December, 2003**, upon consideration of Defendants’ Motion to Dismiss, Plaintiffs’ response thereto, and oral argument thereon, it is hereby **ORDERED** that:

1. Defendants’ Motion to Dismiss (Document No. 4) is **GRANTED in part** and **DENIED in part** as follows:
  - a. Defendant Philadelphia Department of Human Services is **DISMISSED**.
  - b. Plaintiffs’ claims under the “special relationship” doctrine are **DISMISSED**.
  - c. Count III of the Complaint is **DISMISSED**.
  - d. In all other respects, Defendants’ Motion to Dismiss is **DENIED**.
2. The remaining Defendants shall file a responsive pleading no later than **January 5, 2004**.

**BY THE COURT:**

\_\_\_\_\_  
**Berle M. Schiller, J.**