IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 21-CIV-81099-CANNON

D.P. *et al.*,

Plaintiffs,

vs.

SCHOOL BOARD OF PALM BEACH COUNTY *et al.*,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Every year, police officers working for the School Board of Palm Beach County ("**School Board**" or "**the District**"), acting without parental consent, take hundreds of children from their classrooms, put them in handcuffs, and transport them in the back of police cars to psychiatric hospitals for involuntary examination. Some of these children are as young as five. The overwhelming majority do not need psychiatric hospitalization and indeed are profoundly traumatized by the experience. They are children manifesting disabilities, throwing ordinary childhood tantrums, or simply expressing emotions in a developmentally appropriate fashion. The District causes this routine abuse through explicit and customary policies that encourage involuntary examination and misstate the relevant provisions of the Florida Mental Health Act, Fla. Stat. §§ 394.451-47892, (the "**Baker Act**"), by inaccurately training and failing to train its employees, and by failing to monitor its employees' Baker Act use at all, despite repeated warnings that it is violating the rights of hundreds of children per year.

Plaintiffs are two groups: individual children subjected to this traumatic experience, child constituents of Disability Rights Florida ("**DRF**"), and the children of members of Florida State

Conference of the National Association for the Advancement of Colored People ("**FL NAACP**"); and the parents and guardians of the identified Plaintiff children as well as members of FL NAACP. They bring this suit to end the District's unlawful and unjustifiable abuse of their rights and to end the District's ongoing abuses.

Defendants' Motion to Dismiss[1] Plaintiffs' First Amended Complaint ("**FAC**") misstates federal law and fails to respond to the stated legal bases of Plaintiffs' claims. Indeed, it displays the same attitude that produced the District's abuse of the Baker Act in the first place. The District ignores any of Plaintiffs' allegations they find inconvenient, just as they have ignored prior warnings that their policies and practices are illegal. Its repeated misstatement of the law echoes the District's own trainings and policies that are replete with legal misrepresentations. Plaintiffs respectfully request that this Court reject Defendants' effort to evade responsibility and deny their Motion.

BACKGROUND

When an involuntary examination under the Baker Act occurs, an armed officer of the state takes a child into custody and delivers them to a locked institution. This is a "massive curtailment of liberty," *Doe v. State*, 217 So.3d 1020, 1026 (Fla. 2017) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)), which is unconstitutional when applied to "a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

[1] Defendants' Motion is divided into two sections, one containing arguments by counsel representing the District and its employees and another by counsel for Officer Margolis. While the former section is the bulk of the overall Motion, Officer Margolis also adopts the District's "arguments and citations to authority" "to the extent" that they are "supportive" of his arguments. Mot. at 27. Hence, any references to the Motion are in response to all parties' arguments, unless otherwise noted.

Florida law codifies this standard, allowing this serious deprivation of liberty only[2] "if there is reason to believe that the person has a mental illness *and* because of his or her mental illness . . . [t]here is a substantial likelihood that without care or treatment the person will cause serious bodily harm to . . . herself or others in the near future, as evidenced by recent behavior." Fla. Stat. § 394.463(1) (emphasis added). "Mental illness" is defined to exclude developmental disabilities, including Autism Spectrum Disorder ("**ASD**"). Fla. Stat § 394.455(29). "Serious bodily harm" is "[s]erious physical impairment of the human body; esp., bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ." *Black's Law Dictionary* (11th ed. 2019). To justify use of the Baker Act, "Florida courts require more than erratic behavior or knowledge that a person is suffering from a mental illness." *Khoury v. Miami-Dade Cnty. Sch. Bd.*, 4 F.4th 1118, 1128 n.7 (11th Cir. 2021).

The District uses involuntary examinations under the Baker Act at an incredibly high and increasing rate. In the pandemic-shortened 2019-2020 school year, the District seized 323 children for involuntary examination. FAC ¶ 197. The youngest children, those under nine, were examined 17 times in 2019-2020. FAC ¶ 198.

D.P. was just nine years old and in third grade when Officer Margolis, a police officer stationed at D.P.'s school through the District's contract with Lantana Police Department, seized him for involuntary examination. FAC ¶¶ 71, 86. As his school knew, D.P. has ASD and

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[2] Examination is also allowed where "[w]ithout care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services." Fla. Stat. § 394.463(1). However, this prong is generally not cited by District personnel when using the Act. FAC ¶ 56.

Attention Deficit Hyperactivity Disorder ("**ADHD**"). FAC ¶¶ 72-73. The day of the involuntary examination, D.P. had recently experienced a death in his family. FAC ¶ 78. He became upset and threw a stuffed animal. FAC ¶¶ 71, 79. He was then placed in a prone restraint in which two adults held him to the ground using their body weight. FAC ¶ 82. According to the police report he threatened himself or others. FAC ¶ 88. But in that situation, it would not be surprising that he was angry and said things he neither meant nor had the ability to follow through on. Simply allowing him some time to sit and calm down would have resolved the situation. FAC ¶ 81. Instead of consulting a medical professional, letting D.P. go home to a responsible adult, or simply allowing him to calm down in place, Officer Margolis seized and handcuffed D.P., who was then left awaiting transport in the back of a police car for more than an hour. FAC ¶¶ 92-94. P.S., D.P.'s grandmother, was notified he was being involuntarily examined but her consent was not sought. FAC ¶ 91. D.P. remained handcuffed for approximately 30 minutes during transport, for a total of 90 minutes of handcuffing. FAC ¶¶ 96, 376. In the aftermath of this experience, D.P. became aggressive and upset more easily, and, despite participating in two years of therapy, still fears that police and school staff are out to get him. FAC ¶¶ 101, 329, 382.

E.S. was just nine years old and in third grade when Officer Cuellar seized him for involuntary examination under the Baker Act. FAC ¶ 102. As his school knew, E.S. has ASD, ADHD, and Dyslexia, was placed in a classroom for children with ASD, and had a Board Certified Behavior Analyst ("**BCBA**") who worked with him in school. FAC ¶¶ 102-05. On the day he was involuntarily examined, he became upset, started eating some pieces of paper, and was taken to an office. FAC ¶ 107. There he was upset, yelled, and swung his arms, striking a window, but not damaging it, and hit his BCBA's chest, hard enough to leave a red mark but not hard enough to injure her. FAC ¶ 108. He calmed down successfully thereafter. FAC ¶ 109.

However, by this point the school had contacted Officer Cuellar. FAC ¶ 109. When he arrived, he tackled E.S. to the ground, injuring his knees, and said, "If you're going to act like a fool I'm going to treat you like a fool," and "You are coming with me." FAC ¶¶ 110, 111, 387. Even though "the tantrum behavior had ceased," and E.S.'s BCBA believed it was not necessary, Officer Cuellar seized E.S. under the Baker Act. FAC ¶¶ 112-13. He contacted J.S., E.S.'s mother, but did not seek her consent, and even told her there was "no point" in hurrying to the hospital because she would not be allowed to see E.S. FAC ¶ 116. Officer Cuellar handcuffed E.S. for approximately 30 minutes during transport to the receiving facility. FAC ¶¶ 115, 392. E.S. experienced both physical harm (injury to his knees) and psychological harm as a result of this incident. FAC ¶ 390. He became extremely afraid of Officer Cuellar and upset in his presence, experienced anxiety, and developed a more generalized fear of all men, especially men in uniform. FAC ¶¶ 119, 398. An internal-affairs investigation of the incident found "concerns which should be addressed through training, with regards to Baker Acts involving students with Autism", but the District has not acted on those recommendations. FAC ¶¶ 228-29.

L.A. was just eight years old and living with her mother in a homeless shelter when she was involuntarily examined. FAC ¶¶ 129, 131. L.A. had been evaluated for disabilities and the school knew that her only diagnosis was ADHD and that she had a therapist. FAC ¶¶ 130, 132. On the day she was examined, she became upset and embarrassed after a teacher mistook her drawing of a rocket for a drawing of male genitalia. FAC ¶ 133. L.A. left class, intending to visit a trusted adult, the assistant principal, as she had done before. FAC ¶ 134. Instead, the school principal intercepted her and took her to his office. FAC ¶¶ 134-35, 138. In response, she called him a "devil" with "eyes like momo." FAC ¶¶ 136-38. She did not threaten herself or others with serious bodily harm, or any harm, for that matter. FAC ¶ 138. The school did not employ de-

escalation strategies that would have been effective, such as letting her see her mother or draw by herself until she calmed down. FAC ¶¶ 134, 139. A mobile response team member evaluated L.A. and recommended she receive counseling *but not* that that she be involuntarily examined. FAC ¶ 141. The school also did not contact her regular therapist to seek their insight. FAC ¶ 146. Instead, Officer Blocher overruled the mobile crisis team member's recommendation, seized L.A. for examination, and placed her in handcuffs while he walked her to his car. FAC ¶¶ 142, 149, 403. A.B., L.A.'s mother, was contacted by the school about the situation and arrived there before L.A. was transported, but was not allowed to see L.A. FAC ¶¶ 144-45. L.A. experienced trauma as a result of the incident, including the handcuffing. FAC ¶ 153. After her seizure, she had nightmares, experienced bullying by other students who knew she had been involuntarily examined, and, for the first time, had suicidal thoughts. FAC ¶¶ 153, 155, 405.

W.B. was just ten when he was involuntarily examined. FAC ¶ 156. W.B. has an Emotional/Behavioral Disability and had been placed in a class intended to meet the needs of such students. FAC ¶ 157. He has an aversion to physical touch, especially by men, of which the District was aware. FAC ¶ 158. One day W.B. became upset over a dispute with another student. FAC ¶ 162. He threw chairs and accidentally touched a staff member. *Id.* He was then handcuffed to a chair by Officer Brown; this understandably also upset him, particularly given his known aversion to touch. FAC ¶ 164. While W.B. was angry and requested that his handcuffs be removed, he did not get up from the chair he was sitting in. FAC ¶ 164. He said he would "jump over a gate"—presumably to escape the situation—but did not say that he wanted to harm himself or others. FAC ¶ 168. Though both his mother and father arrived at the school, neither was allowed to take him home. FAC ¶¶ 164, 166. The school did not contact W.B.'s regular therapist and, while it initially called the mobile response team, it cancelled that request before

they arrived, telling his mother that "they had enough to Baker Act" him. FAC ¶ 165. Officer Brown transported W.B. for involuntary examination, over his parents' objections, keeping him handcuffed in a police car for a total of approximately at least 40 minutes. FAC ¶¶ 171, 414. W.B. experienced trauma as a result of the handcuffing. FAC ¶¶ 177, 416.

M.S. was just eleven years old and in sixth grade when she was transported in handcuffs from her school for involuntary examination under the Baker Act. FAC ¶178. M.S. is a student with a disability of Post-Traumatic Stress Disorder ("**PTSD**") who had experienced traumatic events during the prior year. FAC ¶¶ 20, 180. She was handcuffed and transported to a receiving facility by a sheriff's deputy in January 2021 and was handcuffed and transported to a receiving facility by Officer Lauginiger in February 2021, with the school's assistant principal riding in the car with her. FAC ¶¶ 182, 187. M.S. has experienced trauma and educational harms as a result of being handcuffed and transported in a police car during the Baker Act incidents. FAC ¶¶ 191-92.

Plaintiffs' stories are not atypical. District policies do not require, and District training does not teach, employees to seek parental consent for use of the Baker Act, and employees are not trained or required to attempt to determine if children have mental illnesses or if they can be more effectively served by non-institutional mental health interventions. FAC ¶¶ 204-20. District policies do, however, require handcuffing of all children being subjected to involuntary examination under the Baker Act. FAC ¶ 194. Review of police reports from 2018-2020 shows routine abuse of the Baker Act on children, including on a seven-year-old who said he wanted to "tie up and punch" a teacher because "she wouldn't let him attend a pizza party," and a nine-year-old who supposedly tried to hurt others with a "white plastic fork." FAC ¶ 195.

ARGUMENT

On a motion to dismiss, courts "accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff" and "ask whether the complaint

contains enough facts to state a claim to relief that is plausible on its face." *Bilal v. Geo Care, LLC*, 981 F.3d 903, 911 (11th Cir. 2020) (cleaned up). "A claim is plausible on its face 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Randall v. Scott*, 610 F.3d 701, 709–10 (11th Cir. 2010) (no heightened pleading standard in qualified immunity or § 1983 cases).

The FAC alleges that the District's use of involuntary examinations under the Baker Act and/or use of handcuffs on Plaintiff children D.P., E.S., L.A., W.B. and M.S. violated Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Florida Educational Equity Act, Fla. Stat. § 1000.05, and seek damages and injunctive and declaratory relief (Counts 1-5). Plaintiffs P.S., J.S., L.H., A.B. and FL NAACP allege that they were deprived of their fundamental rights to care, custody, and control over and to make medical decisions for their children without adequate due process, and seek injunctive and declaratory relief (Counts 6 and 7). Plaintiffs D.P., E.S., L.A., W.B., DRF, and FL NAACP allege that the children were seized for involuntary examination in violation of the Fourth Amendment and seek declaratory and injunctive relief (Count 8), while each of the individual children also brings a claim for damages on this basis (Counts 9-12). Finally, Plaintiffs D.P., E.S., L.A., W.B., M.S., DRF, and FL NAACP allege that the unnecessary use of handcuffs during their seizures violated the Fourth Amendment's prohibition on excessive force and seek declaratory and injunctive relief (Count 13), while each individual child also seeks damages on this basis (Counts 14-18). Defendants on these claims are, as laid out in the FAC, the

School Board; its Superintendent,[3] in his official[4] and personal capacities; its Police Chief, in his official capacity; and the "**Officer Defendants**": Jose Cuellar, Joseph M. Margolis, Jr., Howard Blocher, Johnny Brown, and Jordan Lauginiger.

The FAC alleges not only that the District routinely violates these clearly established laws and constitutional standards,[5] but also that District employees are instructed do so by District policies and training materials that require handcuffing, explicitly misstate parts of the Baker Act requirements and omit others entirely. FAC ¶¶ 194, 205-18. The FAC also alleges that though the District knows that children, including Plaintiffs D.P. and E.S., are often examined due to behaviors that are manifestations of ASD, a developmental disability, not a mental illness, the District has failed to train its personnel that such use is illegal or take any steps to prevent it. FAC ¶¶ 209, 214-15, 227-32, 328, 335, 341.

Broadly, Defendants argue that Plaintiffs[6] have failed to state a claim on each of their 18 counts,[7] that they have failed to plead facts sufficient to establish municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for their § 1983 claims, and that the Officer Defendants are entitled to qualified immunity for the § 1983 claims. For the reasons

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[3] Fennoy argues that Plaintiffs have not alleged specific facts regarding his individual actions that would give rise to liability on their § 1983 claims. Mot. at 26-27. Plaintiffs address this argument below. He has not otherwise argued that his liability on Plaintiffs' remaining claims is distinct from the School Board's. *Id.*

[4] Defendants object that official-capacity defendants are superfluous, though it appears they do so only for the § 1983 claims. To the extent the School Board is waiving any sovereign immunity defense on Plaintiffs' Fourth and Fourteenth Amendment claims, Plaintiffs do not object to dismissing these Defendants in their official capacities.

[5] Defendants claim that "[t]here are no allegations that any of the Defendants violated the Act." Mot. at 10. This is surprising given the detailed allegations set out in the FAC that the Plaintiff children were involuntarily examined despite not meeting the statutory criteria.

[6] Defendants confine their arguments in their Motion to the individual Plaintiffs' claims. They do not argue that the organizational Plaintiffs, the FL NAACP and DRF, lack standing to state claims. Hence, the Motion should be denied as to the organizational Plaintiffs, to the extent their claims are otherwise valid.

[7] Defendants have also not argued that either the organization or individual Plaintiffs lack standing or have not properly pled an entitlement to injunctive relief, to the extent they have otherwise pled viable causes of action.

set forth below, Plaintiffs have properly stated each of their claims, have alleged facts sufficient to establish municipal liability under *Monell*, and have sufficiently alleged that the Officer Defendants are not entitled to qualified immunity as to each of the § 1983 claims.

Defendants also claim that Plaintiffs have failed to make clear who the plaintiffs and defendants are in their claims, but Plaintiffs, in fact, clearly laid out that information for each claim in the FAC, including in an appendix attached to the FAC. This is a complex case, and Plaintiffs have endeavored to plead it in a way that balances the need to avoid an excessive number of counts with the differing legal and factual issues raised by various parties and causes of action. To that end, they combined claims by multiple Plaintiffs against multiple Defendants into single counts where the facts and legal issues were common. This is precisely what the Rules of Civil Procedure call for. *Compare* Fed. R. of Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief") *with* Fed. R. of Civ. P. 10(b) ("[a] party must state its claims . . . each limited *as far as practicable* to a single set of circumstances" and "*[i]f doing so would promote clarity*, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count or defense." (emphasis added)). The FAC's factual background section, only the relevant portions of which are incorporated by reference in each count, explains what each Defendant is alleged to have done.[8]

[8] Officer Margolis objects to being listed in certain claims brought by multiple Plaintiffs alongside other Officer Defendants, arguing that the organizational Plaintiffs and individual Plaintiffs whose involuntary examinations he was not involved in have not stated a claim against him. Mot. at 30-31. However, they are not attempting to do so. Rather, each Plaintiff is stating a claim against the School Board, Superintendent Fennoy, and Chief Alexander, and the individual Plaintiffs are stating claims against the individual officers involved in their examinations. Officer Margolis does not dispute that D.P. and P.S. have standing to bring claims against him.

I. PLAINTIFFS HAVE STATED CLAIMS FOR DISABILITY DISCRIMINATION

Defendants do not contest that Plaintiffs have sufficiently alleged that Plaintiff children[9] are individuals with disabilities or that Plaintiffs were excluded from participation in or denied the benefits of a public entity. Mot. at 7-11.[10] Their only challenge to Plaintiffs'[11] disability discrimination claims is that Plaintiffs were not excluded solely by reason of their disabilities. *See* Mot. at 11. In fact, though, only Plaintiffs' intentional discrimination claim under Section 504 requires a showing that the discrimination occurred "solely" by reason of the Plaintiff children's disabilities. Plaintiffs do not need to show sole causation to prevail on an ADA claim for intentional discrimination; for claims under the ADA, Section 504, or the FEEA that the Defendants failed to provide reasonable modifications and accommodations to avoid discrimination; or for claims that the District employed methods of administration that discriminated against Plaintiffs.

A. Plaintiffs Have Pled Facts Sufficient to State a Claim for Intentional Disability Discrimination Under Both the ADA and Section 504.

The ADA does not require plaintiffs to show that intentional discrimination occurred solely on the basis of disability. In *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996), the Eleventh Circuit expressly declined to import the term "solely" into the ADA and held that a plaintiff could show intentional disability discrimination where disability was "a factor that made a difference in the outcome. The ADA imposes a 'but-for' liability standard." *Id*. at 1074, 1077. The *McNely* court explained that "importing the term 'solely' into the ADA is not

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[9] All Plaintiff children bring claims for disability discrimination alleging either discrimination through the District's use of both involuntary examinations and handcuffing (Counts 1-2, 5 brought by D.P., E.S., L.A., and W.B.) or because of the District's use of handcuffing alone (Counts 3-5, brought by M.S.).

[10] Officer Margolis does not separately address Plaintiffs' disability claims at all.

[11] Defendants' argument appears to be limited to individual student Plaintiffs. Defendants make no assertions regarding discrimination alleged by constituents of DRF or the members and their children of the FL NAACP.

warranted under the statute's plain language, is not authorized by section 12201(a), and is not consistent with the explicitly stated purpose of the statute," *id*. at 1074, and that Congress deliberately omitted the word "solely" from Title II of the ADA "because it believed inclusion of the word 'solely' in Title II could lead to absurd results." *Id*. at 1075.[12]

Without addressing *McNely*, Defendants instead cite to *J.P.M. v. Palm Beach County School Board*, 916 F.Supp.2d. 1314 (S.D. Fla. 2013). However, the text that Defendants quote from *J.P.M.* and present as evidence that both Section 504 and the ADA require sole causation refers only to the elements of a Section 504 claim. Mot. at 8; *J.P.M.*, 916 F.Supp.2d at 1320. *J.P.M.* actually describes the elements of a claim of discrimination under the ADA as: "[plaintiff] is a qualified individual with a disability; (2) [who] was excluded from participation in or denied the benefits of the services, programs, or activities of the School Board or otherwise discriminated against by the School Board; (3) *by reason of such disability*." *J.P.M.*, 916 F. Supp. 2d at 1325 (emphasis added).[13] Plaintiffs need not allege that discrimination occurred solely on the basis of disability to state an intentional discrimination claim under the ADA.[14]

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[12] In dicta, the Eleventh Circuit has affirmed *McNely*'s distinction between the language of Section 504 and the ADA: "[P]laintiffs claiming intentional discrimination under the [Section 504 of the Rehabilitation Act] must show that they were discriminated against '*solely* by reason of [their] disability,' 29 U.S.C. § 794(a) (emphasis added), but the ADA requires only the lesser 'but for' standard of causation . . . ." *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008).

[13] *J.A.M. v. Nova Southeastern University, Inc*., which Defendants also cite, further reinforces the Eleventh Circuit's distinction between the causal standard for ADA and 504 claims for claims of intentional discrimination. 646 F. App'x 921, 927 (11th Cir. 2016) (unpublished). *Compare id*. at 924 (stating that Title III of the ADA prohibits discrimination *on the basis of disability*) *with id*. at 926 (stating that Section 504 prohibits discrimination *solely by reason of disability*).

[14] The Florida Educational Equity Act (FEEA), Fla. Stat. § 1000.05(2)(a) (emphasis added), similarly omits the word "only," providing that:

> Discrimination *on the basis of* . . . disability . . . against a student or an employee in the state system of public K-20 education is prohibited. No person in this state shall, on the basis of . . . disability. . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public K-20 education program or activity . . . .

Moreover, Plaintiffs have sufficiently pled facts that support a claim of intentional discrimination under the ADA and Section 504. In *J.P.M.*, the court was deciding a motion for summary judgment after full fact discovery had occurred; therefore, *J.P.M.* is not instructive as to the standard on a motion to dismiss. *Id*. at 1315. Here, Plaintiffs have alleged sufficient facts to properly plead that they were excluded from participation in their public school (which Defendants do not dispute, Mot. at 7-11) both by reason of and solely because of disability. For example, Plaintiffs have alleged that Defendants were aware of D.P.'s and E.S.'s needs as students with known ASD, and decided to initiate involuntary examinations under the Baker Act despite the Baker Act's express prohibition on its use for individuals whose needs arise from developmental disabilities. FAC ¶¶ 57, 71-73, 92-93, 102-06, 112, 121-22. Indeed, Plaintiffs allege that Defendant Cuellar told District investigators that he knew E.S. had ASD and informed J.S., E.S.'s mother, that he would have initiated an involuntary examination regardless of E.S.'s disability. FAC ¶¶ 116, 121. Plaintiffs have additionally alleged that Defendants were aware that W.B. was, due to his disability, particularly sensitive to touch, especially by men, and nonetheless handcuffed W.B. FAC ¶¶ 158, 164, 169, 171. Similarly, Plaintiffs have alleged that Defendants were aware of M.S.'s counseling for past traumatic experiences. FAC ¶¶ 180, 184. Despite this, Defendants handcuffed M.S. during transportation to a receiving facility, even though less restrictive alternatives were available. FAC ¶¶ 187-88.

B. Plaintiffs Pled Facts Sufficient to State a Claim for Disability Discrimination Due to Defendants' Failure to Provide Reasonable Modifications.

Defendants' reliance on the causal standard for intentional discrimination is irrelevant to Plaintiffs' claims that the Defendants failed to provide Plaintiffs with reasonable modifications to avoid discrimination. Failure to provide reasonable modifications and accommodations is an independent basis for liability under both the ADA and Section 504. *Alboniga v. Sch. Bd. of*

Broward Cnty. Fla., 87 F. Supp. 3d 1319, 1332 (S.D. Fla. 2015) (citing *Bennett–Nelson v. La. Bd. of Regents,* 431 F.3d 448, 454 (5th Cir. 2005) for the proposition that "the only material difference between the rights and remedies afforded plaintiffs under Title II and Section 504 lies in their respective causation requirements, but that difference [is] immaterial where the plaintiff's claims are based on a failure to make reasonable accommodations for [individuals with disabilities]").[15]

Under Section 504 and the ADA, a qualified plaintiff with a disability states a failure-to-accommodate claim by pleading that the plaintiff experienced discrimination by reason of the defendants' failure to provide a reasonable accommodation. *See, e.g.*, *Boyle v. City of Pell City*, 866 F.3d 1280, 1289 (11th Cir. 2017); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 2001); *Bennett-Nelson*, 431 F.3d at 454–55 ("[B]oth the ADA and [Section 504] impose upon public entities an affirmative obligation to make reasonable accommodations. . . . Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant.").

Here, Plaintiffs have identified reasonable modifications and accommodations that the Defendants knew or should have known would prevent discrimination against the Plaintiffs. For example, Plaintiffs have alleged that, instead of subjecting Plaintiff children to the trauma and exclusion of an involuntary examination under the Baker Act, Defendants could have, but did not, employ multiple strategies known to de-escalate the child Plaintiffs. FAC ¶¶ 81, 93, 102-06, 109-13, 134, 139, 153, 169. Defendants could have contacted mental health and case

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[15] *See also Schwarz*, 544 F.3d at 1212 n.6 (noting in dicta that both the ADA and Section 504 recognize reasonable accommodation theories as well as intentional discrimination); *J.A.M.*, 2015 WL 4751149, at *4 (S.D. Fla. Aug. 12, 2015), *aff'd,* 646 F. App'x 921 (11th Cir. 2016) ("Even in the absence of disparate treatment, a defendant will be liable for failing to reasonably accommodate [an individual with a disability] . . . as a failure to accommodate is an independent basis for liability under the ADA and [Section 504].") (citing *Meyer v. Sec'y, U.S. Dep't of Health & Human Servs.*, 592 F. App'x. 786, 791 (11th Cir. 2014) (unpublished).

management providers working with the Plaintiff children or appropriately trained mental health or medical staff working for the District.[16] FAC ¶¶ 75, 92-93, 105, 113, 125, 132, 146, 165, 169, 184. Defendants could have released Plaintiff children to the care of their parents, guardians or emergency contacts. FAC ¶¶ 91, 93, 114, 116, 139, 144-45, 147, 166. Plaintiffs have further alleged that Defendants applied a blanket policy requiring handcuffing to Plaintiff children without any consideration of reasonable modifications to that policy to avoid discrimination against Plaintiff children. FAC ¶¶ 94-96, 112, 115, 148-49, 171, 187-88.

C. Plaintiffs Have Additionally Pled Facts Sufficient to State a Claim that Defendants' Methods of Administration Discriminated Against Plaintiffs.

Similarly, the causal standard for intentional discrimination is irrelevant to Plaintiffs' allegations that Defendants used methods of administration that discriminated against Plaintiffs. As the court explained in *Dunn v. Dunn*, 318 F.R.D. 652, 665 n.12 (M.D. Ala. 2016), *modified sub nom*. *Braggs v. Dunn*, No. 2:14-CV-601-MHT, 2020 WL 2395987 (M.D. Ala. May 12, 2020) (citations omitted):

> The methods-of-administration regulation makes clear that a know-nothing, do-nothing policy of non-administration is a privately actionable violation of the ADA, at least when plaintiffs can show that it has the effect of discriminating. As Justice Marshall explained in *Alexander v. Choate*, Congress designed the Rehabilitation Act, the predecessor statute to the ADA, to address not only "invidious animus," but also, more commonly, "thoughtlessness and indifference—[ ] benign neglect." Courts have consistently explained that "Title II [of the ADA] imposes affirmative obligations on public entities and does not merely require them to refrain from intentionally discriminating against the disabled."

Here, Plaintiffs have alleged that Defendants' methods of administration, namely Defendants' policies and practices regarding involuntary examination of students under the Baker Act, have

[16] Or, in L.A.'s case, they could have listened to the recommendation of the mobile crisis team member who was consulted. FAC ¶ 141.

the effect of subjecting Plaintiffs to discrimination and the effect of defeating or substantially impairing the public entity's objectives regarding individuals with disabilities. FAC ¶¶ 248, 252, 270. Plaintiffs have alleged that Defendants: have a blanket policy of handcuffing all children for whom Defendants are initiating an involuntary examination under the Baker Act, FAC ¶ 194; fail to sufficiently train their police employees and contractors regarding applying the legal standard contained within the Baker Act without discrimination to children with disabilities, FAC ¶¶ 213-14, 216; have failed to act on recommendations regarding improving training "with regards to Baker Acts involving students with Autism," FAC ¶¶ 228-29, 232; provide school officials with inaccurate information regarding when an involuntary examination can be legally initiated, particularly for students with development disabilities, FAC ¶¶ 205-12, 215; fail to consult appropriately trained mental health professionals to identify alternatives to involuntary examination, FAC ¶¶ 217-19; and fail to instruct school officials about employing less traumatic alternatives to involuntary examination, FAC ¶ 6. Defendants' Motion to Dismiss should therefore be denied as to Plaintiffs' disability discrimination claims.

II. PLAINTIFFS HAVE STATED CLAIMS UNDER § 1983

A. All Defendants are Potentially Liable under § 1983.

Plaintiffs bring four sets of claims under 42 U.S.C. § 1983. D.P., E.S., W.B., and L.A. bring claims for violation of their Fourth Amendment rights against unreasonable seizures, and all Plaintiff children[17] bring claims for violation of their Fourth Amendment rights to be free of excessive force. P.S., J.S., A.B., and L.H.—parents or guardians of D.P., E.S., W.B., and L.A.—

[17] The term "Plaintiff children" refers in this section to whichever child Plaintiffs bring the claim under discussion—D.P., E.S., L.A., W.B. and M.S. in the case of the excessive force claims and D.P., E.S., L.A., and W.B. in the case of the other claims.

bring claims that the District failed to provide sufficient procedural due process when it interfered with their fundamental rights to care, custody, and control of and to make medical decisions for their children.[18] Defendants' Motion is not always clear, but it appears that they challenge each § 1983 cause of action on the basis that (1) Defendants did not violate any constitutional rights; (2) the Officer Defendants are entitled to qualified immunity; and (3) the School Board and the official capacity Defendants are not liable under *Monell*.

To overcome the qualified immunity defense raised by the Officer Defendants on Plaintiffs' damages claims,[19] Plaintiffs must both sufficiently allege that their rights were violated and establish that the alleged violation was of "clearly established statutory or constitutional rights of which a reasonable person would have known." *Davis v. Williams*, 451 F.3d 759, 762 (11th Cir. 2006) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).[20] While "[t]he usual way of establishing that a constitutional violation was clearly established law is by pointing to a case, in existence at the time, in which the Supreme Court or [11th Circuit] Court found a violation based on materially similar facts . . .'officials can still be on notice that their conduct violates established law even in novel factual circumstances'" if the law at the time would have given them "fair warning when [they] engaged in the conduct giving rise to the claim that [their] conduct was unconstitutional." *Cantu v. City of Dothan, Ala.*, 974 F.3d 1217, 1232–33 (11th Cir. 2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

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[18] The organizational Plaintiffs join these claims in the manner described in more detail above. Because Defendants do not address their claims, Plaintiffs focus on the individual Plaintiffs' claims.

[19] Qualified immunity does not apply to injunctive relief. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009).

[20] Plaintiffs do not dispute that use of involuntary examinations under the Baker Act is a discretionary function, a prerequisite for the application of this doctrine.

The liability of the School Board is governed by *Monell v. Department of Social Services*, 436 U.S. 685 (1978).[21] Under that standard, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 404 (1997). This may be demonstrated through a formal policy, a custom (also known an informal policy), or failure to train. A formal policy is simply "a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality." *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997). "A custom is a practice that is so settled and permanent that it takes on the force of law." *Id.* To establish a custom, "it is generally necessary to show a persistent and wide-spread practice" and "actual or constructive knowledge of such customs must be attributed to the governing body of the municipality." *Depew v. City of St. Marys, Ga.*, 787 F.2d 1496, 1499 (11th Cir. 1986). Finally, a municipality can be liable due to its failure to train "where the municipality inadequately trains or supervises its employees, this failure to train or supervise is a city policy, and that city policy causes the employees to violate a citizen's constitutional rights." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389–91 (1989)).

As with any other 12(b)(6) motion, in a motion to dismiss based on qualified immunity the court must take "the facts alleged in the complaint as true, drawing all reasonable inferences in the plaintiff's favor". *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010).

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[21] Municipal liability may be established without finding an individual defendant liable. *See, e.g.*, *Barnett v. MacArthur*, 956 F.3d 1291, 1301 (11th Cir. 2020).

B. Plaintiffs D.P., E.S., W.B., and L.A. Were Unconstitutionally Seized.

1. It is clearly established that seizing a child for involuntary examination is unlawful absent reason to believe the child meets the Baker Act criteria.

An officer violates the Fourth Amendment if they seize a student from school under the Baker Act without "reason to believe" or probable cause to believe they meet the Baker Act criteria. In this context, reasonableness has the same meaning as probable cause. Outside of schools, it is clearly established that there is no probable cause to detain someone if they do not meet the specific criteria in the Baker Act statute. *Khoury*, 4 F.4th at 1125–1129 (applying the probable cause standard in concluding that an officer who seized an adult under the Baker Act was not entitled to qualified immunity for a false arrest claim). Under *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a search of a student *in a school* is only constitutional when it is "reasonable." "[T]he reasonableness of the search is evaluated using a two-step inquiry: 'first, one must consider whether the . . . action was justified at its inception'; second, one must determine whether the search as actually conducted was 'reasonably related in scope to the circumstances which justified interference in the first place.'" *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304 (11th Cir. 2006) (quoting *T.L.O.*, 469 U.S. at 341). If a child does not meet the Baker Act criteria at the time they are seized for involuntary examination, then that seizure cannot be "justified at its inception." Officers' only legal authority to detain someone for purposes of involuntary examination comes from the Baker Act.

A crucial element of the criteria is that the officer has "reason to believe" that a child has a mental illness and that there is a "substantial likelihood" that because of this mental illness the child will cause serious bodily harm to themself or others in the near future. *Khoury*, 4 F.4th at 1126 (quoting Fla. Stat. § 394.463(1)). "'Substantial likelihood' is a standard that meets or exceeds the requirement of probable cause." *Cochrane v. Harvey*, No. 4:04-CV-475-RH/WCS, 2005 WL 2176874, at *3 n.4 (N.D. Fla. Sept. 1, 2005) *see also McQuade v. State of Fla.*, 3:04-

CV-170/RV/MD, 2006 WL 1836013, at *8 (N.D. Fla. June 30, 2006) ("Florida's involuntary examination statute requires probable cause to believe the person is mentally ill and dangerous to herself or others."). Hence, while it is not clearly established whether *T.L.O.* or *Khoury* applies to in-school use of the Baker Act, under either standard, the Officer Defendants were required to have probable cause to seize the Plaintiff children for involuntary examination.[22]

Officer Margolis asserts that Plaintiffs are "mistaken" that "a failure to comply with the Baker Act's requirements gives rise to a constitutional claim." Mot. at 36. He cites *Knight v. Jacobson*, which held that "there is no federal right not to be arrested in violation of state law." 300 F.3d 1272, 1276 (11th Cir. 2002). But *Knight* concerned state *procedural* law which set higher standards for searches than the federal Constitution. *Id.* In contrast, "[w]hether an arresting officer possesses probable cause or arguable probable cause naturally depends on the elements of the alleged crime". *Skop v. City of Atlanta*, *Ga*, 485 F.3d 1130, 1137 (11th Cir. 2007). Like a criminal statute, the Baker Act sets out the basis for detention. The Fourth Amendment inquiry is then whether the officer had arguable probable cause to meet those elements. *See Cochrane v. Harvey*, No. 4:04-CV-475-RH/WCS, 2005 WL 2176874, at *3 (N.D. Fla. Sept. 1, 2005) ("[T]he Fourth Amendment . . . prohibit[s] . . . a seizure in Florida if there is *not* probable cause to believe these [Baker Act] criteria have been met . . . because Florida law

[22] To the extent these standards produce different results, for purposes of injunctive relief, and liability for the School Board (which is not entitled to qualified immunity), Plaintiffs agree with the Defendants (except Officer Margolis) that *Khoury* best articulates the standard. Mot. at 19. However, as explained above, because the Baker Act itself requires probable cause, there is no difference between the *Khoury*'s probable cause standard and *T.L.O.*'s reasonableness standard.

recognizes no extra-statutory basis for such a seizure, and the Fourth Amendment prohibits a seizure absent probable cause to believe the governing substantive standards have been met.").[23]

2. Defendants had no reason to believe D.P., E.S., L.A. and W.B. met the criteria for involuntary examination under the Baker Act.

Defendants' position appears to be that any child, no matter how young, who acts out, yells, or is otherwise unruly can legally be handcuffed and taken to a locked psychiatric facility. But that position, which wildly diverges from accepted best practices for providing mental healthcare to children, FAC ¶¶ 60-67, is thankfully not the law. Use of the Baker Act is only lawful where an officer has "reason to believe" the person has a mental illness (*not* a developmental disability such as ASD) and because of that mental illness they pose a danger of "serious bodily harm" "without care or treatment" in the "near future." Fla. Stat. § 394.463(1). Each of these elements is required to legally seize a person under the Baker Act. *See Khoury*, 4 F.4th at 1126 ("Vague notions about what a person might do—for example, a belief about some likelihood that without treatment a person might cause some type of harm at some point—does not meet" the arguable probable cause standard for use of the Baker Act).

The most obvious evidence that the officers knew or should have known that Plaintiff children did not meet the criteria is that none of their Baker Acts were recommended by mobile response teams or other medical professionals. FAC ¶¶ 92, 125, 141, 165. In L.A.'s case, Officer Blocher actually *overruled* a mobile response team member. FAC ¶ 141. In W.B.'s case the team was called but then told not to come. FAC ¶ 165. In E.S.'s case, the decision was made over the

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[23] Margolis also misleadingly quotes *Greer v. Hillsborough County Sheriff's Office* as holding that a plaintiff "may not maintain a Section 1983 claim based on a violation of Florida's Baker Act." 2006 WL 2535050, at *1 n.3 (M.D. Fla. Aug. 31, 2006) (citation omitted). But the court was simply explaining that § 1983 allows only claims for violations of federal constitutional rights, not state law, *in the midst of an analyzing* whether the defendant officers detained the plaintiff in violation of the Baker Act criteria and hence violated his Fourth Amendment rights.

objections of his BCBA. FAC ¶¶ 105, 126. Moreover, in both D.P. and E.S.'s cases, the District was aware that they had each been diagnosed with ASD, and that the behaviors they displayed were consistent with manifestations of ASD, which is not a mental illness. FAC ¶¶ 72-73, 103-04. Taking the facts in the light most favorable to Plaintiffs, Officers Margolis and Cuellar either knew this or failed to take basic steps to investigate if it was true.

The Officer Defendants also lacked reason to believe there was a "substantial likelihood" that these children, who ranged from eight to ten years old, would cause "serious bodily harm" in the "near future." L.A. and E.S. made no verbal threats to do so. FAC ¶¶ 105-08, 138, 168. D.P. was upset but, as he later told the receiving facility staff, "I just get mad. I don't want to hurt myself." FAC ¶¶ 80, 97-98. W.B. reacted after being restrained—something he was especially sensitive to given his disability, which his school knew. FAC ¶¶ 158, 164, 167-8. To the extent these children did make threats, the officers took no steps to determine if, given their age, they had any ability to carry them out or cause "serious bodily harm."

Finally, in each case the officers lacked reason to believe that without involuntary examination the children would pose a danger to themselves or others. Each officer ignored simple de-escalation strategies that could have resolved the situation, and instead employed the most restrictive means of addressing the situation. FAC ¶¶ 81, 91-94, 96, 106, 110-12, 125-26, 132, 134, 139, 142, 145-47, 164-65, 169, 171. These de-escalation strategies could have included allowing each child to calm down in a non-threatening setting or allowing them to speak with their parents, therapists, or other trusted adults. *Id*. Indeed, in some cases the children had already deescalated before seized: for example, E.S.'s "tantrum behavior had ceased." FAC ¶ 113.

3. The School Board had formal and informal policies promoting illegal Baker Act use and trained its officers to use the Baker Act illegally, causing violation of Plaintiff children's rights.

This is the "rare[]" case in which a municipality "ha[s] an officially-adopted policy of permitting a particular constitutional violation". *Grech v. Clayton Cnty., Ga.*, 335 F.3d 1326, 1330 (11th Cir. 2003). The District's only written policy for all school staff concerning the Baker Act—the "Baker Act Bulletin"—instructed them that they could use the Baker Act on a child who "presents a danger to self or others; *and/or* appears to have a mental illness as determined by a licensed mental health professional" (emphasis added). FAC ¶ 206. This policy, which Defendants' Motion does not bother to mention or defend, wrongly states that only one of these two elements needs to be met to authorize use of the Act and that these are the only two relevant factors, leaving out the requirements of danger in the near future and serious bodily harm. The Defendant Officers, accordingly, ignored these key statutory elements when using the Baker Act on the Plaintiff children. There can be no more straightforward application of *Monell*.

Defendants may suggest that this not an "official policy" because it was not voted on by the School Board. But the question of who has final decision-making authority is one of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). Here, Superintendent Fennoy,[24] under Florida law, is "responsible . . . for directing the work of [District] personnel". Fla. Stat. § 1001.51(7). Moreover, to the extent that the authority to set policy regarding the Baker Act resides in the School Board, "[a] municipal governing body may be held liable for acts or

[24] Fennoy concedes that he can be held personally liable where there is "a causal connection between the actions of the supervising official and the alleged constitutional deprivation" and that this causal connection can be demonstrated in the same manner as liability for a municipality. Mot. at 26 (quoting *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003)).

policies of individuals to whom it delegated final decisionmaking authority in a particular area." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1291 (11th Cir. 2004).

Moreover, even if the Baker Act Bulletin does not rise to the level of an officially adopted policy, it is strong evidence that the District has a custom of using the Baker Act on children who do not meet the statutory criteria. *See Praprotnik,* 485 U.S. at 130 (while there was no liability because final decisionmaker had not adopted a policy, "[i]t would . . . be a different matter if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware."). Plaintiffs alleged that District "employees have also been made aware of inappropriate use of the Baker Act in numerous individual instances by medical experts and child advocates over the intervening years, including some it employs itself" and that these concerns were brought to the School Board. FAC ¶¶ 223, 225. Had the District investigated these complaints, it would have learned the facts presented in the FAC, including data showing that, over four years, the District employed involuntary examinations more than 1200 times and dozens of times on five-, six-, and seven-year-olds. FAC ¶¶ 197-201, 220, 224.

In the only two incidents where its own police internal affairs department did investigate involuntary examinations under the Baker Act, they found facts showing the examinations were unjustified, yet no action was taken. FAC ¶¶ 226-32. In another case, a school police officer recorded a school principal attempting to convince him to initiate an involuntary examination under the Baker Act on a child, even though the principal conceded the child was not a danger to herself or others; again, no action was taken. FAC ¶¶ 233-37. Plaintiffs also obtained redacted police reports about use of the Baker Act over two years and described thirteen examples of use of the Baker Act that were, on their face, illegal, such as a seven-year-old who was sent for involuntary examination after he "threw books and kicked chairs" even though he denied

wanting to hurt himself or others. FAC ¶ 195. Finally, one board member even admitted publicly that she had been told of multiple incidents of inappropriate Baker Act use. FAC ¶ 242.

Moreover, Plaintiffs found these examples of illegal use of involuntary examination under the Baker Act on the face of police reports—documents which often mischaracterize student behavior and statements. FAC ¶¶ 136, 138, 167-68. Defendants argue these are a small number of cases when compared to the entire student population of the District. Plaintiffs, however, included these only as examples. FAC ¶¶ 195-96. And Defendants cite no authority for the proposition that the number of children whose civil rights a municipality *doesn't* violate is relevant to determining whether there is a pattern of civil rights violations. To the contrary, courts have found that even a pattern of violations by a single employee of a school district can be enough to establish a custom and give rise to municipal liability. *See Williams v. Fulton Cnty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1122 (N.D. Ga. 2016) (collecting cases).

Defendants also argue, without citation, that "[e]ven if ALL of the 1200 involuntary examinations alleged by Plaintiffs were found to be unnecessary, it would still not rise to the level of pervasiveness to establish the School Board's liability". Mot. at 13. This is like arguing that even if every arrest made by a police department was without probable cause, that would not establish a custom of unconstitutional arrests because the number of arrests is small compared with the population of the area. That, thankfully, is not the law. *See, e.g.*, *Depew*, 787 F.2d at 1499 (city liability established by "several incidents involving the use of unreasonable and excessive force by police officers"). Plaintiffs have pled far more than courts have found sufficient to establish an unconstitutional custom. *See, e.g.*, *Valdes v. Crosby*, 450 F.3d 1231, 1244 (11th Cir. 2006) (whether repeated incidents of excessive force against prisoners put warden on notice of custom of such violence was a question for the jury). While "[o]ne or two

incidents . . . is generally insufficient" to meet plaintiffs' burden, "on a motion to dismiss, allegations of anything more than that are generally sufficient". *Williams*, 181 F. Supp. 3d at 1122.

Finally, even if its employees' use of involuntary examinations on children who did not meet the criteria did not rise to the level of a custom, the District's failure to train its officers and other employees would still be a sufficient basis for liability. The District's Baker Act training materials repeat and worsen the false statements of the law in the Baker Act Bulletin, telling officers that any "individuals who have a mental illness, *or* who may harm or neglect themselves or others" can be involuntarily examined and omitting other statutory requirements. FAC ¶ 214. Only fifteen minutes long, the Baker Act portion of the training additionally never explained when the Act should be used or the harms of using it unnecessarily. *Id*.

"Inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton*, 489 U.S. at 388. Under normal circumstances, this deliberate indifference must be demonstrated by "[a] pattern of similar constitutional violations by untrained employees". *Connick v. Thompso*n, 563 U.S. 51, 62 (2011). But training officers that they may legally use the Baker Act when use would in fact be illegal falls under the "narrow range of circumstances" where "a pattern of similar violations might not be necessary to show deliberate indifference." *Id.* at 63 (citing *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. at 404; *see Canton*, 489 U.S. at 390 n.10 (1989) (giving as an example the need to train officers who are given guns when they may use deadly force). It should be obvious that if a district trains officers that they may seize children for involuntary examination without any reason to believe those children are mentally ill, those officers may well go on to do that. Should

more evidence be needed, the repeated violations of the rights of Plaintiffs and others alleged in the FAC demonstrate the District's custom. *See* Background, above.

Regardless of the method that plaintiffs use to demonstrate municipal liability—formal policy, informal custom, or failure to train—they must also demonstrate that "the injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." *Canton*, 489 U.S. at 391. Here, D.P., E.S., W.B., and L.A. have sufficiently alleged that they did not meet the Baker Act criteria, as set out above. Therefore, had the District had a lawful policy and/or trained police officers only to use the Baker Act on children who properly met the criteria, Plaintiffs have sufficiently alleged that D.P., E.S., W.B., and L.A., as well as youth in other similar cases, would not have been detained. The District's own internal affairs investigators found in E.S.'s case that there were "concerns . . . with regard to Baker Acts involving students with Autism" that required more training. FAC ¶ 228.

C. The Plaintiff Children Have Stated Claims that They Were Unconstitutionally Subjected to Excessive Force.

While four of the Plaintiff children allege that they were subject to illegal seizures, *even if* any of the seizures had a legal basis, the use of handcuffing on D.P., E.S., L.A., W.B., and M.S. nevertheless constituted excessive force under the circumstances. Excessive force claims are a discrete constitutional violation when the force applied is alleged to be excessive regardless of the legality of the seizure. *See, e.g.*, *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000) ("[A] claim for excessive force during a legal stop or arrest is a discrete claim."); *Bashir v. Rockdale Cnty., Ga.*, 445 F.3d 1323, 1332 (11th Cir. 2006) ("[A]n excessive force claim presents a discrete constitutional violation relating to the manner in which an arrest was carried out, and is independent of whether law enforcement had the power to arrest.").

1. Plaintiff children have stated a claim for use of excessive force.

In assessing excessive force claims, courts apply the standard set forth by the Supreme Court in *Graham v. Connor*.[25] 490 U.S. 386 (1989). This requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the "countervailing governmental interests at stake." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). Factors include severity of the "crime" at issue, whether there is an immediate threat of harm to officers or others, and whether there is an attempt to actively resist or evade the officer, and courts consider the "totality of the circumstances" in making this assessment. *Id.* (quoting *Garner*, 471 U.S. at 8–9). The Eleventh Circuit has specifically noted the importance of a child's age in assessing reasonableness. In *Gray v. Bostic*, it held that it was clearly established that handcuffing a nine-year-old child (who had physically threatened her gym teacher but posed no safety concerns) for at least five minutes constituted excessive intrusion for reasons including her age. 458 F. 3d at 1306–7 ("[H]andcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights."). The

[25] Even if the Court applied the standard articulated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), rather than the *Graham* standard, to this analysis, it should still find that the Plaintiff children were subjected to excessive force. The force used was not "justified at inception" nor "reasonably related in scope" to the circumstances justifying the initial interference, but rather was excessively intrusive given the age of Plaintiff children and other factors. *See Gray*, 458 F. 3d at 1306 ("handcuffing Gray was not reasonably related to the scope of the circumstances that justified the initial investigatory stop" and "the handcuffing was excessively intrusive given Gray's young age and the fact that it was not done to protect anyone's safety."). Note that in *Gray,* the excessive force claims were subsumed by the illegal seizure claims, because the basis of the excessive force claim was that the seizure was illegal, such that any use of force was excessive, and the court analyzed the illegal seizure claim under the *T.L.O.* standard. In contrast, here the excessive force claims are not subsumed by the illegal seizure claims and the *Graham* analysis applies instead. *Id.*

premise that handcuffing children constitutes excessive force in violation of the Fourth Amendment is well-established in other circuits as well.[26]

Plaintiff children are children with one or more disabilities who were between eight and eleven years old when they were subjected to involuntary examination under the Baker Act, due to behavior exhibited and/or statements made at school. *See* Background, above. Plaintiffs allege that their actions did not pose threats of serious bodily harm to the Officer Defendants or to others, particularly given their ages. FAC ¶¶ 90, 124, 143, 170, 188, 315. Nor did they actively attempt to evade or resist the Officer Defendants. *Id.* The Officer Defendants' actions caused—rather than prevented—harm to the students. Officer Defendants failed to use sufficient de-escalation techniques or alternative approaches to handcuffing. FAC ¶¶ 93, 125-26, 139, 146, 169, 185. They also forced the children to remain in handcuffs when they were calm and confined to police vehicles, when there was no credible basis for believing the children could have caused harm to themselves, the officers, or others. FAC ¶¶ 112, 115, 376-77, 392-93, 414-15, 426-27. E.S. was also "tackled" to the ground even though he was calm. FAC ¶¶ 109-11.

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[26] The Fourth Circuit, for example, has stated that "[c]ircuit and district courts around the country have recognized that youth is an important consideration when deciding to use handcuffs during an arrest." *E.W. by & through T.W. v. Dolgos*, 884 F.3d 172, 182 (4th Cir. 2018). In that case, the court concluded that the "calm, compliant ten-year-old" plaintiff fell "squarely within the tender age range for which the use of handcuffs is excessive absent exceptional circumstances." *Id.* at 181–82. The Ninth Circuit similarly held that an officer's decision to handcuff a "small, calm" eleven-year-old child in response to a school-related incident "was completely unnecessary and excessively intrusive," and that "none of the *Graham* factors even remotely justified keeping [him] handcuffed for approximately thirty minutes in the back seat of a safety-locked vehicle." *C.B. v. City of Sonora*, 769 F.3d 1005, 1030–31 (9th Cir. 2014). In *Hoskins v. Cumberland Cnty. Bd. of Educ.*, a district court in the Sixth Circuit held that a School Resource Officer (SRO) used excessive force when he handcuffed an 8-year-old after an altercation in physical education class. No. 2:13-CV-15, 2014 WL 7238621, at *8 (M.D. Tenn. Dec. 17, 2014). After its analysis of the *Graham* factors, the Court concluded that the Officer's initial handcuffing of "a very young child in the school setting[] was not objectively reasonable, and his leaving the child handcuffed for forty-five minutes was even less reasonable." *Id.* The court pointed out that the plaintiff "was a startlingly young child to be handcuffed at all, much less for forty-five minutes." *Id*. at *11.

Plaintiffs have stated a claim that this handcuffing violated the Fourth Amendment's prohibition on excessive force. Simply put, it is not "objectively reasonable" to handcuff young, physically and emotionally vulnerable children with disabilities who are experiencing behavioral issues or emotional distress at school and who pose no immediate safety threat.[27]

Defendants rely on *Williams v. Sirmons*, 307 F. App'x 354 (11th Cir. 2009) (unpublished), for the principle that "where an arrest is supported by probable cause, the application of de minimis force as needed to effect the arrest, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *Id.* at 360. But in *Williams*, the plaintiff was an adult woman who did not allege physical or psychological harm as a result of the force and she was seized after officers believed she was fleeing or resisting an actual arrest. *Id. at* 361–62.[28] Here, though, Plaintiffs have alleged that handcuffing was not necessary "to effect the arrest," or, in this case, seizure for involuntary examination. FAC ¶¶ 377, 393, 404, 415, 427.[29] Moreover, Plaintiffs are young children with disabilities who have alleged psychological injury from traumatic handcuffing. FAC ¶¶ 100-01, 119, 153, 155, 177, 192, 378, 382, 398, 405, 409, 416, 421, 428, 433. Further, the Baker Act itself prohibits the use of "restraining devices utilized

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[27] Defendants' actions were also clearly in conflict with the "right to individual dignity" enumerated in the Baker Act itself: "Procedures, facilities, vehicles, and restraining devices utilized for criminals or those accused of crime shall not be used in connection with persons who have a mental illness, except for the protection of the patient or others." Fla. Stat. § 394.459(1); FAC ¶ 59.

[28] Defendants also cite to *Rodriguez v. Farrell*, 280 F.3d 1341, 1351 (11th Cir. 2002) and *Nolin v. Isbell*, 207 F.3d 1253, 1257–58 (11th Cir. 2000) for the premise that handcuffing in itself does not constitute excessive force. But neither *Rodriguez* nor *Nolin* involved a young child plaintiff, neither alleged psychological injury, and neither involved the Baker Act. Their application to the force used on Plaintiff children here, all of whom suffered psychologically as a result of handcuffing while Baker Acted, is therefore of limited utility.

[29] For this reason, Defendants' citations to *Wilson v. Gee*, No. 8:10-CV-2104-T-35TBM, 2012 WL 13106092 (M.D. Fla. Nov. 27, 2012), and *Lillo v. Bruhn*, No. 306CV247/MCR/EMT, 2009 WL 2928774 (N.D. Fla. Sept. 9, 2009), are not relevant. In both cases, courts, *on summary judgment*, found that officers' use of force to restrain adults who undisputedly met the Baker Act criteria and *were actively resisting seizure* did not violate § 1983. *Wilson* 2012 WL 13106092 at *4-8; *Lillo* 2009 WL 2928774 at *3.

for criminals or those accused of a crime," such as handcuffs, except when necessary to protect the person subject to involuntary examination or others. Fla. Stat. § 394.459(1).

2. A child's psychological harm is true harm and part of an excessive force analysis.

Plaintiff children allege psychological injuries from the use of excessive force. FAC ¶¶ 100-01, 119, 153, 155, 177, 192, 378, 382, 398, 405, 409, 416, 421, 428, 433. Children who are handcuffed by police report significantly higher emotional distress, as well as subsequent post-traumatic stress, as compared to children who are not handcuffed during police encounters. FAC ¶ 62. Defendants' assertion that only *physical* harm, rather than *psychological* harm, is relevant to an excessive force analysis is both misguided and troubling. Psychological injury to a child is true harm, and indeed may be more enduring than physical injury, causing lasting impacts on childhood and adolescent development. FAC ¶ 65. Defendants' reliance on *Digennaro v. Malgrat* (an unpublished opinion, currently on appeal) as finding that *only* physical injury is relevant is misleading. No. 4:20-CV-10094-KMM, 2021 WL 3025322, at *5 (S.D. Fla. June 14, 2021). In that case, an officer *attempted* to handcuff a boy before escorting him to a police vehicle unrestrained. *Id*. Citing *Stephens v. DeGiovanni*, 852 F.3d 1298 (11th Cir. 2017), *Digennaro* asserts that "the relevant inquiry in assessing excessive force claims relates to *physical harm* suffered," while also acknowledging that the child suffered emotional harm. *Id.* at *2, *5. But *Stephens* did not hold that psychological harm was irrelevant; rather, the *Stephens* court noted that the adult plaintiff's injuries included "[p]hysical inconvenience and discomfort, loss of time, *emotional trauma, anxiety and distress, humiliation and embarrassment, and impairment to reputation*." 852 F.3d. at 1311. The court then concluded that the officer in question "had no reason to use the force he did on Stephens that resulted in severe and permanent physical injuries *as well as psychological trauma*." *Id.* at 1326 (emphasis added).

While the court stated that "[t]he nature and extent of physical injuries sustained by a plaintiff are relevant" to an excessive force claim, clearly emotional and psychological injuries are *also* relevant. *Id.* at 1318, 1325. *Gray* also stands for the proposition that a child's young age should be considered in determining the psychological harm of handcuffing. 458 F.3d at 1307.

3. It is clearly established that handcuffing young, compliant children who pose no threat of bodily harm constitutes excessive force under the Fourth Amendment.

Defendants argue that Officer Defendants are protected from liability from Plaintiffs' damages claims based on qualified immunity. To overcome this defense, Plaintiffs must establish that they have sufficiently alleged that their rights were violated (discussed above) and that the violation was of "clearly established statutory of constitutional rights of which a reasonable person would have known." *Davis v. Williams*, 451 F.3d 759, 762 (11th Cir. 2006) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In some cases, an officer's conduct is "so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [should be] readily apparent to [him], notwithstanding the lack of [fact-specific] case law." *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002) (quoting *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926 (11th Cir. 2000). "Even in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases." *Gray*, 458 F.3d at 1306.

As in *Gray*, the constitutional violation alleged by Plaintiffs is obvious. In *Gray*, the court denied qualified immunity to a deputy who had handcuffed "a compliant, nine-year-old girl" with "no indication of a threat to anyone's safety." *Id.* at 1306–07. Even though there was no prior similar case law, the court found that the deputy had fair warning that his behavior violated the Fourth Amendment because the violation was "obvious." *Id.* at 1307. *Gray* clearly established that handcuffing young, compliant children constitutes excessive force under the

Fourth Amendment, and is sufficiently similar to the Plaintiff's allegations to put Defendants on notice that their conduct was unlawful. Further, as in *Gray*, the constitutional violation inherent in handcuffing young children posing no imminent danger to themselves or others is "obvious" even without similar case law.

4. The School Board has a policy and custom of, and trains its officers to, handcuff all children subjected to the Baker Act, causing harm to Plaintiff children.

Separate from the liability of the Officers, the School Board is liable through its policy and custom of handcuffing all children seized for involuntary examination. The School Board is additionally liable because it failed to provide adequate training and supervision regarding the use of force against children who are being seized for involuntary examination under the Baker Act, despite being on notice of the need for such training and supervision.

The FAC alleges that, even though the Baker Act itself prohibits the use of handcuffs and other restraints except when necessary to protect the person being subjected to the Baker Act or others, Fla. Stat. § 394.459(1), District policy provides that officers shall handcuff and restrain children both at school and during transportation to the receiving facility. FAC ¶¶ 194, 215, 369. The District policy does not create exceptions for situations in which there is no need for use of force, or situations involving very young children, children with disabilities, and/or children who are not attempting to evade or resist custody. FAC ¶¶ 194, 369. The District has a history of applying this policy without any individual determinations around the need for handcuffing individual children. FAC ¶ 248. Concerns regarding the District's use of the Baker Act were brought to the School Board over the course of years. FAC ¶¶ 223, 225. Yet, the School Board failed to act to change the District policy and practice around handcuffing. The Officer Defendants therefore followed this policy and practice. Because this policy and practice mandate

handcuffing even when unnecessary or unreasonable, it directly caused the Plaintiff children's injuries and violated their constitutional rights. FAC ¶¶ 369-71.

In addition, the FAC alleges that the School Board does not provide adequate training and supervision regarding the use of force, including handcuffing, against students who were seized and transported for involuntary examination. Officers were not trained on the harms of handcuffing young children, including young children with disabilities, or on the Baker Act's limitations on the use of handcuffs. FAC ¶¶ 6, 205, 213, 228, 229, 232, 327-28, 340, 351, 362, 381, 396, 408, 419, 431. Because this resulted in officers improperly handcuffing children during involuntary examinations under the Baker Act, it directly caused the Plaintiff children's injuries and violated their constitutional rights. FAC ¶¶ 381, 396, 408, 419, 431.

D. P.S, J.S., A.B., and L.H. have Stated Procedural Due Process Claims for Interference with their Constitutionally Protected Parental Rights.

Plaintiff parents P.S., J.S., A.B., and L.H. have stated claims, for only injunctive relief,[30] that all Defendants except Officer Lauginiger interfered with their fundamental parental rights without adequate due process. "[A] § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)). Defendants appear to dispute the first and third of these elements.

[30] Defendants' arguments regarding qualified immunity are therefore irrelevant. Mot. at 25, 40.

1. P.S., J.S., A.B. and L.H. were deprived of constitutionally-protected interests.

The Supreme Court has long recognized the fundamental right of parents to direct the upbringing of their children. "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (plurality opinion). Parents' interest in the "care, custody and control" of their children "is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

Parents also have a right to make medical decisions for their children, including regarding psychiatric care. *See Parham v. J.R.*, 442 U.S. 584, 604 (1979) (noting that parents "retain plenary authority to seek [psychiatric] care for their children"). "[N]either the state nor private actors, concerned for the medical needs of a child, can willfully disregard the right of parents to generally make decisions concerning the treatment to be given to their children. '[P]arents have the right to decide free from unjustified governmental interference in matters concerning the growth, development and upbringing of their children.'" *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (quoting *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305, 313 (11th Cir. 1989)).[31] In the face of these controlling precedents, Defendants offer no argument whatsoever beyond their assertion that these rights are not "recognized." Mot. at 23.

[31] Additionally, a 2021 Florida Law reaffirms that "parental rights are reserved to the parent of a minor child . . . including . . . [t]he right to make health care decisions for his or her minor child, unless otherwise prohibited by law." HB 241 (2021), codified at Fla. Stat. § 1014.04(1). *See also Vazzo v. City of Tampa*, 415 F. Supp. 3d 1087, 1098 (M.D. Fla. 2019) ("The law in Florida is that, with very few exceptions, parents are responsible for selecting the manner of medical treatment received by their children, and this continues until age 18.") (citing Fla. Stat. § 743.07 (2019)).

2. Pre-deprivation process was required before P.S., J.S., A.B. and L.H. were deprived of these liberty interests.

Due process generally requires pre-deprivation notice and hearing before the State deprives a person of a liberty interest. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). The Defendants appear to argue that if adequate post-deprivation remedies are available, Plaintiffs cannot state a claim for a due process violation. Mot. at 6 (citing *Hudson v. Palmer*, 468 U.S. 517, 534 (1984) (holding that where a post-deprivation remedy was available, deprivation of property interest did not violate due process)). However, the Supreme Court has described *Hudson* as an exception to the general rule that pre-deprivation process is required, *id*. at 128, and stated that "when . . . officials fail to provide constitutionally required procedural safeguards . . . the state cannot then escape liability by invoking . . . *Hudson*." *Id.* at 135.

In *Zinermon*, the Supreme Court explained that that the exceptional holding in *Hudson* might only apply: when a deprivation of liberty was predictable; when pre-deprivation process was possible; and when, had the State "limited and guided" officers' power, "the deprivation might have been averted." *Id*. at 136–39. Here, Plaintiffs have clearly alleged all three factors, indicating that pre-deprivation process was constitutionally required. As described below, Plaintiffs have alleged that the Defendants' policies and practices created the likelihood of deprivation. *See* Sec. II.D.4. As further described below, Plaintiff parents have sufficiently alleged that no "true emergency" existed that would make pre-deprivation process impossible. *See* Sec. II.D.3. Plaintiffs have also alleged that the Defendants could have limited and guided

officers' power to prevent the deprivation by instructing officers to allow parents to take custody of their children to avoid an involuntary examination under the Baker Act. FAC ¶ 208.[32]

3. P.S., J.S., A.B. and L.H. have pled that they did not receive due process when their children were removed without their consent.

The state may, under a civil statute, constitutionally remove a child from their parents' custody without consent or a court order only in "true emergencies" where "there is probable cause to believe the child is threatened with imminent harm." *Doe v. Kearney*, 329 F.3d 1286, 1294–95 (11th Cir. 2003).[33] Similarly, it is clearly established that parents can only be deprived of their rights to make medical decisions for their children if there is a true or reasonably perceived emergency. *Bendiburg v. Dempsey,* 909 F.2d 463, 468 (11th Cir. 1990) ("The validity of the [state consent to a child's surgery without a parent's consent], both for constitutional and state law battery purposes, turns on whether such an emergency existed, or was thought to exist by the state employees, so as to make constitutional what would be unconstitutional in the absence of a medical emergency . . . .").

The FAC alleges that there was no "true emergency" or even a reasonable perception of an emergency as to D.P., E.S., L.A. and W.B. and that police officers working for the District

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[32] Moreover, even if the constitutionality of Defendants' actions could be saved through post-deprivation review, Plaintiffs have alleged that Defendants conduct no such review. FAC ¶ 220. Defendants' argument appears to be that their constitutional violations can be remedied by the acts of the receiving facility, Mot. at 23-24, acts in which the Defendants play no role and acts which the Defendants do nothing to guarantee occur. But any actions by receiving facility staff only address potential legal violations caused by the receiving facility. They do not and cannot remedy Defendants' failure to provide notice or an opportunity to consent to parents before the decision to seize their child for an involuntary examination occurs, or the Defendants' denial of any meaningful opportunity to be heard to parents before depriving them of their liberty interest in the care, custody, and control of and medical decision-making regarding their child. FAC ¶¶ 91, 114, 116, 144-45, 163, 166, 208. Defendants additionally cite to *Grady v. Baker*, 404 F. App'x, 450, 454 (11th Cir. 2010) (unpublished), in claiming that Plaintiffs have not alleged denial of notice or hearing. However, as described here, Plaintiffs have plainly alleged denial of notice and a hearing before Defendants seize Plaintiff children from their care, custody, and control and deny Plaintiff parents the opportunity to direct the medical treatment of their own children.

[33] "The term 'emergency' as used in this context [of child removals by the state] is synonymous with 'exigency' and 'imminent danger.' We have found that courts use them interchangeably." *Doe v. Kearney*, 329 F.3d at 1295 n.10.

regularly seize other children in similar circumstances. *See* Background, above. Taking all of Plaintiffs' asserted facts as true and making all inferences in their favor, the Court must conclude that no emergency existed that would justify depriving P.S., J.S., L.H. and A.B. of their rights to care, custody and control and to make medical decisions for their children.

Defendants also argue that "[i]t would be an irrational policy to require parental consent for involuntary examination, as some children would be barred from receiving the interventions they need during a mental health crisis, due to abusive or neglectful parents." But this can hardly be a justification for ignoring parents' wishes when there is *no reason to suspect* they are abusive, and it is not the constitutional standard, which requires an emergency or imminent harm before temporarily depriving parents of their rights. *See Parham*, 442 U.S. at 602–03 ("The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.") (internal citation omitted). Defendants do not argue that they had any reason to doubt the fitness of P.S., J.S., or L.H. to make decisions for their children. In A.B.'s case, the police report makes a cursory reference to abuse "at home," without any further substantiation. FAC ¶¶ 136, 140. It is apparent that any investigation was minimal at best, and that the evidence was insufficient to meet the emergency or imminent harm standard required to constitutionally deprive A.B. of her rights over her child.[34]

[34] Defendants also allege that they complied with the Baker Act. However, whether or not that is true, that is irrelevant to the extent Plaintiff parents' constitutional rights were violated.

4. District policies, customs, and failure to train caused violations of Plaintiff parents' rights.

Defendants do not dispute that they took the D.P., E.S., L.A. and W.B. into custody without parental consent. Defendants also do not dispute that the District routinely seizes children for involuntarily examination, including children of members of Plaintiff NAACP FL, without parental consent. Plaintiff parents P.S., J.S., A.B. and L.H. have alleged that the seizures for involuntary examination of their children without their consent carried out by police officers working in District schools were the result of longstanding District policies adopted by, ratified by, acquiesced to and endorsed by Defendants School Board, Fennoy, and Alexander and their predecessors. For example, Plaintiffs have alleged that the District's Baker Act Decision Tree provides that even contacting parents before initiating an examination, let alone seeking their permission, is only "recommended." FAC ¶ 211. Plaintiffs also have alleged that the District has a custom of using involuntary examinations without parental consent. FAC ¶¶ 296. Finally, Plaintiffs have further alleged that these violations were also the result of those Defendants' failure to supervise and train District police, employees, and contractors to seek parental consent before initiating a Baker Act examination. FAC ¶ 297.

Despite being aware that the District was employing involuntary examination under the Baker Act for hundreds of children, and that many of those Baker Act involuntary examinations could be prevented by contacting children's parents, Defendants failed to train their officers to do so. In failing to involve parents in critical decision-making about the care, custody, and control of their children, the Board interfered with Plaintiff parents' fundamental procedural due process rights under the Fourteenth Amendment.

III. THE BAKER ACT'S "GOOD FAITH DEFENSE" IS IRRELEVANT

Defendants also argue that Plaintiffs' claims all fail because the Baker Act provides that "[a]ny person who acts in good faith in compliance with the provisions of this part is immune from civil . . . liability." Fla. Stat. § 394.459 (10). But, it should go without saying, a state law cannot create a defense to civil liability under a federal statute. *See, e.g.*, *Bendiburg*, 909 F.2d at 468 ("good faith" was a defense to the state statutory claim of battery, but not to procedural due process claim of deprivation of parental rights). Hence, it is irrelevant to Plaintiffs' ADA, 504, and § 1983 claims.[35] To the extent Defendants suggest that for purposes of Plaintiffs' unconstitutional seizure claims under § 1983 "bad faith" is an element of the Baker Act criteria, they are also wrong. It is irrelevant to the two factors required to state a § 1983 claim: "(1) a violation of a constitutional right, and (2) that the alleged violation was committed by a person acting under color of state law." *Holmes v. Crosby*, 418 F.3d 1256, 1258 (11th Cir. 2005); *see also Khoury*, 4 F.4th at 1126–29 (examining whether officer had probable cause to detain plaintiff under the Baker Act without reference to good faith). Even if the good faith defense was relevant to the merits of Plaintiffs' claims, it is an affirmative defense and hence something the Plaintiffs need not plead. *See, e.g.*, *Jackson v. BellSouth Telecomms*, 372 F.3d 1250, 1277 (11th Cir. 2004).

CONCLUSION

Plaintiffs have made specific and detailed allegations about a systemic pattern of illegal use of the Baker Act which state claims for violation of their constitutional and statutory rights. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint should be denied.

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[35] As for Plaintiffs' claim under the Florida Educational Equity Act, Plaintiffs seek only injunctive relief, not to impose "liability." Moreover, to the extent it is relevant, Plaintiffs have alleged that Defendants' allegations, taken in the light most favorable to them, show that Defendants acted in bad faith.

Dated: September 13, 2021

Respectfully submitted,

/s/ Sam Boyd

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