UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GRACE M. DERR, *et al.*, Plaintiffs	)	CIVIL ACTION NO. 4:19-CV-215
	)	(BRANN, D.J.)
v.	)	
	)	(ARBUCKLE, M.J.)
NORTHUMBERLAND CTY. CYS, *et al.*, Defendants	)	

REPORT & RECOMMENDATION
Northumberland County Defendants' Motion to Dismiss (Doc. 21)

I. INTRODUCTION

On January 28, 2019, Plaintiffs Grace M. Derr, William J. Derr, and Stephen A. Derr initiated this *pro se* civil rights action against the following seventeen (17) Defendants:

(1) Northumberland County Children and Youth Services;

(2) Northumberland County Commissioners;

(3) Families United Network;

(4) Richard Schoch;

(5) Samuel J. Shicacatano;

(6) Kimberly Best;

(7) Katrina Gownley;

(8) Cathy Gemberling;

(9) Selissa Mauger;

(10) Lisa Schafferr;

(11) Marie Milke;

(12) Amanda Williard;

(13) Kathy Hollabaough;

(14) Jill Snyder;

(15) Shawn Homan;

(16) Monika Homan; and

(17) Kimberly Bills Carpenter.

On April 5, 2019, all Defendants except Defendant Families United Network (hereinafter the "Northumberland County Defendants") joined in a Motion to Dismiss. (Doc. 21). Along with their Motion, the Northumberland County Defendants filed a brief in support. (Doc. 22). To date, Plaintiffs have failed to file a response to the Northumberland Defendants' Motion to Dismiss. Accordingly, IT IS RECOMMENDED THAT:

(1) The Northumberland County Defendants' Motion to Dismiss (Doc. 21) should be deemed UNOPPOSED and GRANTED pursuant to Local Rule 7.6; or in the alternative,

(2) Plaintiffs' claims against the Northumberland County Defendants should be DISMISSED for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

II. BACKGROUND & PROCEDURAL HISTORY

On January 28, 2019, Plaintiffs initiated this civil rights action in the Eastern District of Pennsylvania. (Doc. 3). Plaintiffs, who at one time resided in a large home in Northumberland County with their children and grandchildren, claim that their rights under the United States Constitution were violated after several of their grandchildren were removed from their parents' custody and the home owned by Plaintiffs (the grandparents). Specifically, they claim that they are not permitted to see their grandchildren, were subjected to an unreasonable warrantless search at the hands of Defendant Northumberland County CYS and its employees and were listed in a child abuse database without a meaningful opportunity to object.

On January 31, 2019, this case was transferred to the Middle District of Pennsylvania. (Doc. 5). All three Plaintiffs sought and were granted leave to proceed *in forma pauperis*. (Docs. 1, 2, 7, 11).

On April 5, 2019, the Northumberland Defendants filed a Motion to Dismiss Plaintiffs Complaint. (Doc. 21). Along with their Motion, the Northumberland Defendants filed a Brief in Support. (Doc. 22). On April 9, 2019, the Court issued an Order directing Plaintiffs to respond to the Northumberland Defendants' Motion. (Doc. 26). On April 24, 2019, Plaintiffs sought an were granted an extension of time—until May 10, 2019—to respond. To date, Plaintiffs have failed to do so.

III. LEGAL STANDARD FOR A MOTION TO DISMISS

A motion to dismiss tests the legal sufficiency of a complaint. It is proper for the court to dismiss a complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure only if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss, the court "must accept all factual allegations in the complaint as true, construe the complaint in the light favorable to the plaintiff, and ultimately determine whether plaintiff may be entitled to relief under any reasonable reading of the complaint." *Mayer v. Belichick*, 605 F.3d 223, 229 (3d Cir. 2010). In reviewing a motion to dismiss, a court must "consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the [plaintiff's] claims are based upon these documents." *Id.* at 230.

In deciding whether a complaint fails to state a claim upon which relief can be granted, the court is required to accept as true all factual allegations in the complaint as well as all reasonable inferences that can be drawn from the complaint. *Jordan v. Fox Rothschild, O'Brien & Frankel, Inc.*, 20 F.3d 1250, 1261 (3d Cir. 1994). These allegations and inferences are to be construed in the light most favorable to the plaintiff. *Id.* However, the court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to

dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Further, it is not proper to "assume that [the plaintiff] can prove facts that [he] has not alleged . . . ." *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Following the rule announced in *Ashcroft v. Iqbal*, "a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, a complaint must recite factual allegations enough to raise the plaintiff's claimed right to relief beyond the level of mere speculation. *Id.* To determine the sufficiency of a complaint under the pleading regime established by the Supreme Court, the court must engage in a three-step analysis:

> First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 675, 679). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief" and instead must 'show' such an entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

As the court of appeals has observed:

> The Supreme Court in *Twombly* set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in *Iqbal*. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." *Id*. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955).

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011).

In undertaking this task, the court generally relies only on the complaint, attached exhibits, and matters of public record. *Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir. 2002); *see also, U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the

complaint may be considered without converting the motion to dismiss in one for summary judgment.") However, the court may not rely on other parts of the record in determining a motion to dismiss. *Jordan v. Fox, Rothschild, O'Brien &Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994).

IV. ANALYSIS

In the section of their Complaint where Plaintiffs were asked to identify the basis for federal question jurisdiction, Plaintiffs wrote:

a. Do parents and grandparents have a constitutionally protected interest in association with their children under the 1st Amendment?

b. Can people be placed in a child abuse database or held in county records with no notification or a way to defend against any allegations simply because they reside in the same residence with children?

c. Are county workers subject to constitutional and statutory laws protecting the rights of people?

d. Can NCCYS grant rights to people over family members w1ho [sic] are unrelated to children?

e. 1st 4th, 5th, 6th, 14th amendment of the Constitution, Child Abuse Prevention Treatment Act (CAPTA), USC 1983

(Doc. 3, p. 2). Their Complaint, however, only includes sections about two First Amendment claims, a Fourth Amendment claim, a Fifth Amendment claim, a Fourteenth Amendment claim, and a *Monell* claim. I construe Plaintiffs' Complaint as alleging only claims under the First, Fourth, Fifth, and Fourteenth Amendments, as well as a claim that certain entities are subject to *Monell* liability.

A. THE NORTHUMBERLAND DEFENDANTS' MOTION SHOULD BE DEEMED UNOPPOSED AND GRANTED PURSUANT TO LOCAL RULE 7.6

Local Rule 7.6 of the Rules of this Court imposes an affirmative duty on Plaintiffs to respond to the Northumberland Defendants' Motion to Dismiss. This rule states, in relevant part:

> Any party opposing any motion, other than a motion for summary judgment, shall file a brief in opposition within fourteen (14) days after service of the movant's brief, or, if a brief in support of the motion is not required under these rules, within seven (7) days after service of the motion. *Any party who fails to comply with this rule shall be deemed not to oppose such motion*.

Local Rule 7.6 (emphasis added).

"Local Rule 7.6 can be applied to grant a motion to dismiss without analysis of the complaint's sufficiency 'if a party fails to comply with the [R]ule after a specific direction to comply from the court.'" *Williams v. Lebanon Farms Disposal, Inc.,* No. 09-1704, 2010 WL 3703808, *1 (M.D. Pa. Aug. 26, 2010) (quoting *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (1991)). Plaintiffs were specifically directed to respond to the Northumberland County Defendants' Motion and advised of the consequence of their failure to respond. Despite these warnings, they failed to do so. (Doc. 26). Given this procedural default by Plaintiffs, the Court must be mindful of the basic truth that:

> the Federal Rules are meant to be applied in such a way as to promote justice. *See* Fed. R. Civ. P. 1. Often that will mean that courts should strive to resolve cases on their merits whenever possible. However,

> justice also requires that the merits of a particular dispute be placed before the court in a timely fashion . . . ."

Lease v. Fishel, 712 F. Supp. 2d 359, 371 (M.D.Pa. 2010) (quoting *McCurdy v. American Bd. of Plastic Surgery*, 157 F.3d 191, 197 (3d Cir. 1998)). With this basic truth in mind, we acknowledge a fundamental guiding tenet of our legal system. A failure on our part to enforce compliance with the rules, and impose the sanctions mandated by those rules when the rules are repeatedly breached, "would actually violate the dual mandate which guides this Court and motivates our system of justice: 'that courts should strive to resolve cases on their merits whenever possible [but that] justice also requires that the merits of a particular dispute be placed before the court in a timely fashion.'" *Id.* (quoting *McCurdy v. American Bd. of Plastic Surgery*, 157 F.3d 191, 197 (3d Cir. 1998)). Therefore, the Court is obliged to ensure that one party's refusal to comply with the rules does not lead to an unjustified prejudice to those parties who follow the rules.

These basic tenets of fairness apply here. Plaintiffs have failed to comply with Local Rule 7.6 by filing a timely response to this motion to dismiss. This failure now compels us to apply the sanction called for under Rule 7.6 and deem the Northumberland Defendants' Motion unopposed.

B. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 41(B)

Rule 41(b) of the Federal Rules of Civil Procedure authorizes a court to dismiss a civil action for failure to prosecute, stating that: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). Decisions regarding dismissal of actions for failure to prosecute rest in the sound discretion of the Court, and will not be disturbed absent an abuse of that discretion. *Emerson v. Thiel College*, 296 F.3d 184, 190 (3d Cir. 2002) (citations omitted). That discretion, however, while broad is governed by certain factors, commonly referred to as *Poulis* factors. As the United States Court of Appeals for the Third Circuit has noted:

> To determine whether the District Court abused its discretion [in dismissing a case for failure to prosecute], we evaluate its balancing of the following factors: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

Emerson, 296 F.3d at 190.

The first *Poulis* factor—the extent of Plaintiffs' responsibility for the failure to respond to the Northumberland Defendants' Motion to Dismiss—weighs in

favor of dismissal. In this case, Plaintiffs, all of whom are proceeding *pro se*, are personally responsible for failure to comply with the Court's rules and orders.

The second *Poulis* factor—the prejudice to the Northumberland Defendants caused by Plaintiffs' failure to respond to the pending Motion to Dismiss—weighs in favor of dismissal. Examples of prejudice are "the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party." *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984). Prejudice for purposes of the *Poulis* analysis, however, does not mean irremediable harm. *Ware*, 322 F.3d at 222. "[T]he burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial." *Id.* Plaintiffs failure to litigate this case, comply with L.R. 7.6, and abide by Court Orders directing them to comply with L.R. 7.6 has frustrated and delayed the resolution of this action. Furthermore, this delay can be seen to prejudice the Northumberland Defendants, whose attempt to seek timely resolution of this case has been hindered by Plaintiffs' inaction.

The third *Poulis* factor—Plaintiffs' history of dilatoriness—also weighs in favor of dismissal. While "conduct that occurs one or two times is insufficient to demonstrate a 'history of dilatoriness,'" *Briscoe*, 538 F.3d at 261, "[e]xtensive or repeated delay or delinquency constitutes a history of dilatoriness, such as

consistent non-response to interrogatories, or consistent tardiness in complying with court orders." *Adams v. Trs. of N.J. Brewery Emps.' Pension Trust Fund*, 29 F.3d 863, 874 (3d Cir. 1994). A "party's problematic acts must be evaluated in light of [their] behavior over the life of the case." *Id.* at 875. Plaintiffs have failed to respond to the Northumberland Defendants' Motion to Dismiss after being ordered to do so, and despite the Court's warning that the failure to respond may result in the dismissal of this case. (Doc. 26). Plaintiffs requested, and were granted, an extension of time. However, no brief in opposition was filed with the Court.

The fourth *Poulis* factor—whether Plaintiffs' failure to respond was willful or in bad faith—also weighs in favor of dismissal. "Willfulness involves intentional or self-serving behavior." *Adams*, 29 F.3d at 875. Plaintiffs were ordered to file a brief in opposition to the Northumberland Defendants' Motion to Dismiss but did not do so. Moreover, they were warned of the possible consequences of failing to file a brief in opposition. Plaintiffs failure to comply with the Court's order, failure to file a brief after being granted an extension of time, or failure to file a brief at any point over the past four months since that deadline passed leads to an inference that they have willfully abandoned this case.

The fifth *Poulis* factor—the effectiveness of alternate sanctions—also weighs in favor of dismissal. Dismissal is a sanction of last resort, and it is

incumbent upon a court to explore the effectiveness of lesser sanctions before ordering dismissal. *Poulis*, 747 F.2d at 868. Plaintiffs are proceeding *pro se* and *in forma pauperis*, and there is no evidence to support a reasonable inference that they would be able to pay monetary sanctions. Therefore, monetary sanctions, including attorney's fees and costs, would not be an effective sanction in this case. Moreover, Plaintiffs' failure to comply with the Court's orders leads to an inference that further orders would not be effective. In this case, no sanction short of dismissal would be effective.

The sixth *Poulis* factor—meritoriousness of Plaintiffs' claims—weighs in favor of dismissing all claims except one. Under *Poulis* and Fed. R. Civ. P. 41(b), a claim will be deemed meritorious when the allegations of the complaint, if established at trial, would support recovery. *Poulis*, 747 F.2d at 870. After reviewing Plaintiffs' First, Fifth, and Fourteenth Amendment claims, the Court concludes that the allegations of the Complaint do not state a plausible claim. *See* Sections III(C)(2), (4), and (5) of this Report.

Although Plaintiffs may have pleaded a plausible Fourth Amendment claim, this claim should also be dismissed under Fed. R. Civ. P. 41(b). As discussed above, the decision of whether to dismiss a complaint rests in the sound discretion of the Court. In exercising this discretion "there is no 'magic formula' that we apply to determine whether a District Court has abused its discretion in dismissing

for failure to prosecute." *Lopez v. Cousins*, 435 F. App'x 113, 116 (3d Cir. 2011) (quoting *Briscoe v. Klaus*, 538 F.3d 252 (3d Cir. 2008)). Therefore, "[i]n balancing the *Poulis* factors, [courts] do not [employ] a . . . 'mechanical calculation' to determine whether a District Court abused its discretion in dismissing a plaintiff's case." *Briscoe*, 538 F.3d at 263 (quoting *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir.1992)). Consistent with this view, it is well-settled that "no single *Poulis* factor is dispositive," and that "not all of the *Poulis* factors need be satisfied in order to dismiss a complaint." *Briscoe*, 538 F.3d at 263 (internal citations and quotations omitted). Moreover, recognizing the broad discretion conferred upon the district court in making judgments weighing these six factors, the court of appeals has frequently sustained such dismissal orders where there has been a pattern of dilatory conduct by a *pro se* litigant who is not amenable to any lesser sanction. *See, e.g.*, *Emerson*, 296 F.3d 184; *Tillio v. Mendelsohn*, 256 F. App'x 509 (3d Cir. 2007); *Reshard v. Lankenau Hospital*, 256 F. App'x 506 (3d Cir. 2007); *Azubuko v. Bell National Organization*, 243 F. App'x 728 (3d Cir. 2007). With respect to Plaintiffs' Fourth Amendment claim, five out of the six *Poulis* factors weigh in favor of dismissal. Furthermore, Plaintiffs have just barely pleaded enough facts to state a plausible claim. Given the weakness of this claim, as well as Plaintiffs apparent abandonment of this case, I recommend that this claim—along

with all the other claims raised in the Complaint—be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

C. MOST OF PLAINTIFFS' CLAIMS FAIL ON THE MERITS

1. Section 1983 Claims

Plaintiffs' First, Fourth, Fifth, and Fourteenth Amendment claims are brought under 42 U.S.C. § 1983. "Section 1983 imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States." *Shuman v. Penn Manor School Dist.*, 422 F.3d 141, 146 (3d Cir. 2005). "It is well settled that § 1983 does not confer any substantive rights, but merely 'provides a method for vindicating federal rights elsewhere conferred.'" *Williams v. Pennsylvania Human Relations Comm'n*, 870 F.3d 294, 297 (3d Cir. 2017) (quoting *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 104 (3d Cir. 2014)). To establish a claim under § 1983, Plaintiffs must establish a deprivation of a federally protected right and that this deprivation was committed by a person acting under color of state law. *Woloszyn v. County of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005).

a. Defendants Shawn and Monika Homan are not State Actors

To establish a claim under § 1983, Plaintiff must establish a deprivation of a federally protected right and that this deprivation was committed by a person

acting under color of state law. *Woloszyn v. County of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005). "Only persons acting under the color of state law [ ] can be held liable for constitutional violations under § 1983." *Hynoski v. Columbia County Redevelopment Authority*, 941 F.Supp.2d 547, 560 (M.D. Pa. 2013).

Furthermore, for a private actor to "come within the purview of § 1983 liability, plaintiff must show that [the stated] defendants acted under color of state law by pointing to some action, undertaken by them, that is 'fairly attributable' to the state." *Id.* at 562 (citations omitted). To accomplish this, a plaintiff "must show (1) that the defendants' acts were 'the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible' and (2) that the defendants may fairly be said to be state actors." *Id.* For example, "[a] private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts 'under color of state law' for purposes of § 1983." *Id.*

Based on the allegations in the Complaint, it appears that Shawn and Monika Homan are foster parents of one or more of the grandchildren. The Third Circuit has held that foster parents are not state actors for purposes of liability under § 1983. *Leshko v. Servis*, 423 F.3d 337 (3d Cir. 2005).

b. Lack of Personal Involvement

Liability in a § 1983 action is personal in nature, and to be liable, a defendant must have been personally involved in the wrongful conduct. In other words, defendants are "liable only for their own unconstitutional conduct." *Barkes v. First Corr. Med., Inc.*, 766 F.3d 307, 316 (3d Cir. 2014), *rev'd on other grounds sub nom. Taylor v. Barkes*, 135 S.Ct. 2042 (2015). Respondeat superior cannot form the basis of liability. *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). As this Court has explained:

> This personal involvement can be shown where a defendant personally directs the wrongs, or has actual knowledge of the wrongs and acquiesces in them. *Id.; A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 586 (3d Cir.2004) (noting that "a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations"). Actual knowledge "can be inferred from circumstances other than actual sight." *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir.1995). Acquiescence is found "[w]here a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in (i.e., tacitly assented to or accepted) the subordinate's conduct." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir.1997).

Festa v. Jordan, 803, F. Supp. 2d 319, 325 (M.D. Pa. 2001) (Caputo, J.) (internal footnote omitted).

Plaintiffs do not make any specific allegations against Defendants Best, Gownley, Gemberling, or Schafferr. Furthermore, although Plaintiffs list County Commissioners as a Defendant, they have also sued several County Commissioners by name, and do not make any allegations against the County Commissioner's office as a whole. Accordingly, the claims against these Defendants should be dismissed due to a lack of personal involvement.

2. Plaintiffs' First Amendment Claims Against Defendants Northumberland CYS, Milke, Williard, Snyder, Hollabaough, and Carpenter

In their First Amendment claim, Plaintiffs appear to be asserting that Defendants Northumberland County CYS, Milke, Williard, Snyder, Hollabaough, and Carpenter violated the right of the Grandparent-Plaintiffs to associate with their grandchildren.

As explained in *Doe v. Fayette County CYS:*

> There are two types of association protected by the First Amendment: expressive and intimate. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). "Generally speaking, expressive association protects the ability of individuals to gather in order to pursue political, social, economic, educational, religious, and cultural ends.... Intimate association protects the closest and most interdependent of human relationships against state interference." *Schultz v. Wilson*, 304 F. App'x 116, 120 (3d Cir. 2008) (internal quotations and citations omitted); *Roberts v. Mentzer*, No. 09–3251, 2010 WL 2113405, 2 (3d Cir. May 27, 2010). Intimate associations "by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Pi Lambda Phi Fraternity, Inc. v. University of*

> *Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) *(quoting Roberts v. United States Jaycees*, 468 U.S. 609, 619–20 (1984)).

No. 8-823, 2010 WL 4854070 at *18 (W.D. Pa. Nov. 22, 2010).

In this case, it appears that as of April 2017 three generations of this family resided together in a large home. It appears that Plaintiff Grace Derr is the matriarch of this family, is a parent and grandparent, and owns a one-third interest in the home this family resided in. Plaintiff William Derr is Plaintiff Grace Derr's husband, is the patriarch of this family, is a parent and grandparent, and owns a one-third interest in the home this family resided in. Plaintiff Stephen Derr is one of Grace and William's sons and owns a one-third interest in the home this family resided in. It is not clear whether Stephen Derr is the parent of any of the children involved. Although more of Grace and William's children resided in the home, it is not clear which of these children were adults and which were minors, or which of Grace and William's children had children of their own.

It also appears, that as of April 2017, the *parent* of each minor child had custody of them—not the grandparents.

At some point, due to arrests and/or calls to Northumberland County CYS, most if not all of the minor children residing in the Derr household were removed from the custody of their biological parents. Plaintiffs Grace Derr and William Derr did regain custody of some of these children for some period of time. It is not clear what children Plaintiffs still have custody of, if any. As a basis for their First

Amendment claim, Plaintiffs allege that they are not allowed to see their grandchildren (Doc. 3 p. 8), but once again do not specify which ones or when or why, or if by "see" they mean visit with or regain custody of.

It appears that the proper place for this type of claim is under the Fourteenth Amendment Due Process Clause—not the First Amendment. *See KK v. Berks County*, 5:15-CV-0475, 2016 WL 1274052 at *8 (E.D. Pa, Mar. 31, 2016). However, even assuming that this is a cognizable First Amendment claim, it should be dismissed due to Plaintiffs failure to comply with Rule 8 of the Federal Rules of Civil Procedure.

It is well-settled that: "[t]he Federal Rules of Civil Procedure require that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. R. Civ. P. 8(a)(2), and that each averment be 'concise, and direct,' Fed. R. Civ. P. 8(e)(1)." *Scibelli v. Lebanon County*, 219 F. App'x 221, 222 (3d Cir. 2007). Thus, dismissal is appropriate when a complaint is so "rambling and unclear" as to defy response. *Tillio v. Spiess*, 441 F. App'x 109 (3d Cir. 2011). Similarly, dismissal is appropriate in "'those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.'" *Id.* at 110 (quoting *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995)); *Tillio v. Northland Grp. Inc.*, 456 F. App'x 78, 79 (3d Cir. 2012).

These principles are applicable here. Although it is clear that Plaintiffs have a large number of grandchildren whom they care for deeply, it is not clear when or which ones they lost custody or contact with, or why they lost custody or contact with the children. Accordingly, it is recommended that Plaintiffs' First Amendment Familial Association claim be dismissed on its merits.

3. Plaintiffs' Fourth Amendment Claims against Defendants Northumberland County CYS, Williard, and Milke

Plaintiffs allege that each of them own a 1/3 interest in the house where they resided during the relevant period. They also allege that one of them called Northumberland CYS and requested assistance. It is not clear from the face of the Complaint why assistance was requested, or whether any homeowner gave consent for any employee of Northumberland CYS to enter or search the home. With respect to their Fourth Amendment claim that Defendant Williard and Milke illegally entered their home, Plaintiffs allege:

> This violation pertains to homeowners specifically Stephen Derr. Stephen Derr admonished NCCYS workers to leave. As asserted in video, Williard stated, "I have the permission of the homeowners," and Mr. Derr asserted I am the homeowner and you don't have mine and you need to leave without a warrant. Williard stated that she didn't need anyone's permission she is from the county and they can enter wherever children are present.

(Doc. 3, p. 11); *see also* (Doc. 3, p. 4) (alleging that Plaintiff Stephen Derr asked Defendant Milke to leave). Plaintiffs also appear to allege that Defendant Northumberland County CYS is liable for the acts of Defendants Williard and

Milke. I construe this claim as being alleged against only Defendants Northumberland County CYS, Williard and Milke.

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 755-56 (2010) (quoting *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-614 (1989)). Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established exceptions." *Arizona v. Grant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967). Among these exceptions are occupant consent, or exigent circumstances.

In their Brief in Support, the Northumberland Defendants argue that Plaintiffs' Fourth Amendment claim should be dismissed for two reasons: (1) "because the assertions outlined by Plaintiffs' [sic] in their Complaint cannot be deemed a willful detention or taking on the part of the moving Defendants"; and (2) "exigent circumstances existed such that NCCYS was justified in entering Plaintiffs' home." (Doc. 22, p. 24). I disagree. Plaintiffs allege that Defendant

Williard, and possibly other employees entered Plaintiffs' home without a warrant. This type of intrusion is protected by the Fourth Amendment. Furthermore, on its face, the Complaint does not allege facts that suggest exigent circumstances existed at that time. Thus, to the extent the Northumberland Defendants contend that they did, this issue would be best addressed at summary judgment, when the Court's review is not limited to the facts alleged in the Complaint itself. Nonetheless, because the balance of the *Poulis* factors weigh in favor of dismissal in this case, it should be dismissed under Rule 41 of the Federal Rules of Civil Procedure.

4. Plaintiffs' Fifth Amendment Due Process Claims Against Defendants Northumberland County CYS, Williard, Carpenter, Snyder, and Milke

Plaintiffs argue that their Fifth Amendment right to due process of law has been violated because Defendants Northumberland County CYS, Williard, Carpenter, Snyder, and Milke listed them in an "agency database" as "perpetrators of child abuse" without notice, a hearing, or any means to dispute that finding. (Doc. 3, p. 12).

The Fifth Amendment provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The due process clause of the Fifth Amendment, however, applies only to the federal government and federal officials. *Shoemaker v. City of Lock Haven*,

906 F. Supp. 230, 238 (M.D. Pa. 1995). "It does not apply to the acts or conduct of the states, their agencies, subdivisions, or employees." *Id.*

The Fifth Amendment is not applicable in this case because the Northumberland Defendants are state, not federal, actors. Accordingly, Plaintiffs' Fifth Amendment claims should be dismissed.

5. Plaintiffs' Fourteenth Amendment Claims

Plaintiffs argue that they have been "deprived the right to see [their] grandchildren or act on their behalf due to inclusion in a county record, listing in court records based on solely subjective views of a caseworker in strong contrast to federal statute." (Doc. 3, p. 22). Plaintiffs also allege that they were given no meaningful opportunity to defend themselves before being placed in the database *Id.*, and that Plaintiff Grace Derr—who is pursuing a master's degree in in marriage and family studies—has had difficulty finishing her studies because she is in this database. (Doc. 3, p. 14).

As discussed above, to state a claim under § 1983, Plaintiffs must allege that they were deprived of a right guaranteed under the United States Constitution. To the extent Plaintiffs argue that they have a constitutionally protected liberty interest in the custody, care and management of their grandchildren, they are incorrect. Although parents have a constitutionally protected liberty interest in the custody, care and management of their children, *Croft v. Westmoreland Cty. CYS*, 103 F.3d

1123, 1125 (3d Cir. 1997), grandparents do not always have a protected interest in the same.

As explained in *Rees v. Office of CYS*:

> The various circuit courts of appeals have not been uniform in their method of analyzing substantive due process claims involving asserted liberty interests on the part of grandparents or their extended family members relative to their minor kin. Nevertheless, certain common themes seem to figure prominently in the cases, most notably the court' emphasis on whether the plaintiff was a custodial figure or otherwise acting in loco parentis to the children at the time of the state's involvement in their lives; whether and for how long the children had been residing with the plaintiff prior to state intervention; whether the plaintiff has a biological link to the children; whether there is a potential conflict between the rights of the plaintiff and the rights or interests of the children's natural parents; and whether the plaintiff has any rights or expectations relative to the children under relevant state law.

744 F.Supp.2d 434, 451-452 (W.D. Pa. 2010) *aff'd by* 473 F. App'x 139 (3d Cir. 2012). In order to make a determination as to whether a protected liberty interest exists, these factors must be weighed when considering the grandparent's relationship with *each* child. As with Plaintiffs' First Amendment claim, the Complaint as pleaded does not set forth enough facts for this Court to conclude that a protected liberty interest exists. Although it is clear that Plaintiffs resided with their grandchildren for at least a short period of time before Northumberland County CYS became involved and that Plaintiffs are the biological grandparent to at least some of the children at issue, Plaintiffs did not provide any specific facts about their relationship with each individual child. Therefore, I find that, as

pleaded, Plaintiffs fail to show that they have a protected liberty interest in the care and management of their grandchildren that was violated by Northumberland CYS. Absent such interest, their Fourteenth Amendment claim that they were deprived of the right to visit their grandchildren fails.

Next, Plaintiffs allege that their rights under the Fourteenth Amendment were violated because they were placed into a child abuse database without any meaningful opportunity to defend themselves. The allege that they "have never been accused or convicted of any crime against any child anywhere," and that "the agency refused to remove [them] from this database . . . thusly denying plaintiffs any process at all." (Doc. 3, p. 4). Plaintiffs also allege that "[i]n July of 2018 Mrs. Derr submitted a resume for a position with a local hospital and was denied employment on the basis of child abuse clearance. She questioned NCCYS and they stated that [Plaintiff Grace M. Derr is] considered a 'perpetrator'. (Doc. 3, p. 6).

Plaintiffs appear to allege that, at some point, and based on a report by an unidentified employee of Defendant Northumberland County CYS, they were placed in Pennsylvania's Childline database. "ChildLine" is:

> An organizational unit of the [Pennsylvania Department of Human Services] which operates a Statewide toll-free system for receiving reports of suspected child abuse established under 6332 of the CSPL (relating to establishment of Statewide toll-free telephone number), refers the reports for investigation and maintains the reports in the appropriate file.

55 Pa. Code § 3490.4. ChildLine maintains a statewide central register of all "founded" or "indicated" reports. 55 Pa. Code § 3490.35. When an indicated or founded report is made, the Pennsylvania Department of Human Services is required to notify the all subjects (except for the child) of the report by first class mail. 55 Pa. Code §§ 3490.4, 3490.4a. Once a notice is received, a perpetrator has forty-five (45) days to may make a written request that the report be amended or expunged. 55 Pa. Code §§ 3490.105a, 3490.106a. If an appeal is taken, a hearing is scheduled before the Pennsylvania Department of Human Services' Bureau of Hearings and Appeals.

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. To state a claim under 42 U.S.C. § 1983 for the deprivation of the right to procedural due process, Plaintiffs must allege that: "(1) [they were] deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,'"; and "(2) the procedures available to [them] did not provide 'due process of law.'" *Hill v. Borough of Kutztown*, 455 F.3d 225, 234 (3d Cir. 2006) (quoting *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)).

Plaintiffs' claim that they were denied due process fails as pleaded. Although Plaintiffs allege that no process was available to them, that appears to be

incorrect. There is a process under Pennsylvania law to amend or expunge a report that appears in the ChildLine database. Plaintiffs did not explain whether they availed themselves to this procedure or why they found this procedure to be inadequate. Furthermore, Plaintiffs have named county entities only. It appears that it is the responsibility of the Pennsylvania Department of Human Services—not the responsibility of the county—to amend or expunge reports after an appeal. *See e.g. Mulhollan v. Government County of Berks, Pa.*, 706 F.3d 227, 240 (3d Cir. 2013). Accordingly, I find that Plaintiffs have failed to allege enough facts to make out a cognizable due process claim related to ChildLine database.

V. RECOMMENDATION

IT IS RECOMMENDED that:

(1) The Northumberland County Defendants' Motion to Dismiss (Doc. 21) should be deemed UNOPPOSED and GRANTED pursuant to Local Rule 7.6; in the alternative,

(2) Plaintiffs' claims against the Northumberland Defendants should be DISMISSED for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure; and

(3) The Clerk of Court be directed to CLOSE this case.

Date: October 23, 2019

BY THE COURT

s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GRACE M. DERR, *et al.*, Plaintiffs	)	CIVIL ACTION NO. 4:19-CV-215
	)	(BRANN, D.J.)
v.	)	
	)	(ARBUCKLE, M.J.)
NORTHUMBERLAND CTY. CYS, *et al.*, Defendants	)	

NOTICE OF LOCAL RULE 72.3

NOTICE IS HEREBY GIVEN that any party may obtain a review of the Report and Recommendation pursuant to Local Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses, or recommit the matter to the magistrate judge with instructions.

Date: October 23, 2019

BY THE COURT

s/William I. Arbuckle
William I. Arbuckle
U.S. Magistrate Judge