

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn**

Civil Action No. 13-cv-01053-REB-CBS

C.G., a minor child, by his parents and next friends,
JASON GALLEGOS, for himself and C.G., and
JENNIFER YARBROUGH, for herself and C.G.,

Plaintiffs,

v.

THE CITY OF FORT LUPTON, COLORADO,
KEVIN HALLORAN, individually and in his official capacity as a Fort Lupton Police Officer,
CRYSTAL SCHWARTZ, individually and in her official capacity as a Fort Lupton Police
Officer,
PAUL STIPE, individually and in his official capacity as a Fort Lupton Police Officer,
JOHN DOE, individually and his official capacity as a Fort Lupton Police Officer,
WELD COUNTY RE-8 SCHOOL DISTRICT,
MARK PAYLER, individually and in his official capacity as Superintendent, Weld County
RE-8 School District,
NATIVITY MILLER, individually and in her official capacity as Principal of Butler
Elementary School,
STEPHANIE ANDERSON, individually and in her official capacity as Vice-Principal of
Butler Elementary School, and
CANDACE KENSINGER, individually and in her official capacity as Principal of Fort
Lupton Middle School,

Defendants.

**ORDER ADOPTING RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE**

Blackburn, J.

The matter before me is the magistrate judge's **Recommendation on Pending Motions To Dismiss** [#76],¹ filed May 19, 2014. No objection having been filed to the recommendation, I review it only for plain error. ***See Morales-Fernandez v.***

¹ "[#76]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

Immigration & Naturalization Service, 418 F.3d 1116, 1122 (10th Cir. 2005). I

perceive no error, much less plain error, in the magistrate judge's recommended disposition. The recommendation is exceptionally detailed and well-reasoned. Any attempt to further expound on the issues already so thoroughly and cogently addressed by the magistrate judge would merely be a festooned reiteration of his impressive work, and therefore prodigal.² I therefore find and conclude that the recommendation should be approved and adopted.

I note that the magistrate judge recommends that all claims addressed by the motions be dismissed with prejudice. Although dismissals pursuant to Fed. R. Civ. P. 12(b)(6) are commonly without prejudice, this case presents a unique circumstance in which dismissal with prejudice is indicated. This lawsuit represents plaintiffs' second attempt to bring viable claims based on the underlying facts. In their prior lawsuit asserting these same claims, plaintiffs were afforded three opportunities to amend their complaint before they voluntarily dismissed their claims. Plaintiffs were given yet another chance to amend their pleadings after this lawsuit was filed. Moreover, at the hearing before the magistrate judge, plaintiffs acknowledged that they had no further facts to assert in support of these claims. Under these circumstances, allowing yet further amendment would be futile, and therefore dismissal with prejudice is proper.

Brereton v. Bountiful City Corp., 434 F.3d 1213, 1219 (10th Cir. 2006).

² I adopt not only the magistrate judge's recommended disposition of the pending motions to dismiss, but also his recommendation that plaintiffs' claims against defendant Mark Payler in his official capacity be dismissed, despite the fact that no motion requesting such relief has been filed on behalf of Mr. Payler. (**See Recommendation** at 2 n.1.) Similarly, because all claims implicating the City of Fort Lupton will be dismissed, plaintiffs' official capacity claims against the individual police officer movants also will be dismissed. **See Porro v. Barnes**, 624 F.3d 1322, 1328 (10th Cir. 2010).

Therefore, I find and conclude that the arguments advanced, authorities cited, and findings of fact, conclusions of law, and recommendation proposed by the magistrate judge should be approved and adopted.

THEREFORE, IT IS ORDERED as follows:

1. That the magistrate judge's **Recommendation on Pending Motions To Dismiss** [#76], filed May 19, 2014., is **APPROVED** and **ADOPTED** as an order of this court

2. That **Defendants City of Fort Lupton, Schwartz and Halloran's Motion To Dismiss Second, Third, Fourth, Sixth and Eighth Claims** [#53], filed is October 1, 2013, is **GRANTED**;

3. That the **School District Defendants' Fed. R. Civ. P. 12(b)(6) and 12(b)(1) Motion To Dismiss Counts VII, XI and XIII of the Amended Complaint** [#56], filed October 1, 2013, is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. That the motion is **DENIED** with respect to Count XI as against defendant, Stephanie Anderson, in her individual capacity; and

b. That in all other respects, the motion is **GRANTED**;

4. That the following claims in the Amended Complaint are **DISMISSED WITH PREJUDICE**:

a. Count II;

b. Count III as against defendants Kevin Halloran and Crystal Schwartz in their individual and official capacities;

c. Count IV;

- d. Count VI;
- e. Count VII as against defendant Weld County RE-8 School District;
- f. Count VIII as against defendants Kevin Halloran and Crystal Schwartz in their individual and official capacities;
- g. Count XI as against defendant Nativity Miller in her individual capacity;
- and
- h. Count XIII;

5. That at the time judgment enters, judgment with prejudice **SHALL ENTER** against plaintiffs, C.G., a minor child, by his parents and next friends; Jason Gallegos, for himself and C.G.; and Jennifer Yarborough, for herself and C.G., as follows:

- a. In favor of defendant, the City of Fort Lupton, Colorado, as to Counts II, IV, and VI of the Amended Complaint;
- b. In favor of defendants, Kevin Halloran and Crystal Schwartz, in their individual and official capacities, as to Counts III and VIII of the Amended Complaint;
- c. In favor of defendant, Weld County RE-8 School District, as to Count VII of the Amended Complaint;
- d. In favor of defendant, Nativity Miller, in her individual capacity, as to Counts XI and XIII of the Amended Complaint;
- e. In favor of defendant, Candace Kensinger, in her individual capacity, as to Count XIII of the Amended Complaint; and
- f. In favor of defendant Mark Payler, in his official capacity as Superintendent, Weld County RE-8 School District, as to all claims alleged

herein; and

6. That defendants, the City of Fort Lupton, Colorado, and Mark Payler, in his official capacity as Superintendent, Weld County RE-8 School District, are **DROPPED** as named parties to this action, and the case caption **AMENDED** accordingly.

Dated June 10, 2014, at Denver, Colorado.

BY THE COURT:



Robert E. Blackburn
United States District Judge