

**UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

KRISTEN FRY,

Plaintiff,

v.

SCHOOL DISTRICT NO. 1 d/b/a DENVER
PUBLIC SCHOOLS, et al.,

Defendants.

No. 24-cv-02284-DDD-TPO

**PLAINTIFF'S OPPOSITION TO
DEFENDANT COATES' MOTION
TO BE REMOVED AS A
DEFENDANT IN THE ABOVE
REFERENCED CASE AND
DEFENDANT SHOFNER'S
MOTION TO REMOVE
DEFENDANT MIDIAN
SHOFNER FROM THE CASE
[ECF NOS. 22 & 23]**

INTRODUCTION

Plaintiff Kristen Fry has three children in Denver public schools. Along with other parents and educators, Ms. Fry raised her voice to oppose what she viewed as dangerous policies around discipline and safety. Rather than meeting these criticisms with good faith, Defendants sought to silence their opponents. Their retaliation took several forms and targeted several victims—in Ms. Fry's case, they literally put her freedom on the line by pushing a false criminal prosecution against her while withholding exculpatory evidence.

Ms. Fry brings this action to redress violations of her First Amendment rights. She also brings claims against certain Defendants for defamation, abuse of process, and malicious prosecution under Colorado law. There are two sets of

Defendants:

(1) School District No. 1 d/b/a Denver Public Schools (“DPS”) and four individuals (Auon’Tai Anderson, Scott Esserman, Xochitl Gaytan and Michelle Quattlebaum) who are current or former member of the DPS Board of Education (collectively the “DPS Defendants”); and

(2) Two nominally private individuals, Hashim Coates and MiDian Shofner, who jointly engaged with the DPS Defendants in a scheme to retaliate against their political opponents, one of whom happened to be Ms. Fry.

Defendants Coates and Shofner, acting *pro se*, have filed papers styled “Hashim Coates Motion to be Removed as a Defendant in the Above Referenced Case,” (“Coates Motion”) [ECF No. 23], and “Midian Shofner Motion to Remove Defendant Midian Shofner from the Case,” (“Shofner Motion”) [ECF No. 22]. Read charitably, those papers set forth motions to dismiss the operative First Amended Complaint (“FAC”). [ECF No. 8]. The grounds substantially overlap. Both assert that (1) the court lacks personal jurisdiction over them due to improper service of process, Coates Motion ¶ 1; Shofner Motion ¶ 4; and (2) the First Amendment claims against them fail because they are not DPS employees, but are instead nominally private parties. Coates Motion ¶¶ 2, 9; Shofner Motion ¶¶ 1-2; *see also* [ECF No. 22-1] ¶ 22 (asserting that she was “neither an employee of . . . DPS nor the . . . BOE”). Because of the overlap and in the interest of preserving judicial resources, Plaintiff submits this single brief in joint opposition to both motions.

FACTUAL BACKGROUND

I. Defendants Implement Controversial Public School Policies.

Defendants Coates and Shofner are significant players in Denver, Colorado politics. They both run political consulting firms, FAC ¶¶ 14, 16, and work closely with local politicians—including the DPS Defendants—to advance policies Mrs. Shofner describes as benefitting the interests of “the Black community within the . . . DPS system.” Shofner Answer [ECF 22-1] ¶ 17. Mrs. Shofner has not only worked in unofficial capacities on education policy, but she was appointed to a seat on the Board of Education in 2016. FAC ¶ 16.¹ Defendant Coates’ firm was involved in the electoral campaigns of each of the DPS Defendants, and he personally ran the campaigns of Defendants Anderson and Esserman. *Id.* ¶ 14. In return, Defendant Esserman acted as a principal executive on, and financial contributor to, Mr. Coates’ campaign for elective office in 2024. *Id.* ¶ 17.

In the years leading up to the 2022-23 school year, the DPS Defendants implemented policy changes to address alleged racial inequities in disciplinary enforcement. *Id.* ¶¶ 24-29. DPS removed safety officers from schools, and reduced accountability for disruptive and violent student conduct. *Id.* Defendants Shofner and Coates were moving forces in the political drive for those policy enactments. *Id.* ¶¶ 14, 16-18. Indeed, Defendant Esserman called Mrs. Shofner a “partner” in

¹ According to news reports, Mrs. Shofner was appointed to a vacant Board seat, but withdrew after a criminal conviction came to light. <https://www.westword.com/news/denver-school-board-prez-to-appoint-new-member-after-child-abuse-controversy-7820312>.

developing the policies. *Id.* ¶ 16. And both of them received an “official[] proclamation,” from DPS, honoring them for advancing the political goals they shared with the DPS Defendants. *Id.* ¶ 17.

Defendants’ policies proved to be controversial and harmful, leading not only to a “degradation of the learning environment,” *id.* ¶ 27, but also to a number of high-profile violent events, *id.* ¶ 28. In separate incidents in early 2023, a student at East High School was killed, and two school administrators were shot while they patted-down a student with a history of weapons offenses. *Id.*

Whether one agrees or disagrees with DPS’s policies, it is beyond question that they became the subject of significant controversy and public criticism. As detailed below, rather than engaging in a healthy process of debate and disagreement, Defendants began retaliating against anyone who opposed their views.

II. Facing Criticism, Defendants Retaliate.

Shortly after the second East High shooting, Kurt Dennis, then a middle school principal, gave a television interview to expose that Defendants’ policies were creating dangerous conditions at his school. *Id.* ¶¶ 30-31. Within days, DPS initiated proceedings to terminate his employment. *Id.* ¶ 39. To justify their moves, DPS Board Members Anderson and Esserman secretly enlisted Defendant Coates to spearhead an “investigation” into alleged misconduct by Mr. Dennis. *Id.* ¶¶ 51-54. Notwithstanding that Defendant Coates lacked an employment relationship with DPS or any acknowledged official role in school governance, he was provided “key responsibility” for the investigation. *Id.* ¶ 52. The “investigation” purported to find

misconduct on Mr. Dennis' part, including that he used an "incarceration room" to lock up "students of color." *Id.* ¶ 53. These allegations, repeated at multiple news conferences, were false and retaliatory. *Id.*

Meanwhile, parents, including Ms. Fry, began to speak out both in opposition to DPS's mismanagement of the schools and to its mistreatment of Mr. Dennis. *Id.* ¶¶ 32-36, 40. Parents formed online groups, staged press conferences, and attended public comment sessions. *Id.* In response, Defendants Coates and Anderson repeatedly smeared parents in online posts using terms such as "white racists." *Id.* ¶¶ 36, 56, 75, 113; *see also id.* ¶ 14 (Anderson smeared a parents' group as "the Klan"). Coates also posted parents' personal information online—a practice commonly referred to as "doxing"—that, along with repeated and relentless attacks against them, resulted in part in at least one family moving out of Denver entirely. *Id.* ¶ 56. Defendant Shofner also joined these increasingly harsh attacks against parents. Among other things, Defendant Shofner facilitated "town halls" that were billed as opportunities for parents to discuss the underlying issues, but were in reality manipulated by Defendants Shofner, Coates, Esserman, Quattlebaum and Anderson into public bullying sessions against "white parents." *Id.* ¶¶ 41-48. At one of the "town halls," Defendant Coates loudly and falsely accused parents of "targeting black and brown students," and accused Ms. Fry in particular of being "racist." *Id.* ¶¶ 47-49. Mrs. Shofner and the other Defendants acquiesced in Mr. Coates' bullying. *Id.* ¶ 48.

III. Defendants Single Out Ms. Fry.

On August 21, 2023, in an effort to save Mr. Dennis from losing his job and

his school from losing an outstanding principal, parents, staff, and students attended the final public comment session before the BOE was set to ratify his termination. *Id.* ¶ 57. Several teachers were so afraid of retaliation that they asked students to read their anonymous statements into the record. *Id.* ¶ 58. Defendants Gaytan and Anderson, however, created a new “rule” that prevented the children from reading their teachers’ statements. *Id.* ¶ 59. Defendants Coates and Shofner, who were sitting directly adjacent to the podium, repeatedly interrupted speakers with loud “coughing” noises, and statements such as “racist,” and “white supremacist.” *Id.* ¶ 60. Some of their targets were ten- to twelve-year-old children. *Id.* Despite requests that the DPS Board enforce rules against disruptive conduct, the other Defendants did nothing. *Id.* ¶¶ 62-64.

Shortly before Ms. Fry’s turn to speak came up, she asked Mr. Coates and Mrs. Shofner to “please be respectful of the speakers.” *Id.* ¶ 67. Mr. Coates immediately exclaimed, “did you just call me n***er?!” *Id.* ¶ 68. Mr. Coates, of course, knew that his accusation was false, as did Mrs. Shofner and the DPS Defendants, who were sitting close by. *Id.* ¶¶ 61, 72. Mr. Coates also claimed later that Ms. Fry had not only used a racial epithet, but had also assaulted him, grabbing him roughly by the shoulder. *Id.* ¶ 70. As surveillance video evidence improperly withheld by DPS for months would eventually show, Coates’ allegations were utterly false. *Id.* ¶¶ 71, 115-118. Mr. Coates repeated his false accusations in an email to the DPS Board. *Id.* ¶ 85. Without any effort to test the truth or falsity of Coates’ email, the DPS Board then devoted ten full minutes of the next Board

meeting to publicly shaming Ms. Fry for an alleged racist incident that never occurred. *Id.* ¶¶ 86-95.

Worse, Defendants Anderson, Coates, and Shofner repeated the false allegations against Ms. Fry on a popular local politics broadcast. *Id.* ¶¶ 76-82. Audience members who had been told that Ms. Fry grabbed Mr. Coates while calling him a racial slur opined that she committed a “racial hate crime,” with some seemingly calling for violence against her. *Id.* ¶ 83. Apparently not satisfied with destroying Ms. Fry’s reputation, Mr. Coates also filed a false police report, again alleging that she “assaulted” him while using a racial slur. *Id.* ¶¶ 96-98. Mrs. Shofner gave a false statement in support that she “saw Ms. Fry grab Mr. Coates on the shoulder,” *id.* ¶ 99, and Defendants Esserman, Quattlebaum and Anderson later agreed to provide more false testimony in support of criminal charges against Ms. Fry, *id.* ¶ 105.

Ms. Fry, of course, knew that all of these allegations were false. In an attempt to clear her name, she sought surveillance videos from DPS through the Colorado Open Records Act, but DPS wrongfully withheld the videos for months, during which time Ms. Fry was subjected to a Kafka-esque prosecution for a crime that anyone with access to the surveillance video could see beyond any doubt did not happen. *Id.* ¶¶ 101-02, 115-18. During this process, Ms. Fry was subjected to a restraining order that effectively prohibited her from participating in Board of Education elections set for that fall. *Id.* ¶¶ 107-08, 113. She was also barred from volunteering at her children’s schools. *Id.* ¶ 111.

Ms. Fry’s nightmare only ended months later when, in response to a criminal subpoena, DPS finally produced the surveillance videos it had been improperly withholding. *Id.* ¶¶ 115-18. The videos fully exonerated Ms. Fry, and the criminal charges against her were dismissed. *Id.*

STANDARD OF REVIEW

On a motion to dismiss for insufficient service of process, the parties may submit affidavits and other documentary evidence for the Court’s consideration, and “plaintiff is entitled to the benefit of any factual doubt.” *Fisher v. Lynch*, 531 F. Supp. 2d 1253, 1260 (D. Kan. 2008). In evaluating a motion to dismiss under Rule 12(b)(6), a court must “accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party.” *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). All that is required is that the plaintiff allege sufficient facts to support a “plausible” claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).²

ARGUMENT

I. The Court Has Personal Jurisdiction Over Both Mr. Coates and Mrs. Shofner.

A. Mr. Coates Was Properly Served

Shawn Williams, a process server for ABC Legal Services, served Mr. Coates

² Defendants’ filings are mostly devoted to asserting new factual allegations and denying the truth of the allegations in the complaint. *See, e.g.*, Coates Motion ¶¶ 2-15 (setting forth Mr. Coates’ counter-narrative that Ms. Fry is engaged in a “pattern of harassment and racial intimidation” against Mr. Coates “disturbingly similar to” “the lynching of Emmett Till.”); Shofner Answer [ECF No. 22-1] ¶¶ 1-21, 23-160. On a motion to dismiss for failure to state a claim, however, none of that material is properly before the Court and it should be disregarded.

with process on September 8, 2024, by personally handing him copies of the summons and complaint at his residence address. Mr. Williams previously submitted a Proof of Service under penalty of perjury filed on the docket at ECF No. 10.

In his motion papers, which are unsworn and unsigned, Mr. Coates asserts that he was not properly served and that “[p]aperwork” for himself and Mrs. Shofner was “clipped to [his] door on September 10th when [he] returned from San Francisco.” Coates Motion ¶ 1. Contrary to these assertions, all competent evidence of record demonstrates that Mr. Coates has been properly served and that the Court has personal jurisdiction over him.

First, Mr. Williams’ statement under penalty of perjury states that on September 8, 2024,

I delivered the documents to Hashim Coates with identity confirmed by subject stating their name. The individual accepted service with direct delivery. The individual appeared to be a black-haired black male contact 45-55 years of age, 5'10"-6'0" tall and weighing 180-200 lbs.

[ECF No. 10].

Second, business records from ABC Legal Services further demonstrate proper service. Ex. 1 to Declaration of James Kerwin. According to those records, Mr. Williams’ mobile device registered GPS coordinates corresponding to Coates’ residence on the date and time Mr. Williams avers that he personally served Mr. Coates with process. *Id.* at 1. The records also include proof that the address of service is Mr. Coates’ residence (a fact that Mr. Coates does not dispute), and includes photographs of the residence. Finally, Mr. Coates’ assertion that

paperwork both for him *and for Defendant Shofner* was “clipped to [his] door” makes little sense. Mrs. Shofner was served by a different process server at a different location on a different day. *See infra* § I.B. Plaintiff respectfully submits that Mr. Coates’ unsigned and unsworn assertion that he was not properly served does not raise a genuine issue of fact, especially when considered against the substantial record evidence to the contrary.

B. Mrs. Shofner Was Properly Served

Mikyla Hogan, a process server for ABC Legal Services, served Mrs. Shofner with process on September 16, 2024, by personally handing her copies of the summons and complaint at her residence address. Ms. Hogan previously submitted a Proof of Service under penalty of perjury which states,

I delivered the documents to MiDian Holmes Shofner with identity confirmed by subject saying yes when named. The individual accepted service with direct delivery. The individual appeared to be a black-haired black female contact 35-45 years of age, 5'6"-5'8" tall and weighing 160-180 lbs.

[ECF No. 11].

In her motion, Mrs. Shofner presents the bald conclusion that “I have not been properly served with the summons and complaint in this action,” without any supporting argument or evidence whatsoever. Shofner Motion ¶ 4. Plaintiff respectfully submits that this legal conclusion does not raise a genuine issue of fact and that the uncontested testimony of Ms. Hogan set forth at ECF No. 11 is sufficient to support a finding that the Court has personal jurisdiction over Mrs.

Shofner.³

II. The Complaint Sufficiently Alleges First Amendment Claims Against Both Mr. Coates and Mrs. Shofner—Although not State Officers, Defendants Acted Under Color of Law, and May Be Held Liable Pursuant to 42 U.S.C. § 1983.

Ms. Fry brings claims pursuant to 42 U.S.C. § 1983 for violations of her First Amendment rights. FAC ¶ 130. “The two elements of a Section 1983 claim are (1) deprivation of a federally protected right by (2) an actor acting under color of state law.” *Chang v. Walmart*, No. 21-CV-01459-STV, 2023 WL 2072091, at *3 (D. Colo. Feb. 17, 2023) (cleaned up).

Liberally construed, Mr. Coates’ and Mrs. Shofner’s motions take aim at the second element, and seek dismissal on the basis that they are not DPS employees, and are therefore not state actors for purposes of § 1983 liability. Contrary to these arguments, “to act under color of state law for § 1983 purposes does not require that the defendant be an officer of the State.” *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)(cleaned up). Instead, nominally private parties act under color of law if they are “jointly engaged with state officials in the conduct allegedly violating [a] federal right.” *Janny v. Gamez*, 8 F.4th 883, 919 (10th Cir. 2021) (quoting *Carey v. Continental Airlines*, 823 F.2d 1402, 1404 (10th Cir. 1987)). The question of joint engagement is a “necessarily fact-bound inquiry.” *Id.* (quoting *Lugar v. Edmondson Oil*, 457 U.S. 922, 838 (1982)).

Under one formulation of the test, “courts examine whether state officials

³ Should the Court deem it necessary, Plaintiff would elicit testimony at a hearing to establish effective service of process as to either or both Defendants.

and private parties have acted in concert in effecting a particular deprivation of constitutional rights.” *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995). To show this, a plaintiff must demonstrate that the “public and private actors reached agreement upon a common, unconstitutional goal,” and took “concerted action to advance that goal.” *Janny*, 8 F.4th at 919 (cleaned up).

To carry his or her burden, a plaintiff can point to direct evidence such as a verbal admission that an unconstitutional agreement exists. *See id.* at 920 (parole officer and private party “verified their agreement” to force parolee to attend religious programming). However, “because direct evidence of an agreement to join a conspiracy is rare, a defendant’s assent can be inferred from acts furthering the conspiracy’s purpose.” *Bledsoe v. Carreno*, 53 F.4th 589, 609 (10th Cir. 2022)(cleaned up); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970) (relaxed standards apply where “noncircumstantial evidence of [a] conspiracy could only come from adverse witnesses”). Courts look to such things as “the sequence of events,” *Adickes*, 398 U.S. at 157, and the fact that each member of the alleged conspiracy took discrete actions to further the goal, *Janny*, 8 F.4th at 920; *see also Bledsoe v. Carreno*, 53 F.4th 589, 609-10 (10th Cir. 2022). The Tenth Circuit has also held evidence that a nominally private party was allowed to participate in non-public official activities to be powerful evidence of a conspiracy. *Janny*, 8 F.4th at 920 n.7 (noting that a “jury could find evidence of a conspiratorial agreement *in the very fact [that]* a private third party was allowed to sit in on a meeting between a parole officer and his parolee without the latter’s consent.” (cleaned up, emphasis

added)).

Applying these principles, it is beyond doubt that the FAC survives Defendants' motions. The sequence of events alone shows that all Defendants shared an unconstitutional objective and that they took concerted action to advance the objective. At every step of the way, when someone raised his or her head above the parapet to publicly oppose Defendants' policies, one or the other of the Defendants took swift and decisive action against that person. Kurt Dennis was the first victim. Within a matter of days following his appearance on a news program, the Board of Education began proceedings to terminate his employment. When parents attending public "town halls" raised concerns not only over safety, but also over the retaliation against Mr. Dennis, they were called "racists" and subjected to intimidation by Defendant Coates, with Defendant Shofner facilitating the meetings. When parents formed a Facebook group around shared concerns, Defendants Anderson and Coates subjected them to doxing, relentless harassment, and false charges of "racism," so much so that one family moved out of Denver, at least in part in a bid to make the retaliation stop.

And, when Kristen Fry attended town halls, and later a public comment session, not only did Defendant Coates falsely accuse her of committing a hate crime and using a vile racial epithet, but Defendant Shofner supported his claim with a false police report, Board of Education member Anderson repeated Coates' false and defamatory claims online and on public broadcasts, and the entire DPS Board of Education subjected Ms. Fry to a ten-minute-long diatribe denouncing her

alleged “racist” behavior, all without any attempt whatsoever to listen to her side of the story. Add to all of *that*, DPS’s refusal to turn over exculpatory video evidence that prolonged Ms. Fry’s nightmarish criminal prosecution, and banning Ms. Fry from volunteering at her children’s schools, and the existence of a conspiracy could not be more clear.

Moreover, the fact that Coates—a nominally private individual with no official DPS-related responsibilities—was secretly enlisted by Board Members Anderson and Esserman to take a leading role in an “investigation” into the conduct of Kurt Dennis is particularly damning. FAC ¶¶ 51-54. Defendant Coates was provided with physical access to DPS facilities and was instrumental in the resulting “findings” (which were false and retaliatory) that Mr. Dennis had used an “incarceration room” to lock up “students of color.” FAC ¶ 53. In *Janny*, the Tenth Circuit held that the mere fact that a nominally private party was “allowed to sit in” on non-public official business was enough to support an inference of conspiracy. 8 F.4th at 920 n.7. *A fortiori*, where, as here, a nominally private party is not only allowed to *sit in*, but to *direct and take “key responsibility for”* an “investigation” into alleged misconduct by a middle school principal, FAC ¶ 52 (emphasis added), the inference of conspiracy is exceptionally strong.

As with any conspiracy, when a group of individuals sets out to attain a common unconstitutional goal—here the goal of retaliating against and silencing any political opponent who dared to speak up in opposition to a set of school policies—each member of the group may face “imputed liability” for the acts of other

members in furtherance of the goal. *See, e.g., Bledsoe*, 53 F.4th at 609.

It is therefore no answer for Mr. Coates to say that he did not personally fire Mr. Dennis (though he did direct a pretextual “investigation” into alleged misconduct by Mr. Dennis) or for Mrs. Shofner to say that she did not personally file a false criminal charge against Ms. Fry (though she did file a false police report in support of the criminal charge) or for either of them to say that they did not personally force Board Member Anderson to falsely state in social media posts that Ms. Fry committed a racialized assault or that parent groups who opposed DPS policy were no better than “the Klan,” to take a few examples. Under the “joint action” test, Mr. Coates and Mrs. Shofner acted under color of state law, and are liable for all of the acts of their co-conspirators in furtherance of their joint objective to silence political opponents through retaliatory means. Even read liberally, the motions to dismiss should therefore be denied.⁴

CONCLUSION

The Court should deny Defendants’ Motions to dismiss the complaint as

⁴ Under Tenth Circuit law, a private party may act under color of law for § 1983 purposes even in the absence of a conspiracy, pursuant to several other legal theories. *Janny*, 8 F.4th at 919 (citing the “public function, state compulsion, nexus, and joint action” theories). The “nexus” theory holds that nominally private conduct is “under color of law” if sufficiently encouraged by state actors. *Id.* at 925. The allegations in the FAC set forth facts that satisfy the “nexus” theory as well as the conspiracy theory because the DPS Defendants “provided significant, overt encouragement” to the wrongful acts of Defendants Coates and Shofner. *See, id.*

against them.⁵ In the event the Court is inclined to grant any part of either Defendant's motion, Plaintiff further requests leave to amend to address any perceived inadequacies in the complaint.

DATED this 29th day of October 2024.

Respectfully submitted,

/s/ James Kerwin

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⁵ For the reasons discussed, the complaint states valid First Amendment claims against Defendants Coates and Shofner. Notably, Ms. Fry also brings state law claims against Coates for defamation, abuse of process, and malicious prosecution. Plaintiff is unable to discern in Mr. Coates' papers any arguments to dismiss those claims for failure to state a claim. Accordingly, the state law claims against Mr. Coates survive the instant motion.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation set forth at DDD Civ. P.S. III(A)(1). Per Microsoft Word's Word Count utility, this brief contains 3,974 words, inclusive of footnotes, but excluding the caption, signature block, and this certificate of compliance.