UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 10-60167

WILLIAM "CODY" CHILDRESS, a minor,
through his Natural father John Childress

PLAINTIFF/APPELLANT

VERSUS

TATE COUNTY SCHOOL DISTRICT, ET AL.,

DEFENDANT/APPELLEE

BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION OF MISSISSIPPI
DELTA DIVISION

W. Allen Pepper, United States District Court Judge

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Plaintiff/Appellant certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Circuit may evaluate possible disqualifications or recusal pursuant to Rule 13.6.1 of the United States Court of Appeals for the Fifth Circuit.

1. William "Cody" Childress, Appellant;
2. John Childress, Appellant;
3. Joseph R. Murray, II, Counsel for Appellant;
4. W. Brent McBride, Counsel for Appellant;
5. Harrison Law Office, PLLC., Counsel for Appellant;
6. McBride Law Firm, Counsel for Appellant;

7. Tate County School District, Appellee;

8. Gary Walker, Appellee;

9. Corey Blaylock, Appellee;

10. F. Ewin Henson, III, Counsel for Appellees;

11. J. L. Wilson, IV, Counsel for Appellees.

12. Jim Hood, Intervener

s/ Joseph R. Murray, II
JOSEPH R. MURRAY, II

STATEMENT REGARDING ORAL ARGUMENT

The important issue of whether a county school district can physically strike a student based upon gender warrants oral argument.

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STATEMENT OF JURISDICTION

Plaintiff sued Defendants in district court to vindicate his rights arising under the Eighth and Fourteenth Amendments to the United States Constitution (pursuant to 42 U.S.C. §§ 1983 and 1988. He also sued pursuant to 20 U.S.C. § 1681. The district court's federal question jurisdiction arose under 28 U.S.C. §§ 1331 and 1334. Its pendent jurisdiction over Plaintiff's state law claims arose under 28 U.S.C. § 1367. Jurisdiction in this Court arises under 28 U.S.C. § 1292(a)(1), as this appeal stems from an interlocutory order of the district court denying Plaintiff's motion for a preliminary injunction or, in the alternative, a temporary restraining order. The district court entered its order on February 23, 2010. From this order, Plaintiffs filed a timely notice of appeal on March 8, 2010, in accordance with Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether the equal protection clause of the United States Constitution Amendment Fourteen permits male students to be subjected to corporal punishment at a substantially disproportionate rate when compared to female students. This issue was ruled upon at pages 148-149 of the Excerpts of Record.

2. Whether *Ingraham's* ruling denying school children the right to be free from cruel and unusual punishment is applicable to a preliminary injunction motion challenging corporal punishment on equal protection grounds. This issue was ruled upon at pages 148-149 of the Excerpts of Record.

3. Whether Plaintiff has satisfied the four prong test to necessary justify the issuance of a preliminary injunction and/or a temporary restraining order. This issue was ruled upon at pages 147-149 of the Excerpts of Record.

4. Whether a district court should hold an evidentiary hearing, or at least permit both parties to respond, in deciding a preliminary injunction motion when disputed issues of fact are present. This issue was ruled upon at pages 148-149 of the Excerpts of Record.

5. Whether the district court erred in denying Plaintiff's motion on the grounds Fed. R. Civ. P. 65(c)'s requirement for a security bond was not satisfied. This issue was ruled upon at pages 147-150 of the Excerpts of Record.

STATEMENT OF THE CASE

On February 18, 2010, William "Cody" Childress (hereinafter "Cody"), through his father John Childress, filed a complaint to recover damages for a violation of constitutional rights; one being a Fourteenth Amendment equal protection claim. Record (hereinafter "R"), p. 4.

On February 19, 2010, a motion for a preliminary injunction or, in the alternative, a temporary restraining order, was filed on Cody's behalf. The motion asked the district court to enjoin the practice of corporal punishment until Cody's case was resolved. R., p. 105.

On February 23, 2010, the district court entered an order denying Cody's motion on grounds: (i) the United States Supreme Court case *Ingraham v. Wright*, 430 U.S. 651 (1977) denying school children Eighth Amendment rights barred the issuance of the injunction, (ii) the United States Supreme Court case *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979) barred the issuance of the injunction; (iii) Cody had not satisfied the four-prong test justifying an injunction as detailed in *Spiegel v. City of Houston*, 636 F.2d 997, 1001 n.2 (5th Cir. 1981); and (iv) Cody did not post a security bond pursuant to Fed. R. Civ. P. 65 (c). ER, p. 147. The district court also denied the motion before Tate County School District (hereinafter "TCSD"), TCSD Superintendent Gary Walker (hereinafter "Walker") and Independence High School Principal Corey Blaylock (hereinafter "Blaylock")

could submit a response to the motion and without the benefit of a hearing. *Id*. Cody filed a timely appeal on March 8, 2010. ER, p. 154.

STATEMENT OF FACTS

Cody is a sixteen (16) year old student who lives in Senatobia, Mississippi and is a student currently enrolled in the Tate County School District. R., p. 6, ¶ 14. He currently attends Independence High School. *Id*.

On or about September 1, 2009, while in the care and custody of TCSD, Cody was severely and excessively paddled by Blaylock . R., p. 8, ¶¶ 28-30. On that day, Cody's normal teacher was not in class and he was under the supervision of a substitute teacher named Mr. Galloway. *Id*. Mr. Galloway told the students to talk quietly amongst themselves until class was dismissed. *Id*.

Ten minutes prior to the class's dismissal, Cody was looking at pictures on a digital camera. R., p.8, ¶ 24. The camera belonged to a female student and she showed the pictures to Cody. *Id*. Because Cody was interacting with the female student Mr. Galloway instructed him to go directly to the principal's office. *Id*. at ¶ 23. The female student was not disciplined or punished. *Id*. at ¶ 25.

Blaylock told Cody he was going to be punished. *Id*. Cody was never given a choice of punishment, but was paddled unilaterally. Id. Blaylock told Cody he was going to be paddled because his parents would be upset if he had an in school suspension on his academic record. *Id*. at ¶ 27.

Blaylock struck Cody twice with a paddle. *Id*. at ¶ 30. The blows to Cody's buttocks were so severe that he could not sit. Id. The paddling left visible bruising on Plaintiff's buttocks and made it painful for him to use the restroom. These symptoms lasted days after the paddling.

Once Cody returned home, he was in such pain he informed his step-mother about the incident. *Id*. at ¶ 31. His parents proceeded to examine his injuries and determined it was necessary to take Cody to the hospital. R., p. 9, ¶32. Plaintiff's step-mother also informed Tate County Law Enforcement about the incident and filed a complaint against Blaylock. *Id*. at ¶ 33.

There is little, if no, policy governing corporal punishment in Mississippi. R., p. 4, ¶ 3. Rather, Mississippi has enacted two statutes granting schools immunity for liability, so long as the corporal punishment administered is "reasonable" and not "excessive." *Id*. at ¶ 2.

School districts, therefore, are free to paddle students and may or may not adopt a framework governing such actions. *Id*. TCSD permits paddling and provides no guidance on how and why a student should be paddled. *Id*. TCSD officials do not receive official training on how to paddle students. *Id*.

TCSD policy states, "Corporal punishment may be administered in the Tate County School System as a disciplinary procedure for infractions deemed appropriate. In each instance, another staff member shall be present. Corporal

punishment may be administered to both sexes." R., p. 11, ¶ 51. TCSD policy suggests Cody should not have been paddled in the first place. R. p. 12, ¶¶ 56-57.

Corporal punishment is inherently unconstitutional because it is unequally and disproportionately applied to specific gender, as well as race. Because corporal punishment is flawed, it is falling out of fashion among the fifty (50) states.

Throughout the 2006-07 school year, the DOE reported 223,190 students were struck by school officials as a form of punishment. R., p. 9, ¶ 40. This number is down significantly from the over 1.5 million school children struck by school officials in 1976. R., p. 12, ¶ 62.

Despite the fact many states have either enacted laws banning corporal punishment in schools or have abandoned the practice, Mississippi maintains an active practice of paddling. During the 2006-07 school year, Mississippi's school administrators paddled over 30,000 students or 7.5 percent. R., p. 9, ¶¶ 42, 48. This is the highest rate of paddling students in the country. *Id*. at 42.

When Mississippi's paddling numbers are combined with the numbers in Texas, forty (40) percent of the nation's acts of corporal punishment come from within the Fifth Circuit. R., p. 12, ¶ 63. And in Mississippi, males are receiving a disproportionate number of the paddlings.

Statistics compiled and published by the U.S. Department of Education shows males and blacks are subjected to corporal punishment at a disproportionate

rate than females and whites. R., p. 11, ¶ 48. In completing its study, 6,000 U.S. school districts were surveyed by the DOE. ER, p. 10, ¶ 45. Not all school districts were asked to participate, nor where they required to. *Id*. at ¶ 46.

Every day in Mississippi approximately 184 students are disciplined by a school district using some means of corporal punishment. *Id*. at ¶ 47. Mississippi school officials administer corporal punishment in a sexist manner. R., p. 11, ¶ 48.

Of the 33,055 students who received corporal punishment in Mississippi, 8,625 of the students were female while an overwhelming 24,430 where male; thus roughly three-quarters of the students paddled in this state were male even though they constitute 51 percent; a slim majority of the student population. *Id*.

The student population at TCSD and Independence High School mirrors that of the state average. Forty eight percent of TCSD students are female, while 52 percent are male. R., p. 10, ¶ 43.Thirty-eight (38) percent are black, three (3) percent are Hispanic and fifty-nine (59) percent are white. *Id*.

Forty-seven (47) percent of IHS students are female, while fifty-three (53) percent are male. *Id*. at ¶ 44. Forty (40) percent are black, two (2) percent are Hispanic and fifty-eight (58) percent are white. *Id*.

On February 18, 2010, Cody filed a federal lawsuit seeking damages from the numerous civil rights violations he suffered. R., p. 4. Because there are zero guidelines governing those who administer corporal punishment and how and

when to inflict it on children, Cody filed a motion for a preliminary injunction or, in the alternative, a temporary restraining order. This was necessary because in Mississippi Cody can be paddled for chewing gum or looking at pictures.

In filing his motion, Cody also filed a supporting memorandum of law. R., p. 117. In his memorandum Cody argued *Ingraham* was inapplicable to his case because it did not address equal protection and distinguished *Feeney* from the facts of his case. Cody also satisfied the four prongs of the preliminary injunction/temporary restraining order standard.

Despite Cody's legal argument and factual evidence, the district court denied the motion. The district court denied motion before Appellees could submit a response and without holding an evidentiary hearing. Cody timely appealed. ER, p. 154.

STANDARD OF REVIEW

This Court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion, but a decision based on erroneous legal principles is reviewed de novo." *Anderson v. Jackson*, 556 F.3d 351, 355-56 (5th Cir. 2009) (*citing Walgreen Co. v. Hood*, 275 F.3d 475, 477 (5th Cir. 2001) and *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir.2006)). *See also Lopez v. Heckler*, 725 F.2d 1489, 1498 (9th Cir.1984), vacated on other grounds, 469 U.S. 1082, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984) ("Legal issues underlying a decision to grant an

injunction are reviewed de novo, as is a district court's finding that plaintiffs are likely to succeed on the merits of those issues").

"For the denial of a preliminary injunction, the district court's factual findings are reviewed for clear error…." *Chavers. v. Morrow,* No. 09-20006, slip op. (5th Cir. 2009) (*citing Guy Carpenter & Co. v. Provenzale,* 334 F.3d 459, 463 (5th Cir. 2003) ("A district court's determinations as to each of the elements required for a preliminary injunction are mixed questions of fact and law, the facts of which this Court leaves undisturbed unless clearly erroneous").

In cases such as this, where a "district court's ruling rests solely on a premise as to the applicable rule of law" and has disregarded the factual evidence, this Court "may undertake plenary review of [the] issues rather than limit its review in a case of this kind to abuse of discretion." *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) (*citing Thornburgh v. America College of Obstetricians and Gynecologists*, 476 U.S. 747, 755-57 (1986), overruled in part on other grounds, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992))

All issues presented in this appeal are governed by the above standard.

SUMMARY OF THE ARGUMENT

The evidence in Cody's motion clearly demonstrated that male students are paddled at a disproportionate rate than their female counterparts. Furthermore, the fact pattern in Cody's case further supports such evidence as he, a male student,

was paddled after a female student showed him pictures on a camera. The female student was left unmolested.

In his order denying the motion for preliminary injunction the district court judge acknowledged male students in Mississippi represented 75 percent of all instances of corporal punishment. The district judge, however, erroneously concluded that Cody had to demonstrate a "total exclusion of girls" to satisfy the precedent established in *Feeney*. Cody does not have to demonstrate a "total exclusion of girls" under *Feeney*, but, instead, he must demonstrate the students paddled in Mississippi paddled are substantially male, while those students not paddled are substantially female. *Feeney*, 442 U.S. at 275.

In addition, Cody's motion for a preliminary injunction did not raise an Eighth Amendment argument, thus the district judge's reliance on *Ingraham v. Wright* – a case holding school children are not entitled to Eighth Amendment protections – is misplaced.

Furthermore, Cody demonstrated he satisfied the necessary requirements for a preliminary injunction to issue.

The district court, in making its ruling, did so without an evidentiary hearing. When issues of disputed fact are present and it is obvious both parties hold polar opposite views, an evidentiary hearing is not only customary, it is necessary.

Finally, the district court's denial of Cody's motion was contrary to law, as civil rights plaintiffs traditionally receive a waiver of Fed. R. Civ. P. 65 (c)'s requirement of a bond. Furthermore, Cody could not have provided the security until after the Court granted the preliminary injunction and determined the monetary value of wrongly halting corporal punishment.

ARGUMENT I

THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERANTIVE, A TEMPORARY RESTRAINING ORDER, BECAUSE THE SUPREME COURT'S DECISION IN *FEENEY* DID NOT CREATE AN ALL OR NOTHING REQUIREMENT, IS DISTINGUISHABLE AND PLAINTIFF CAN PROVE A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Supreme Court has long recognized the ability of men to seek judicial relief from discrimination based on gender. *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma statute imposing gender-based differentials in regulating the sale of alcoholic drinks). The Court went a step further when, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), it held a state school could not exclude males from enrolling in a state-supported nursing school.

"Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Feeney*, 442 U.S. at 273 (*citing Caban v. Mohammed*, 441 U.S. 380, 398 (STEWART, J., dissenting)). Such discrimination, however, is not always flagrant

and insidious but can take the form of a seemingly innocent statute, law or policy. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

In instances where the discriminatory classification is *de facto*, i.e. neutral on its face, the Court must decide whether the statute and/or policy has a disparate impact on a protect class. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). If the impact is not glaring, the court than has to determine whether there is a discriminatory purpose. *Washington v. Davis*, 426 U.S. 229 (1976).

"If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." *Feeney*, 442 U.S. at 275 (citing. *Davis*, 426 U.S. at 242; *Arlington Heights supra*, at 266). In other words, there are examples of cases in which impact alone proves a discriminatory motive *Id.*, 442 U.S. at 275.

In such cases a "clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S. 252, 266 (*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)." Thus, "[t]he evidentiary inquiry is then relatively easy." *Id*.

While such cases are admittedly rare, they are not extinct. Additionally, even in cases where the there is not a "total exclusion," the Supreme Court has found an equal protection violation due to the nature of the discrimination. Jury selection cases are the most common examples of such a situation. *Arlington Heights*, 429 U.S. at 266 fn 13 (explaining, "Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion")*. *See, e.g., Turner v. Fouche*, 396 U.S. 346, 359 (1970); *Sims v. Georgia*, 389 U.S. 404, 407 (1967).

Make no mistake, *Yick Wo* and its progeny should apply to this case as it is clearly distinguishable from the *Feeney* facts. In *Feeney*, the Supreme Court was faced with determining whether a Massachusetts veterans' preference statute denied equal protection to women. *Feeney*, 442 U.S. at 259. It was argued that because a vast majority of men are veterans, non-veteran women were disproportionately impacted by the statute. The Supreme Court rejected the argument, but not on the grounds relied on by the district court.

"But there can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans." *Feeney*, 442 U.S. at 275.

The Court further explained:

> Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification…Veteran status is not uniquely male. ***Although few women benefit from the preference, the nonveteran class is not substantially all female.*** To the contrary, significant numbers of nonveterans are men, and all nonveterans -- male as well as female -- are placed at a disadvantage. Too many men are affected by ch. 31, § 23, to permit the inference that the statute is but a pretext for preferring men over women.

Id. (emphasis added).

In the case at bar, the students paddled in Mississippi paddled are substantially male, while those students not paddled are female. ER, p. 11, ¶ 48. This is not a fine line distinction between veterans and non-veterans, but rather a clear distinction between male and female students. Where the *Feeney* Court could argue a vast number of men are not veterans, such an argument will not fly in Cody's case. All children have to be students, less they run afoul of truancy laws, and, of all students, males are disproportionately paddled over females. This is a key distinction that favors the conclusion that paddling males over females cannot be rationally explained.

Thus, unlike *Feeney* where there were two groups – veterans and nonveterans – both containing males and females, Cody situation is different.

Rather there is one group – students – involved in this case and out of that group, males are targeted and struck by school officials at an alarming higher rate.

Just as in *Yick Wo*, Cody's case is analogous to the 200 Chinese laundrymen who were denied permits and tossed in jail. The similarities are glaring.

In *Yick Wo* there were "no rules by which its impartial execution can be secured or partiality and oppression prevented." *Yick Wo*, 118 U.S. at 372-373. In Cody's case, Mississippi provides school districts zero guidelines in administering corporal punishment. Outside of two liability statutes, Mississippi educators are free to paddle as they see fit, so long as corporal punishment is deemed "reasonable." Thus, a student may be paddled for fighting or he may be paddled because he chewed gum. When a government official is given the power to inflict physical harm on a citizen, especially a minor, the power is great and, absent sufficient guidelines, such power can be, and was, greatly abused.

The *Yick Wo* court recognized such a potential for abuse and explained, "when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration." *Id*. at 374.

The same facts are present in the case at bar, for male and female students in Mississippi are treated differently when it comes to the paddle. In Cody's case, he, along with the rest of his class, was told to sit and talk quietly amongst other students. R., p. 7, ¶ 22. Cody followed the order. *Id*.

A female student in Cody's class, however, was showing a digital photo to students and Cody happened to look at the photo. R., p. 8, ¶ 24. The school official then targeted Cody for a paddling. *Id*. at ¶ 23. The female student who instigated the disturbance was left unmolested. *Id*. at ¶¶ 25-30.

Both Cody and the female student were equally at fault, yet it was Cody who had to bend over and assume the position. This trend is further supported by the DOE highlighting the gender disparity in paddling.

As explained by *Yick Wo*:

> For the cases present the ordinances in actual operation, and the facts whown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.

Id. at 373.

Statistical evidence shows male students in Mississippi receive seventy-five (75) percent of paddlings even though they constitute just a slim majority, fifty-one

(51) percent of the student population. R., pgs. 10-11, ¶¶ 43, 48. Of the over 33,000 paddlings in Mississippi, 24,430 of them were male.

The district judge acknowledged this fact, but denied Cody's motion because paddlings in Mississippi did not include a "total exclusion of girls." ER, pgs 147-150. Such a finding was legally incorrect.

Even if the district court determined the corporal punishment's gender gap is not as severe as the laundry gap presented in *Yick Wo*, the very nature of educating school children, not unlike that of jury selection, dictates the statistical evidence is sufficient to prove an equal protection violation.

In *Sims*, the Court found an equal protection violation because "Negroes constituted 24.4% of the individual taxpayers in the county. However, they amounted to only 4.7% of the names on the grand jury list and 9.8% of the names on the traverse jury list from which petitioner's grand and petit juries were selected." *Id*., 389 U.S. at 407. The same was true in *Turner*, where Negros represented thirty-seven (37) percent of the citizens on the jury list, yet constituted sixty (60) percent of the county's general population. *Id*., 396 U.S. at 359.

Thus, even though there was not a total exclusion of Negro jurors, the Court found an equal protection violation. The same can be said of the Supreme Court's decisions regarding busing.

In *Swann v. Board of Education*, 402 U.S. 1 (1971), the Court found an equal protection violation in a school district in which "[t]wo-thirds of those 21,000 [black inner city students] - approximately 14,000 Negro students – attended 21 schools which were either totally Negro or more than 99% Negro." *Id*., 402 U.S. at 6-7. Thus, under the district court's standard of "total exclusion," the one percent of white students attending schools within the city of Charlotte, N.C. would have justified the segregated school system. *See Swann*, 402 U.S. at 25-26.

As detailed above, the statistical evidence compiled by the DOE is sufficient to show a pattern of discrimination that compels judicial intervention. And if TCSD is to survive such a finding, it must explain why such a disparity exists. The school district, however, cannot justify such a disparity.

It could be argued boys are more likely to misbehave, but such a charge is as sexist as the infliction of corporal punishment. Sexist generalizations about gender cannot rationalize why male students are paddled at such a high rate.

"General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise." *New York City Transit Authority, et al v. Beazer, et al*, 440 U.S. 568, 587-88 (1979).

There has never been a constitutional requirement in *Feeney*, or any other case, holding the equal protection violation must result in a total exclusion and such a requirement should not start with this case.

ARGUMENT II

THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERANTIVE, A TEMPORARY RESTRAINING ORDER, BECAUSE THE SUPREME COURT'S DECISION IN *INGRAHAM* IS CLEARLY DISTINGUISHABLE AND PLAINTIFF CAN PROVE A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Supreme Court had occasion to address corporal punishment in the case of *Ingraham v. Wright*, 430 U.S. 651 (1977). In reaching its decision the 5-4 majority held "that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable." *Id*. at 671. The Court further held, "the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law." *Id.*, at 682.

In terms of equal protection, the opinion rendered in *Ingraham* is ***silent***. The Ingraham decision, while decided on constitutional grounds, did not take into account corporal punishment was administered in a disproportionate and discriminatory fashion. It did not take into account that forty (40) percent of the nation's corporal punishment now occurs in two state – Mississippi and Texas –

while seventy-five (75) percent occurs in five states – Alabama, Arkansas, Georgia, Mississippi and Texas. R., p. 10, ¶ 41.

The *Ingraham* precedent did not address the fact of the over 33,000 instances of corporal punishment in Mississippi, 24,430 were male students. ER, p. 11, ¶ 48. Nor did it address the fact that black students, seventeen (17) percent of the U.S. public school student body, constitute thirty-six (36) percent of those students receiving corporal punishment. R., p. 12, ¶ 61. In other words, *Ingraham* did not touch upon corporal punishment' tendency to target certain classes of individuals; it did not examine who is being paddled and why.

The *Ingraham* majority, however, did signal there may be a day when the nation, collectively, hangs up its paddle. That day has arrived.

Discussing corporal punishment, the Supreme Court reasoned:

> Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the practice continues to play a role in the public education of schoolchildren in most parts of the country. Professional and public opinion is sharply divided on the practice ... Yet we can discern no trend toward its elimination.

Id., 430 U.S. at 660-661. Times, however, have changed.

When defining the Eighth Amendment's "cruel and unusual punishment" clause, the Court "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Furman v. State of Georgia*, 408

U.S. 238, 315 (1972) (J. Marshall, concurring). "A penalty that was permissible at one time in our Nation's history is not necessarily permissible today." *Id*.

While Cody's motion was not rooted in Eighth Amendment grounds, it is painstakingly obvious that corporal punishment in the United States does not enjoy the status it held was *Ingraham* was decided. Thus, the only way *Ingraham* applies to Cody's case is to show corporal punishment is falling out of fashion.

Cultural attitudes towards corporal punishment have plummeted since Justice Powell penned the 5-4 majority decision. A year after the Court ruled in *Ingraham*, 1.4 million students were subjected to corporal punishment. R., p. 12, ¶ 62. Three decades later, just 223,190 students were at the wrong end of the paddle. *Id*.

Just 21 states have laws permitting corporal punishment, while the vast majority of states have enacted laws banning its use or have just denied educators the right to use it's as a means of discipline. This trend has gone international with most of Europe banning corporal punishment, as well as nations like Zimbabwe, Zambia and Pakistan.

The result is corporal punishment has become a marginalized and regional practice with forty (40) percent of corporal punishment limited to Mississippi and Texas. R., p. 13, ¶ 63. When Arkansas, Alabama and Georgia are added to the mix, the five states are responsible for seventy-five (75) percent of the nation's corporal

punishment. *Id*. In other words, children in the South, particularly male students, have a greater chance of getting paddled than any other students in the nation. Such an inequality smacks of discrimination.

Even more disturbing, there are zero guidelines governing corporal punishment in Mississippi. R., p. 4, ¶ 3. Each individual school district is free to set its own policy as to how corporal punishment is administered. Id. Without the benefit of guidelines, an arbitrary atmosphere is created in which school officials can target and paddled students for any reason ranging from fist-fighting to chewing gum. And males students are the target of choice.

Mississippi has even acknowledged the inherent evils created by an arbitrary system of corporal punishment unchained from strict guidelines. *Id*. By attempting to pass a bill creating such guidelines, Mississippi took steps to correct a system that has slipped out of control. But the inherent discriminatory nature of corporal punishment would render any attempt to fix – absent a total ban – fruitless.

"[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949) (concurring opinion) (J. Jackson).

Ingraham, nonetheless, is silent on equal protection.

ARGUMENT III

THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERANTIVE, A TEMPORARY RESTRAINING ORDER, BECAUSE PLAINTIFF HAS SATISFIED THE FOUR-PRONG TEST NECESSARY TO JUSTIFY THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION.

The standard for issuance of a preliminary injunction is the same as a temporary restraining order. The standard for a preliminary injunction in the Fifth Circuit is well-established. The factors to be considered were noted in *Roho, Inc. v. Marquis*, 902 F.2d 356 (5th Cir. 1990):

> [A] preliminary injunction is an extraordinary remedy that should not be granted unless the movant has demonstrated, by a clear showing: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from an injunction to the non-movant; and (4) that the injunction will not undermine public interests.

902 F.2d at 358*; see also Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1453 (5th Cir. 1993) (*citations omitted*).

As detailed *supra*., Cody can demonstrate a substantial likelihood of success on the merits. He has provided the court with compelling evidence detailing the disproportionate fashion corporal punishment is administered. Even further, in Cody's case he was punished while the female student, the one who instigated the alleged disruption with pictures, remained unmolested.

While the district court focused on the time gap between Cody's first paddling and the filing on the lawsuit, such a time gap is a red herring. The threat of corporal punishment remains for Cody.

Cody is facing a situation where he can be paddled for chewing gum in the classroom and that scenario increases threefold because he is male. The State of Mississippi has zero guidelines governing how corporal punishment is administered and a track record of paddling male students had a much higher rate than female students.

Because of this Cody's harm is real, as he has been deprived of his constitutional rights. He faces a disproportionately high chance of being subjected to corporal punishment, again, just because of his gender.

Because this Court is facing a situation in which a physical force is involved, it is clear Cody's interest in protecting his equal protection rights far outweighs TCSD's interest in physically striking students.

An injunction preventing the use of corporal punishment will not harm TCSD. The vast majority of states – and some school districts in Mississippi – have outlawed corporal punishment and chaos has not erupted in the classroom. Rather, they have utilized other, less intrusive, methods of disciplining students.

Finally, the public interest in protecting students from gender-driven discipline resulting in physical touching will not disserve the public interest.

ARGUMENT IV

SINCE THE MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERANTIVE, A TEMPORARY RESTRAINING ORDER, CONTAINED DISPUTED ISSUES OF FACT, THE DISTRICT COURT ERRED IN DECIDING THE MOTION WITHOUT THE BENEFIT OF AN EVIDENTARY HEARING.

When a district court is faced with a preliminary injunction motion in which dispute facts are present, a denial or granting of the motion is improper without first holding an evidentiary hearing. *Commerce Park at DFW v. Mardian Const. Co.*, 729 F.2d 334, 341 (5th Cir. 1984) (*holding* "We did not state … that ***in the absence of disputed factual issues*** a hearing is always required before a motion for a preliminary injunction can be denied) (emphasis added). The Fifth Circuit further held, "Where factual disputes are presented, the parties must be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted." *Id*.

In denying Cody's motion, the district judge cited *Commerce Park* as justifying its decision not to hold a hearing. The situation in *Commerce Park* is clearly distinguishable from Cody's case. In *Commerce Park* both parties were permitted to present their views. In Cody's case the district judge shut down the motion two (2) business days after it was filed. ER, p. 147. Being Cody's motion contained thirty-pages of law and his complaint, including exhibits, was close to

one hundred pages, it would be hard pressed to conclude his motion was fully considered.

Unlike the cases cited in *Commerce Park* "where all matters before the district court by were fully explored by the parties in the affidavits and depositions submitted on the motion;" that is not the case before this Court. *Herbert Rosenthal Jewelry Corp. v. Grossbardt*, 428 F.2d 551, 554 (2d Cir.1970) In this case the parties have not stipulated to any fact, admitted any fact or explained any fact and the Appellees did not even respond.

Cody painstakingly detailed how corporal punishment is appealed in a manner violative of the equal protection clause. These factual allegations were worthy of consideration by the Court and response by the Appellees.

Alternatively, even if an evidentiary hearing was not necessary and evidence was sufficient to make a ruling, the denial was premature because the district judge made his ruling before the Appellees could even reply to the motion.

ARGUMENT V

SINCE THE COURT DID NOT PREVIOUSLY SET THE SECURITY BOND PURSUANT TO FED. R. 65 (C) AND SUCH BOND IS CUSTOMARILY WAIVED IN CIVIL RIGHTS CASES, THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERANTIVE, A TEMPORARY RESTRAINING ORDER.

Fed. R. Civ. P. 65(c) reads, "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, ***in such a sum as***

the court deems proper, for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." (***emphasis added***).

In denying Cody's motion the district judge, in part, reasoned, "the plaintiff has not provided the security required by Rule 65(c)." The district court erred in holding Fed. R. Civ. P. 65(c) served any basis for denying Cody's motion.

As stated by the rule, the district court has not yet deemed the appropriate security in this case. Thus, Cody was not able to provide the security required by the rule because the district judge denied the motion before the court could inform Cody of the amount of security.

Furthermore, due to the civil rights nature of the motion, Cody expressly asked for Fed. R. Civ. P. 65(c)'s security requirement to be waived or a nominal fee be imposed. The district judge did not expressly rule on this issue.

As the Supreme Court has observed, "parts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937). *See also Crowley v. Local No. 82*, 679 F.2d 978 (1st Cir.1982) rev'd on other grounds 467 U.S. 526, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984) (district court acted within its discretion in not requiring bond where plaintiffs were not able to afford security

and a bond requirement would affect enforcement of Title I rights adversely); *Wayne Chemical, Inc. v. Columbus Agency Service Corp*., 567 F.2d 692 (7th Cir.1977) (in action to recover insurance benefits, district court properly excused bond upon plaintiffs' showing of indigency where court determined that indigency was circumstance justifying excuse); Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c), 99 Harv.L.Rev. 828 (1986) (arguing that waiver of the bond requirement is appropriate only when the plaintiff is indigent or is suing in the public interest).

In noncommercial cases courts should consider the hardship a bond requirement would impose on the party seeking the injunction in addition to the expenses the enjoined party may incur as a result of the injunction. *Elliott v. Kiesewetter*, 98 F.3d 47, 59 (3d Cir.1996). The Court may waive Rule 65(c)'s bond requirement when the balance of the equities weighs overwhelmingly in favor of the party seeking the injunction. *Id*. at 60. In waiving the bond the Court should also "consider whether the application seeks to enforce a significant federal right or a matter of public interest." *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir.1991), cert. denied sub. nom, *Snider v. Temple Univ*., 502 U.S. 1032, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992).

The nature of the act seeking to be enjoined in this case – corporal punishment – will not impose additional costs on TCSD. There are a plethora of

other, non-monetary, discipline options available to the school should corporal punishment be enjoined. There is, therefore, virtually no possibility of a risk of financial harm to the party to be enjoined. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir.1990); *Instant Air Freight Co. v. C.F. Air Freight*, Inc., 882 F.2d 797, 803-05 & n. 8 (3d Cir.1989).

Cody, on the other hand, comes from a family of modest means. The requirement of security would be an insurmountable hurdle for him and would place a monetary price tag on his civil liberties. Because Cody is facing another potential physical assault and TCSD is facing the loss of one disciplinary measure in its arsenal, the balance of equities tilts in favor of the public interest litigant. Furthermore, corporal punishment in the classroom, as indicated by *Ingraham*, is a serious public policy issue and the resolution of said issue is in the public interest.

For these reasons, it was well within the district judge's purview to waive the Fed. R. Civ. P. 65(c). The district judge, however, denied Cody's motion, in part, before consideration of the said issue.

CONCLUSION

The district court's decision to deny Plaintiff's Motion for a Preliminary Injunction or, in the Alternative, a Temporary restraining Order, should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that, I, Joseph R. Murray, II, attorney for Plaintiff, have, this day by United States mail, postage prepaid, forwarded a true and accurate copy of the above and foregoing document, as well as electronic copy via CD, to:

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This the 22rd day of April, 2010.

s/ Joseph R. Murray, II

JOSEPH R. MURRAY, II

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains:

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3. If the Court requires, the undersigned will provide an electronic version of the brief and/or copy of the word or line print out.

4. The undersigned understands that material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Respectfully submitted,

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