IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM CODY CHILDRESS, a minor, by and through John Childress, Natural Father;	)	**Civil Action No.: 2:10-CV-24-P-A**
Plaintiff	)	
v.	)	
TATE COUNTY SCHOOL DISTRICT, *et al*,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COMES NOW the Plaintiff, WILLIAM "CODY" CHILDRESS, a minor, by and through his natural father, John Childress, by and through counsel, and files this his Brief in opposition to the Defendants' Motion to Dismiss, and would show unto the Court the following:

INTRODUCTION

"Power without responsibility - the prerogative of the harlot throughout the ages," quipped laureate Rudyard Kipling. In filing their Motion to Dismiss, Defendants collectively argue those entrusted to step in the place of the parent and educate our children do not have the responsibility to refrain from using unreasonable force in disciplining students. Defendants, thus, display to the Court the ultimate showing of power without responsibility.

FACTUAL BACKGROUND

Plaintiff is a sixteen (16) year old male who lives in Senatobia, Mississippi and is a student currently enrolled in the Tate County School District. *See Verified Complaint*, ¶ 14. He currently attends Independence High School. *Id.*

On or about September 1, 2009, while in the care and custody of the Tate County School District, Plaintiff was severely paddled by Defendant Corey Blaylock, principal of Independence High School. *Id.* at ¶¶ 28-30. This infliction of corporal punishment was in violation of Defendant Tate County School District's, hereinafter "TCSD," own policies. *Id.* ¶¶ 51-58. The paddling was so severe Plaintiff's step-mother, after Plaintiff complained he was in serious pain, was compelled to take Plaintiff to the hospital for treatment. *Id.* ¶¶ 31-32.

Plaintiff Paddled Over Female Counterpart

With just minutes to go before the final school bell rang, Plaintiff was in his seventh (7^{th}) period biology class on September 1, 2009. *Id.* ¶ 22. On that day, Plaintiff's normal teacher was not in class and he was under the supervision of a substitute teacher named Mr. Galloway. *Id.* It was at this time Mr. Galloway had told the students, including Plaintiff, to talk quietly amongst themselves until class was dismissed. *Id.* Plaintiff followed Mr. Galloway's instruction. *Id.*

Ten minutes prior to the class's dismissal, Mr. Galloway approached Plaintiff and instructed him to go directly to the principal's office. *Id.* at ¶ 23. Mr. Galloway was upset because Plaintiff was looking at a picture displayed on a digital camera. *Id.* at ¶ 24. The camera belonged to a female student and the female student had showed the picture to Plaintiff. *Id.*

But despite the fact the female student had possession of the camera, **in violation of school policy**, and enticed Plaintiff to look at the picture, she was not sent to the principal's office. Rather it was Plaintiff, a male student, who was kicked out of class. *Id.* at ¶ 25.

After arriving at the principal's office, Defendant Blaylock told Plaintiff he needed to be disciplined for allegedly disrupting the class. *Id.* at ¶ 26. Defendant Blaylock instructed Plaintiff to sign an undisclosed piece of paper. Plaintiff, following the orders of an authority figure, signed the paper because he felt he had no other choice. *Id.* The contents of this paper are unknown as Defendant Blaylock did not give Plaintiff a copy. *Id.*

At this point Defendant Blaylock told Plaintiff he was going to be punished. *Id.* Plaintiff was still unsure why he was getting punished, but did not wish to disrespect his principal. **Plaintiff was never given a choice of punishment, but was paddled unilaterally**. *Id.* Defendant Blaylock told Plaintiff he was going to be paddled because Plaintiff's parents would be upset if he had an in school suspension on his academic record. *Id.* at ¶ 27. Plaintiff followed the instructions because Defendant Blaylock had taken away his choice. *Id.* at ¶ 29.

Defendant Blaylock struck Plaintiff twice with a paddle. *Id.* at ¶ 30. The blows to Plaintiff's buttocks were so severe that Plaintiff 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 for days.

Once Plaintiff returned home, he was in such pain he informed his step-mother about the incident. *Id.* at ¶ 31. His parents proceeded to examine Plaintiff's injuries and determined it was necessary to take Plaintiff to the hospital. *Id.* at 32. Plaintiff's step-mother also informed Tate County Law Enforcement about the incident and filed a complaint against Defendant Blaylock; a charge later dismissed.[1] *Id.* at ¶ 33.

Paddle Replaced Policy at TCSD

There is little, if no, policy governing corporal punishment in Mississippi. *Id.* at ¶ 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. TCSD permits paddling and provides no guidance on how and why a student should be paddled.

[1] This matter, *styled State of Mississippi v. Cory Blaylock*, Cause No.: CR2009-163-BT, has absolutely no bearing on the disposition of this case. While Defendants have attempted to muddy the jurisprudential waters by combing a criminal matter with a civil matter, as explained *infra* the criminal case brought against Defendant Blaylock by the State of Mississippi will not govern the outcome of the civil case brought by Plaintiff against Defendant Blaylock, as well as the other named Defendants.

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." *Id.* at ¶ 51. TCSD policy, however, suggests Plaintiff should not have been paddled in the first place.

In regards to minor violations, such as disrupting the class, the student handbook reads, "The classroom teacher should handle minor violations." *Id.* at ¶ 56. The policy continues, "The principal will notify the parent upon first referral. Each student will be given a copy of his/her referral to give the parent. This type of violations includes, but is not limited to... general disruptions and/or excessive distractions of other students." *Id.* at ¶ 57. None of these procedures were followed before a paddle was used to inflict harm on Plaintiff.

Corporal Punishment Stands on Feet of Clay

Throughout the 2006-07 school year, the DOE reported 223,190 students were struck by school officials as a form of punishment. *Id.* at ¶ 40. This number is down significantly from the over 1.5 million school children struck by school officials in 1976. *Id.* at ¶ 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. *Id.* at ¶¶ 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. *Id.* at ¶ 63. Such a travesty is further exasperated by government statistics demonstrating corporal punishment is inherently unequal.

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. *Id.*

at ¶ 48. In completing its study, 6,000 U.S. school districts were surveyed by the DOE. *Id.* at ¶ 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. School officials, however, administer corporal punishment in a sexist, gender-biased manner. *Id.* at ¶ 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 state student population. *Id.* at ¶ 48.

The student population at TCSD and Independence High School mirrors that of the state average. Forty eight percent of the students registered in the TCSD are female, while 52 percent are male *Id.* at ¶ 43. Forty-seven (47) percent of the students attending IHS are female, while fifty-three (53) percent are male. *Id.* at ¶ 44.

STANDARD OF REVIEW

The standard for qualified immunity is set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), which provides that immunity is afforded to "government officials performing discretionary functions" only "insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known."

Properly understood, the qualified immunity defense simply requires that liability be limited to cases in which a right is sufficiently clear that a reasonable official would understand that what his actions violate that right. *U.S. v. Lanier*, 520 U.S. 259, 137 L.Ed.2d. 432, 117 S.Ct. 1219, 1227 (1997). In determining whether a right is clearly established, the courts begin with the assumption that the defendants knew all applicable law. *Elder v. Hollo*way, 510 U.S. 510 U.S. 510, 127 L.Ed.2d 344, 114 S.Ct 1019 (1994).

Moreover, **the burden of pleading and proving a qualified immunity defense rests exclusively upon Defendant**. *Gomez v. Toledo*, 446 U.S. 635, 640, 64 L.Ed2d 572, 100 S/Ct. 1920 (1980) (**emphasis added**); *Harlow* at 815. It is readily recognized that "when a government official with discretionary authority is sued for damages under § 1983 and properly raises the defense of qualified immunity, the plaintiff bears the burden of rebutting that defense." *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992). But prior to the burden shifting to Plaintiff, "the defendant official must plead his good faith and establish that he was acting within the scope of his discretionary authority." *Id.*

The Supreme Court has outlined a two-prong test for determining whether an official is entitled to qualified immunity: (1) "The first inquiry must be whether a constitutional right would have been violated on the facts alleged," *Saucier v. Katz*, 533 U.S. 194, 200 (2001), overruled in part on other grounds by *Pearson v. Callahan*, 129 S. Ct. 808 (2009); and (2) "if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct," *Pearson v. Callahan*, 129 S. Ct. at 816. In determining whether Plaintiff has pled facts sufficient to prove a constitutional violation has occurred, the Court **must accept, as true, Plaintiff's allegations Defendants violated his Eighth and Fourteenth Amendment rights.** *Morgan v. Swanson*, No. 09-40373, slip. Op. at 10 (5th Cir. Jun. 30, 2010) (**emphasis added**).

Although Plaintiffs must point to analogous cases to demonstrate that a constitutional right is clearly established, *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993), they "need not identify a case involving the exact fact pattern at bar, but must be able to identify case law in a closely analogous area." *Perry v. Sheahan*, 222 F.3d 309, 315 (7th Cir. 2000).[2] As the United States Supreme Court has

[2] In fact, there need not be decisional guidance at all if the constitutional violation is obvious. *Eberhardt v. O'Malley*, 17 F 3d 1023, 1028 (7th Cir. 1994); *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993) (a "closely analogous case" is

aptly held, federal courts must understand the High Court's "warning that this is not a mechanical exercise, and that the test is not whether 'the very action in question has previously been held unlawful,' but rather, whether pre-existing law makes the unlawfulness of an act 'apparent.'" *Clem v. S. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (*citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

To summarize Judge Posner's recent observation when rejecting a claim of qualified immunity, "the absence of [many] reported case[s] with similar facts demonstrates nothing more than wide-spread compliance with well-recognized constitutional principles." *Eberhardt*, 17 F.3d at 1028. Thus, if the violated right is a "clearly established and a well litigated general proposition," qualified immunity is not available just because the "case at hand merely presents a new factual wrinkle." *Le Clair v. Hart*, 800 F .2d 692, 696 (7th Cir.1986) (citations omitted).

It is Plaintiff's contention Defendants have failed to meet the first prong of the *Salas* standard, but assuming arguendo the Court finds that Defendant satisfied the first prong, Plaintiff can clearly show that the constitutional rights violated by Defendants, as described by prevailing precedents from the various Circuits, were clearly established, and obvious to a reasonable person at the time of their occurrence.

ARGUMENT I

INDIVIDUAL DEFENDANTS WALKER AND BLAYLOCK ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The Supreme Court has held "general statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks and citations omitted).

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unnecessary if there is "evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts"(citations omitted)).

In addition, it is a rudimentary principle that "when 'the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Casteel* 3 F.3d at 1053). To hold otherwise would allow a government official who understood the unlawfulness of his actions to escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom before been litigated. *See, e.g., K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

Courts, therefore, have understood, "The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.'" *Safford Unified Sch. Dist. No. 1 v. Redding*, ---- U.S. ----, 129 S. Ct. 2633, 2643 (2009) (*citing K.H. ex rel. Murphy v. Morgan*, 914F.2d 846, 851 (7th Cir. 1990)).

Without a doubt, the right to be free from gender discrimination, physical abuse by government officials and bodily integrity are clearly established constitutional and statutory rights and a reasonable person in Defendants' position would have known this fact. As discussed *infra.*, Supreme Court precedent has clearly established such a fact. Likewise, the actions of Defendant were not objectively reasonable as a result of: Defendant first departing from policy, striking Plaintiff to the point bruises were left on his buttocks for a substantial period of time, showing preferential treatment to the female student who actually instigated and caused the alleged "disruption," physically striking Plaintiff in lieu of the female student instigator, and failing to properly investigate claims against Defendant Blaylock's excessive paddling. Thus, such an issue of reasonableness must be decided by a jury. *See Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998); *Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993).

Defendants, therefore, have failed to show they are entitled to qualified immunity. Defendants' motion papers merely state qualified immunity was properly pled in their answer to Plaintiff's complaint. (**Doc. 23**, p. 10). There was no analysis of the constitutional issues, nor was there proper analysis of the facts. Because a naked assertion that qualified immunity was pled is insufficient, Defendants' motion should fail.

A. The facts alleged show Defendant's conduct violated Plaintiff's clearly established constitutional rights and was patently unreasonable.

In bringing his lawsuit Plaintiff is not trying to create rights out of thin air or manipulate the law for his own benefit; he is trying to right a serious, unconstitutional wrong. He was the victim of unconstitutional actions and those actions caused an injury landing him in the emergency room.

Plaintiff's complaint alleges violation of the following constitutional rights: (i) Equal Protection, (ii) Cruel & Unusual Punishment (iii) Intrusion into Bodily Integrity, (iv) Procedural Due Process and (v) Excessive Force. The rights that protect Plaintiff are clearly established and Defendants Walker and Blaylock actions were not reasonable.

1. Plaintiff's Right to Equal Protection was Violated by Defendants[3]

To maintain an equal protection claim, a plaintiff typically alleges that he "received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent." *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir.2001); *see In re United States*, 397 F.3d 274, 284 (5th Cir. 2005); *Beeler v. Rounsavall*, 328 F.3d 813, 816-17 (5th Cir.2003); *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir.1996).

[3] 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 and, therefore, does not govern the Equal Protection component of this case.

By paddling Plaintiff in lieu of the female student who was the cause of the disruption, Defendants TCSD and Blaylock violated Plaintiff's clearly established rights protecting him from sex-based discrimination.

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." *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (*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*, 118 U.S. 356. 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 v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). In other words, there are examples of cases in which impact alone proves a discriminatory motive. *Id.*, 442 U.S. at 275.

While such cases are admittedly rare, they are not extinct. More importantly, Supreme Court precedent has determined that "total exclusion" of one class is not necessary to prove impacted

alone has exposed a discriminatory motive. Jury selection cases are the most common examples of such a situation. *Arlington Heights*, 429 U.S. at 266 fn 13 ("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 of total exclusion.

"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. *See Verified Complaint*, ¶ 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 Plaintiff'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.

Every day in Mississippi approximately 184 students are disciplined by a school district using some means of corporal punishment, according to a U.S. Department of Education study. *Id.* at ¶ 47. School officials, however, administered corporal punishment in a sexist, gender-biased manner. 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 state student population. *Id.* at ¶ 48.

Just like in *Yick Wo*, Plaintiff'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 Plaintiff'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, according to Defendant TCSD's own policies, a student may be paddled for fighting or he may be paddled because he chewed gum in the classroom. When a

government official is given the power to inflict physical harm on a citizen, especially a minor citizen, the power is great and, absent sufficient guidelines, such power can be greatly abused.

In this case, the Supreme Court, the Fifth Circuit, the United States government, and even TCSD's written policy that corporal punishment must be applied equally to all sexes (*Verified Complaint*, ¶ 51), put Defendants on notice. Thus, Defendants knew, or should have known, they could not paddle Plaintiff while, at the same time, giving the female student instigator a free pass.

The inequality concerning corporal punishment also exists outside of Plaintiff's case, for male and female students in Mississippi are treated differently when it comes to the paddle. In Plaintiff's case, he was punished over a female student who caused the disruption. *Verified Complaint*, ¶¶ 23-30.

The fact that twenty-five (25) percent of females are paddled is not controlling in this case. Even if corporal punishment's gender gap is not as severe as the race 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, if courts used the 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, and **did not in its motion papers,** justify such a disparity.

Assuming arguendo *Yick Wo* is not applicable to Plaintiff's case, Plaintiff can still prove a discriminatory purpose/intent. To prove a discriminatory purpose a plaintiff can utilized a number of evidentiary proofs such as (i) a clear pattern unexplainable on other grounds, (ii) historical background of the timing of the decision and (iii) legislative history. *Arlington Heights*, 429 U.S. at 266-68.

The statistics explained *supra* are clear: male students receive seventy-five (75) percent of the corporal punishment administered in Mississippi even though they represent just a slim fifty-one (51) percent majority of Mississippi students. *See Verified Complaint*, ¶¶ 42, 48. Such statistics compliment the notion gender classifications suggest a social acceptance to subject males to corporal punishment instead of females.

Corporal punishment' history is suspect because (i) social attitudes have changed towards its acceptance, (ii) its history finds roots in the cotton fields and (iii) there is no official policy governing how it is administered in Mississippi.

Recognizing school officials cannot discriminate on the basis of gender, Defendants cannot say they acted reasonably when they paddled a male student over the female student instigator.

Further, the reasonableness of Defendants' actions are weakened by the fact Defendant Blaylock failed to follow school policy and arbitrarily decided to paddle Plaintiff.

Because "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful," Defendants' qualified immunity defense must fail. *Hope v. Pelzer*, 536 U.S.730, 741 (2002). As discussed *supra.*, Supreme Court precedent has clearly established a right to equal protection for males. The fact that Plaintiff's argument is one of first impression does not negate such a general principle. Defendants, therefore, were on notice they could not apply corporal punishment in a discriminatory fashion.

For these reasons, the doctrine of qualified immunity should not attach to Defendant Walker and Blaylock.

2. Defendant's Actions were Cruel & Unusual

In *Ingraham,* as stated *supra.*, the Supreme Court based its decision that corporal punishment did not violate the Eighth Amendment on the social acceptance of corporal punishment, as well as its common law roots. Discussing corporal punishment, the Supreme Court reasoned:

> The use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period. It has survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools. 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, and has been for more than a century. **Yet we can discern no trend toward its elimination.**

Id., 430 U.S. at 660-661. Times, however, have changed and there is a clear trend towards corporal punishment's elimination. Further, Plaintiff makes the good faith argument that *Ingraham* created precedent that based its ruling on social factors that have changed substantially in three (3) decades.

Because of this change, "there need not be decisional guidance at all if the constitutional violation is obvious." *Eberhardt*, 17 F 3d at 1028. Defendants, in light of the clearly established right, acted unreasonably and are not afforded qualified immunity.

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). *See also Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) ("The objective component of an Eighth Amendment claim is therefore contextual and responsive to 'contemporary standards of decency.'"). "A penalty ... permissible at one time in our Nation's history is not necessarily permissible today." *Id.*

Ingraham's precedent opened the door that corporal punishment's legality was dependent on national acceptance of the punishment. It clearly recognized that social norms could evolve is such a way that rendered corporal punishment a cruel and unusual punishment. This time has arrived and Defendants, in seeking qualified immunity, cannot now run for cover on the sole basis the case law is confusing or less than clear. *Morgan v. Swanson*, No. 09-40373, slip. Op. at 19 fn 15 (5th Cir. Jun. 30, 2010).

Since *Ingraham* was decided thirty-two (32) years ago, statistics and cultural acceptance has changed, as well as an understanding of corporal punishment's tainted history. A year after the Court ruled in *Ingraham*, 1.4 million students were subjected to corporal punishment. *See Verified Complaint*, ¶ 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 in the classroom. Even nations like Zimbabwe, Zambia and Pakistan have banned the practice.

The result is corporal punishment has become a marginalized and regional practice with forty (40) percent of corporal punishment limited to Mississippi and Texas. *Id.* at ¶ 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.

Responding to this fact, Defendants claim that corporal punishment is done in the open and supported by the public in Mississippi. They further argue Plaintiff's only avenue of correction is to lobby school officials for change. Such an argument undermines the U.S. Constitution.

"In short, if a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity." *Ingraham*, 430 U.S. at 690 (WHITE, J., *dissenting*).

The history of corporal punishment is further blemished when its use and roots are examined. Paddling is a practice that thrived in the cotton fields. *Id.* at ¶ 60. It is a practice that originated to demean and control and while it has common law roots, such roots alone cannot justify its continued use in the schoolhouses of the South.

Even more disturbing, there are zero guidelines governing corporal punishment in Mississippi. *Id.* at ¶ 3. Without the benefit of guidelines, an arbitrary atmosphere is created in which school officials can paddle students for any reason ranging from fist-fighting to chewing gum. Justice White recognized this problem and explained, "[A] public school student who is spanked for a mere breach of discipline may sometimes have a strong argument that the punishment does not fit the offense, depending upon the severity of the beating, and therefore that it is cruel and unusual." *Ingraham*, 430 U.S. at 691 (WHITE, J., *dissenting*).

The fact *Ingraham*, like other Eighth Amendment cases, based its precedent on evolving standards, coupled with the reality the national tolerance towards corporal punishment has deteriorated, it is clear *Ingraham* opened the door for corporal punishment to one day be deemed unacceptable. *Hope*, 536 U.S. at 741. Statistical evidence shows this day has arrived, Plaintiff's right is clearly established and Defendants acted in an unreasonable manner. *Morgan v. Swanson*, No. 09-40373, slip. Op. at 19 fn 15 (5th Cir. Jun. 30, 2010).

3. Plaintiff's Due Process were Violated by Defendants

"To state a cause of action under Sec. 1983 for violation of the Due Process Clause, plaintiffs 'must show that they have asserted a recognized liberty or property interest within the purview of the Fourteenth Amendment, and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law.'" *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 450 (5th Cir. 1994) (*citing Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir.1990) (citations omitted), cert. denied, 498 U.S. 1040, 111 S.Ct. 712, 112 L.Ed.2d 701 (1991)).

Entitlement to a public education has long been recognized as a property interest protected by the Due Process Clause of the Fourteenth Amendment to the Constitution." *Colvin v. Lowndes County, Mississippi School Dist.*, 114 F.Supp.2d 504, 511 (N.D. Miss. 1999) (*citing Goss v. Lopez*, 419 U.S. 565, 573-75 (1975)). The Supreme Court in *Goss* wrote: "The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." *Goss,* 419 U.S. at 574 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

Protections of due process violations however, are not merely confined to the procedural, but encompass the substantive, as well. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[4]

Included in the substantive rights protected by the Due Process Clause is the understanding "schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment" *Doe*, 15 F.3d at 450.[5]

a. Right to Bodily Integrity Clearly Established

The Fifth Circuit has "consistently held that the right to be free of state occasioned damage to a person's bodily integrity is protected by the [F]ourteenth [A]mendment's guarantee of due process." *Priester v. Lowndes County*, 354 F.3d 414, 421 (5th Cir. 2004) (quoting *Doe v. Taylor Ind. Sch. Dist.*, 15 F.3d 443, 450-51 (5th Cir. 1994)); *Petta v. Rivera*, 143 F.3d 895 (5th Cir. 1998).

While it is true this application has not applied to corporal punishment, Plaintiff makes the good faith argument that such an application is warranted. In deciding corporal punishment does not require due process protections because state tort law adequately protects their interests, courts created a Cath-22 for plaintiffs; a fatal flaw recognized by Justice White when he explained:

> This tort action is utterly inadequate to protect against erroneous infliction of punishment for two reasons. First, under Florida law, a student punished for an act he did not commit cannot recover damages from a teacher "proceeding in utmost good faith . . . on the reports and advice of others,"; the student has no remedy at all for punishment imposed on the basis of mistaken facts, at least as long as the punishment was reasonable from the point of view of the disciplinarian, uninformed by any prior hearing ... Second, and more important, even if the student could sue for good faith error in the infliction of punishment, the lawsuit occurs after the punishment has been finally imposed. The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding.

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[4] "The Supreme Court has expanded the definition of 'liberty' beyond the core textual meaning of that term to include [not only] the ... privileges [expressly] enumerated by the Bill of Rights, [but also] the 'fundamental rights implicit in the concept of ordered liberty' and 'deeply rooted in this Nation's history and tradition' under the Due Process Clause." *Griffith*, 899 F2d. at 1435; see also *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) and *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

[5] Such a premise was built upon the notion, long respected by the Fifth Circuit, that an individual has "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir.1981)

Ingraham, 430 U.S. at 693-95 (WHITE, J., *dissenting*). The same can be said of Plaintiff's case.

b. Defendants' Actions were Arbitrary & Capricious

While Courts have not "attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life ... and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Thus, "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. *Roth*, 408 U.S. at 571 (citations omitted).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Id* at 577. It is further understood a plaintiff "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Id.*

The crux of Plaintiff's legal theory is simple – Defendants singled Plaintiff out for punishment because of his gender, ignore school policy in punishing Plaintiff, arbitrarily decided to physically strike Plaintiff, and disregarded Ryan's substantive due process right "to engage in any of the common occupations of life."

4. Defendants Actions Resulted in Excessive Force

When addressing a claim of excessive force under the Eighth Amendment, the significance of the injury is not a factor. *Hudson*, 503 U.S. at 9. If an official "maliciously and sadistically use force

to cause harm, contemporary standards of decency always are violated." *Id.* (*citing Whitley v. Albers*, 475 U.S. 312, 327 (1986). The *Hudson* majority elaborated:

> This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.

Id. (*citations omitted*). Thus, a plaintiff bringing an excessive force claim need not show serious injury, so long as he can show "wanton infliction of pain." *Id.* at 10.

In this case, Defendant has attempted to mock Plaintiff's injuries by arguing medical records show the injury was not severe. This is the same argument that was rejected in *Hudson.* Plaintiff's verified complaint presents the facts that must control this motion, and in the complaint Plaintiff states his injuries were such that he could not sit comfortably, nor use the restroom properly. Further, Plaintiff has pled facts to suggest he was targeted because of his gender.

Thus, if a prison official cannot manhandle an inmate compelled to be in the penitentiary, then surely a school official cannot manhandle a student compelled to be present at school.

ARGUMENT II

DEFENDANTS ARE NOT ENTITLED TO IMMUNNITY IN CORRELATION TO PLAINTIFF'S STATE LAW CLAIMS

In filing their motion to dismiss on the basis of immunity, Defendants argue they are entitled to immunity due to the fact: (i) they receive complete immunity under state law, (ii) Defendants Walker and Blaylock, pursuant to state law, are not liable for actions committed within the course and scope of their employment, (iii) Plaintiff failed to give Defendants proper notice and (iv) the Mississippi Constitution fails to state a claim upon which relief can be granted. Defendants are wrong on all four counts.

A. Defendants are not entitled to Official State Immunity

Defendants, in this case, wish to put the cart before the horse. It is wholly improper to dismiss Plaintiff's state law tort claims at this time. Miss. Code Ann. § 11-46-9 requires a minimum standard of ordinary care be exercised by the government actor in order to raise the statutory shield. Miss. Code Ann. § 11-46-9(1)(b).

Even more concerning, Defendants, in seeking to shield their actions from liability, are attempting to misconstrue the judicial system to hold Plaintiff, a civil litigant, in privity with the State of Mississippi. It is settled law that a victim in a criminal action, such as Plaintiff, is not prevented from bringing a civil suit against his victim if the State fails, or succeeds, in prosecuting Defendant's criminal wrongs.

Defendants' argument, therefore, is fatally flawed and official/sovereign immunity does not attach to their actions.

1. Ordinary Care is a fact question to be determined by a jury.

Mississippi courts have long understood, "as long as ordinary care is used while performing a statutory duty, immunity exists. But when the state actor fails to use ordinary care in executing or performing or failing to execute or perform an act mandated by statute, there is no shield of immunity." *L.W. v. McComb Separate Municipal School District*, 754 So.2d 1136, 1142 (Miss. 1999).

As articulated by the court in *L.W.*, "Schools have the responsibility to use ordinary care to provide a safe school environment" and "taking reasonable steps to minimize risk is one way to provide a safe school environment." *Id.* at 1143 (*citations omitted*). One such duty in which schools must exercise such care is in the discipline of students.

The Mississippi Code states:

> It shall be the duty of each superintendent, principal and teacher in the public schools of this state to enforce in the schools the courses of study prescribed by law or by the state board of education, to comply with the law in distribution and use of free textbooks, and to

> observe and enforce the statutes, rules and regulations prescribed for the operation of schools. **Such superintendents, principals and teachers shall hold the pupils to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds, and during recess.**

Miss.Code Ann. § 37-9-69 (**emphasis added**). Because the statute requires ordinary care in disciplining students and because the state of Mississippi mandates compulsory school attendance for all children upon penalty of law[6], "it only seems logical that the state should then require school personnel to use ordinary care in administering our public schools." *L.W.*, 754 So.2d. at 1142.

Administering corporal punishment to a student constitutes discipline of said student. Further, Miss. Code. § 37-11-57(2) requires that corporal punishment be "administered in a reasonable manner" and that no principal shall be liable unless it is determined the principal "acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety." Such language was incorporated into Miss. Code. Ann. § 11-46-9(1)(x).[7]

With state law requiring school districts/officials to use ordinary care in the discipline of students, "The teachers and administrators here are then protected by sovereign immunity if and only if they used ordinary care in controlling and disciplining their students." *L.W.*, 754 So.2d. at 1142. Additionally, "The issue of ordinary care is a fact question." *Id.*

Much to Defendants' chagrin, Plaintiff's facts demonstrate: (i) ordinary care was not utilized and (ii) Defendant Blaylock, with the blessing of Defendant Walker, acted in "bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety."

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[6] *See* Miss. Code Ann. § 37-13-91 (1972).

[7] Miss. Code Ann. § 11-46-9(1)(x) reads: "Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety."

As stated *supra.*, Plaintiff was physically struck by Defendant Blaylock after Mr. Galloway accused Plaintiff of disrupting the class. *See Verified Complaint*, ¶¶ 21-23. The cause of the alleged disruption was a female student. *Id* at. ¶ 24. The female student did not accompany Plaintiff to the office, nor did she receive any punishment. *Id.*

After arriving at the principal's office, Defendant Blaylock told Plaintiff he needed to be disciplined. *Id.* at ¶ 26. Defendant Blaylock instructed Plaintiff to sign an undisclosed piece of paper, but was never given a copy of the paper. *Id.*

Despite Defendant's claim that it is undisputed Plaintiff elected to be paddled, nothing could be further from the truth. **Plaintiff was never given a choice of punishment, but was paddled unilaterally**. *Id.* Defendant Blaylock told Plaintiff he was going to be paddled because Plaintiff's parents would be upset if he had an in school suspension on his academic record. *Id.* at ¶ 27. Plaintiff followed the instructions because Defendant Blaylock had taken away his choice. *Id.* at ¶ 29.

Defendant Blaylock struck Plaintiff twice with a paddle. *Id.* at ¶ 30. The blows to Plaintiff's buttocks were so severe that Plaintiff could not sit. *Id.* The paddling left visible bruising on Plaintiff's buttocks, made it painful for him to use the restroom and prompted Plaintiff to seek medical care.

Hitting a student so hard that two licks make it difficult to go to the bathroom is not a reasonable exercise of care, nor can it be said to be ordinary care as defined by statute and the courts. Furthermore, it is an issue of fact to be determined by a jury. *L.W.*, 754 So.2d. at 1142.

In administering corporal punishment, Defendants' bad faith, malice and wanton disregard for human rights is evident, as they chose to turn a blind eye to their own policies.

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." *Id.* at ¶ 51. TCSD policy, however, suggests Plaintiff should not have been paddled in the first place.

In regards to minor violations, the student handbook reads, "The classroom teacher should handle minor violations." *Id.* at ¶ 56. The policy continues, "The principal will notify the parent upon first referral. Each student will be given a copy of his/her referral to give the parent. This type of violations includes, but is not limited to... general disruptions and/or excessive distractions of other students." *Id.* at ¶ 57. **None of these procedures were followed** before a paddle was used to inflict harm on Plaintiff.

Plaintiff has provided facts demonstrating his paddling was not only a departure from school policy, but was motivated by his gender. If Defendants are to paddle students, thus physically striking them, they should at least follow their own policies and do so in a gender-neutral fashion. This was not done and there is a question of fact as to whether Defendants used ordinary care in disciplining Plaintiff. Immunity, therefore, does not attach.

2. Res judicata.

In attempting to prove Defendants' actions are devoid of bad faith, malice or wanton disregard of human rights, Defendants are attempting to bootstrap the State's criminal prosecution of Defendant Blaylock to Plaintiff's civil suit. Such tactics did not work for O.J. Simpson, nor should they work for Defendants.

Mississippi's criminal prosecution of Defendant Blaylock took place in a different court of law, involved different burdens of proof, addressed criminal sanctions and has no bearing on Plaintiff's civil case.

a. Res judicata is inapplicable to the case at bar.

Due to the fact criminal and civil courts are markedly different, the United States Supreme Court has long understood, "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata." *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938). Additionally, "[t]hat acquittal on a criminal charge is not a bar to a civil action ... arising out

of the same facts on which the criminal proceeding was based has long been settled." *Id.* (*citing Stone v. United States*, 167 U.S. 178, 188 (1897) and *Murphy v. United States*, 272 U.S. 630, 631-632 (1926)).

"The general rule of the common law is that a judgment in a criminal proceeding cannot be read in evidence in a civil action to establish any fact there determined. The reason for this rule is primarily that the parties are not the same, and, secondarily, that different rules of evidence are applicable." *Chantango v. Abaroa*, 218 U.S. 476, 481-82 (1910).

In the case at bar, the State of Mississippi, acting through the Tate County Prosecutor, brought charges against Corey Blaylock for assault. The case was aptly styled *State of Mississippi v. Cory Blaylock*, Cause No.: CR2009-163-BT. This was a criminal case that had criminal implications.

While it is true Plaintiff was involved in the suit, his involvement was that of a victim, not a party. Rather, criminal actions brought by the State are brought in the name of the people, for the people of Mississippi have a general public interest in ensuring school children are not assaulted and battered while attending school. Likewise, a civil lawsuit is customarily brought by a claimant with a personal interest in the outcome; thus the differences between the two courts.

Defendants are now trying to bootstrap Defendant Blaylock's criminal case to Plaintiff's civil case; a legal strategy that was rejected by the Supreme Court. When faced with a criminal matter in which the Defendant was found to be free of wrongdoing, such a determination does not impact a civil case when the case is "purely civil." *Stone*, 167 U.S. at 188.

b. Assuming arguendo Res Judicata applies Defendants are unable to show identity of the parties.

The requirements for both collateral estoppel and its sister doctrine res judicata are clearly outlined by Mississippi Courts.

"Generally, four identities must be present before the doctrine of res judicata will be applicable: (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person

against whom the claim is made...." *Dunaway v. W.H. Hopper and Associates, Inc.*, 422 So.2d 749 (Miss.1982). *See also Norman v. Bucklew,* 684 So.2d 1246, 1253 (Miss.1996).

The doctrine of res judicata is inapplicable in this case for one reason – the identity of the parties. Despite Defendants' claims, the parties in the criminal case were the State of Mississippi and Defendant Blaylock. The parties in this case are Cody Childress and Defendant Blaylock. The parties are distinctly different and "[t]he only common denominator [is] the defendant." *State v. Pittman*, 744 So.2d 781, 786 (Miss. 1999). An identical defendant, however, is not enough to satisfy the requirements of res judicata. *Id.*

In order for res judicata to apply to this case Plaintiff, who was the minor victim in the criminal proceeding, must have been a party to that criminal proceeding or in privity with the parties in that action. He was neither.

In determining privity Mississippi "follows the general rule that parties must be substantially identical for res judicata to apply." *Hogan v. Buckingham*, 730 So.2d 15, 18 (Miss.1998). "Thus, ' privity' 'is ... a broad concept, which requires us to look to the surrounding circumstances to determine whether claim preclusion is justified.'" *Id.* (*quoting Little v. V & G Welding Supply, Inc.*, 704 So.2d 1336, 1339 (Miss.1997)). The "surrounding circumstances" conclusively determine privity does not exists between the State of Mississippi and the Plaintiff.

In the criminal proceeding Defendant Blaylock's opponent was the State of Mississippi, not Plaintiff or his step-mother, Marie Childress. Plaintiff had no control over the prosecution of the criminal case and his role "at the [preliminary] hearing was simply that of a witness for the prosecution." *Duncan v. Clements*, 744 F.2d 48, 52 (8th Cir. 1984).

Plaintiff "could not call witnesses ... direct the examination of the State's witnesses ... [or] choose the counsel who represented the State at the suppression hearing." *Harris v. Jones*, 471 N.W.2d 818, 820 (Iowa 1991). *See also Smith v. New Dixie Lines,* 201 Va. 466, 472, 111 S.E.2d 434,

438 (1959) ("The parties in a criminal proceeding are not the same as those in a civil proceeding and there is a consequent lack of mutuality"). For this very reason, the 10th Circuit noted, "[W]e are aware of no case in which a person ... has been precluded from litigating an issue because of a ruling adverse to the state in a prior criminal prosecution." *Kinslow v. Ratzlaff*, 158 F.3d 1104, 1105-07 & n. 3 (10th Cir.1998).

Just because Plaintiff's step-mother was the adult complainant in the criminal matter does not automatically result in Plaintiff being in privity with the State of Mississippi. As explained by the Supreme Court of North Carolina:

> [T]he plaintiff mother swore out the warrant which initiated the criminal prosecution against the defendant and, presumably, was a witness for the State at the trial of that action. She was not, however, in control of the prosecution. The State was represented by its prosecuting attorney, not an attorney employed by the mother. She had no control of his handling of the trial ... As Justice Higgins observed in his dissent ... estoppels by judgment run against parties, not witnesses.

Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816, 114 (N.C. 1976). Plaintiff, thus, was not able to have his interests fully litigated and his involvement in the case as a witness is not sufficient to create a privity among himself and the State of Mississippi. [8]

More compelling, numerous courts are in complete agreement that police officers involved in a criminal proceeding are not barred from re-litigating an adverse outcome because they were not parties to the criminal proceeding. *See Jackson v. Ramundo*, No. 95 Civ. 5832, 1997 WL 678167, at * 4 (S.D.N.Y. Oct. 30,1997) (stating that collateral estoppel did not apply to section 1983 action because officer was not party or privy to criminal case). *See also Trujillo v. Simer*, 934 F.Supp. 1217, 1224 (D.Colo.1996) (holding that collateral estoppel was inapplicable because customs officers were not

[8] It is important to note that Plaintiff's involvement in the previous criminal matter is not determinative. "Although appellants were fully aware of the prior litigation, the appearance of one of them as a witness gave them no power to control any aspect of the case." *Lynch v. Glass*, 44 Cal.App.3d 943, 949 (1975). Additionally, "That plaintiff's counsel appeared on plaintiff's behalf when she testified as a pretrial witness (and also made such an appearance for another witness) gave them no ability to control or shape the judgment...." *Victa v. Merle Norman Cosmetics, Inc.*, 24 Cal.Rptr.2d 117, 19 Cal.App.4th 454, 468 (1993).

parties to the criminal case and were not in privity with the party); *Griffin v. Strong*, 739 F.Supp. 1496, 1502-03 (D.Utah 1990) (determining that officer was not a party to or in privity with the state in plaintiff's criminal case); *Brown v. City of New York*, 458 N.E.2d 1250, 1251 (1983) (holding that determination in criminal case on unlawfulness of plaintiff's arrest does not bar city from contesting the unlawfulness of arrest in subsequent civil action). The same reasoning applies to victims, as well.

Defendants, in claiming a res judicata defense, have not provided any case law demonstrating a victim in a criminal proceeding is barred from bringing a subsequent civil case solely because the State of Mississippi was handed an adverse ruling in state court. While an exact case matching this fact pattern was not found in Mississippi case law, the various cases cited above provide precedent for what common sense has long established.

Defendants subtly attempted to dodge this fatal bullet by claiming it was Plaintiff's mother, not the Tate County prosecutor, who was prosecuting Defendant Blaylock in state court. This is not true, as Plaintiff's step-mother did not have any authority to control the case, call witnesses, plan strategy, confront Defendant Blaylock or select the lawyer to prosecute.

Because Defendants have not produced legal precedent demonstrating a victim in a criminal proceeding is barred from litigating his interest in a subsequent civil proceeding, it is clear the doctrine of res judicata is inapplicable because the identity of the parties ***was not*** the same.

B. Defendants Walker and Blaylock are not entitled to Individual Immunity

Under Mississippi common law, government actors enjoy only a limited immunity from tort liability. *Evans v. Trader*, 614 So.2d 955, 957 (Miss. 1993). A government actor, therefore, has "no immunity to a civil action for damages if his breach of a legal duty causes injury and (1) that duty is ministerial in nature, or (2) that duty involves the use of discretion and the governmental actor greatly or substantially exceeds his authority and in the course thereof causes harm, or (3) the governmental actor commits an intentional tort." *Barrett v. Miller*, 599 So.2d 559, 567 (Miss.1992).

Defendants argue that they are immune from suit under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq. (2002) for "acts or omissions occurring within the course and scope of [his] duties." It is Plaintiff's position that allegation that the Defendants acted out of "malice" are not covered by the Mississippi Tort Claim Act. Under Miss. Code Ann. §11-46-7(2) reads, in part:

> For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

There is sufficient factual evidence to show Defendants acted out of malice, bad faith and/or wanton disregard of human rights.

Malice is defined as: (i) the intent, without justification or excuse, to commit a wrongful act; (ii) reckless disregard of the law or a person's legal rights; or (iii) ill-will; wickedness of heart. Black's Law Dictionary, 8th Ed. (1999).

Defendants' characterization of the evidence as "mere conclusory allegations" is disingenuous. Defendants claim Plaintiff's lawsuit presents only the allegation that the public official used more force than needed. This is not the case, as Plaintiff's case shows excessive force was used, but used for discriminatory and malicious reasons.

As stated *supra.*, this was not just a typical "punishment" executed by a school official. Defendant Blaylock, in striking Plaintiff, punished Plaintiff because of his gender. The female student who instigated the alleged disruption by possessing a digital camera was not punished, nor paddled by Defendants. Rather it was Plaintiff who was told to assume the position. Such an arbitrary decision clearly gives rise to malice, for it is wholly impermissible to punish a student based upon his gender.

Additionally, Defendant Blaylock failed to follow TCSD policy when he decided to physically strike Plaintiff. Defendant Blaylock, without providing Plaintiff an option, struck Plaintiff for merely disturbing the class. Such an offense, according to TCSD policy, does not warrant a paddling. And when Plaintiff's step mother complained, Defendant Walker turned a blind eye.

Plaintiff's facts, therefore, established that corporal punishment is administered in a discriminatory fashion, Plaintiff was a victim of discrimination and, when coupled with the fact TCSD policy was not followed, sufficient evidence to support the notion Defendants acted with malice. The fact that the punishment took place during school hours is irrelevant, as Defendant Blaylock's punishment exceeded the scope of his employment because the discriminatory motive, coupled with the failure to adhere to TCSD policy, rises to the level of malice and is sufficient to negate state law qualified immunity.

Finally, Plaintiff's allegations that the Defendants did act out of malice must be accepted as true to show that the Defendant's actions, under the Mississippi Tort Claims Act, were not taken within the course and scope of his employment duties. See Opinion of Judge Michael P. Mills in the case styled *Williams v. City of Horn Lake, Miss., et al.*, U.S.D.C. 2:04CV5.

C. Notice not required under *Patsy v. Board of Regents of Florida*

In general, exhaustion of state remedies "is **not** a prerequisite to an action under §1983," *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982) (**emphasis added**). *See also Felder v. Casey*, 487 U.S. 131, 147 (1988) ("plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court"); *Thornquest v. King* , 61 F.3d 837, 841 n.3 (11th Cir. 1995) ("a section 1983 claim cannot be barred by a plaintiff's failure to exhaust state administrative remedies with respect to an unreviewed administrative action"); *Woods v. Smith* , 60 F.3d 1161, 1165 (5th Cir. 1995) ("[E]xhaustion of state judicial or administrative remedies is not a prerequisite to the bringing of a section 1983 claim."); *Wilbur v. Harris*, 53 F.3d 542, 544 (2d Cir. 1995) (recognizing that exhaustion

of state administrative remedies is not required as a prerequisite to bringing an action pursuant to § 1983); *Hall v. Marion Sch. Dist. No. Two*, 31 F.3d 183, 190-91 (4th Cir. 1994) (recognizing that exhaustion of state administrative remedies is not a prerequisite to bringing a § 1983 action).

In the case at bar, Plaintiff has alleged a number of constitutional claims pursuant to § 1983, as well as a number of state tort law claims. Due to the emergency nature of his claims – Plaintiff is continually under the threat of excessive corporal punishment – Plaintiff filed for a preliminary injunction in federal court. Defendants, seeking to evade liability, argue Plaintiff should have first filed a ninety-day (90) notice of claim before being able to file his federal lawsuit. Such a standard would thwart the purpose of § 1983 and was repudiated by *Patsy* and her progeny.

Make no mistake, § 1983 is the engine moving Plaintiff's complaint and the state law claims are merely counterparts to the federal claims asserted. The state law tort claims are product of the federal violations; they are not independent issues requiring their own adjudication. *See Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Because of this fact, *Patsy* holds Plaintiff's federal claims should not be entangled with his supplemental state law claims as to negate the purpose of § 1983.

Patsy's rule permitting Plaintiff to by-pass state administrative requirements "makes particular sense where, as here, the state administrative procedures do not encompass many of the claims asserted by the plaintiff." *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215 (4th Cir. 1997). Plaintiff, therefore, was not under any obligation to give notice.

D. Mississippi Constitution Guarantees a Free, Adequate Public Education

"The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." MISS. CON. Art. 8, sec. 201.

Mississippi's law requires children to attend any public or nonpublic school from the ages of six to seventeen and punishes parents for non-compliance.. Miss. Code Ann. § 37-13-91 (1972).

Because Mississippi enacted a compulsory education law, the state's legislature has found the right to an education is fundamental.

This state's Supreme Court held, "the right to a minimally adequate public education created and entailed by the laws of this state is one we can only label fundamental. As such this right, to the extent our law vests it in the young citizens of this state, enjoys the full substantive and procedural protections of the due process clause of the Constitution of the State of Mississippi." *Clinton Municipal Separate School District v. Byrd*, 477 So.2d 237, 240 (1985).

Defendants claim corporal punishment does not transgress federal constitutional parameters and due to this fact there is no state constitutional infringement. Mississippi, however, does not give school officials a blank check regarding corporal punishment.

Miss. Code. § 37-11-57(2) requires that corporal punishment be "administered in a reasonable manner" and will hold a school official liable if he acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety." As stated *supra*, Plaintiff has claimed Defendants acted in bad faith and thus denied Plaintiff an adequate education in accordance with the Mississippi Constitution. Because Defendants have operated outside the scope of the law, a claim is cognizable under Mississippi state law.

ARGUMENT III

PLAINTIFF SUCCESSFULLY PLED A CLAIM UNDER TITLE IX – 20 U.S.C. § 1681

Plaintiff did not sue Defendants Walker and Blaylock under Title IX, but rather he sued Defendant TCSD. This concession concerning Defendants Walker and Blaylock in their individual capacity, by no means, impacts Plaintiff's claim against Defendant TCSD.[9] In this case, as detailed

[9] *Davis v. Monroe County Board of Education, et al.*, 526 U.S. 629 (1999) established that a school district may be held liable in damages, when it is "willfully indifferent" to student-on-student sexual harassment. *Doe v. Dallas Independent School District,* 153 F.3d 211 (5th Cir. 1998); *Murrell v. School District No. 1, Denver, Colorado*, 186 F.3d 1238 (10th Cir. 1999). See also, 34 CFR 106.8(a) (failure of a school district to correct a hostile environment limits a student's ability to benefit from

supra, Defendant TCSD had notice of the unequal treatment concerning corporal punishment – as evident by punishing Plaintiff and giving the female student who instigated the alleged altercation a free pass – and acted with deliberate indifference in responding to the charges of abuse.[10]

ARGUMENT IV

PLAINTIFF IS ENTITLED TO PUNITIVE DAMAGES AGAINST DEFENDANTS WALKER AND BLAYLOCK.

Plaintiff is not seeking punitive damages from TCSD under § 1983. Plaintiff is, however, seeking such damages from Defendants Walker and Blaylock because they are not entitled to raise the defense of qualified immunity. *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others").

CONCLUSION

For all the reasons stated herein, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied.

Respectfully submitted,

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educational programs). This standard has been applied in various factual contexts. *See, e.g., Vance v. Spencer County Public School District*, 231 F.3d 253, 259 (6th Cir. 2000) (school district liable under Title IX when it took no action in response to sexual harassment, with the exception of talking to offended students); *Doe ex rel. Doe v. Derby Board of Education*, 451 F.Supp.2d 438 (D. Conn. 2006) (Title IX is violated whenever federal funding recipient's response to nonsexual harassment amounts to "deliberate indifference" to discrimination); Whether there is "deliberate indifference" is a "fact based question" in which "bright lines are ill-suited;" *Doe*, 451 F.Supp.2d at 447;

[10] Notice to a school official who has the authority to take corrective action on behalf of a funding recipient is notice to the school district. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 277 (1988).

CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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