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

TREY CLAYTON, a minor, by and through his natural mother DANA HAMILTON,	)	
Plaintiff,	)	**Civil Action No.: 2:11-cv-00181**
v.	)	
TATE COUNTY SCHOOL DISTRICT, *et al.,*	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF AUTHORITIES
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS[1]

COMES NOW the Plaintiff, TREY CLAYTON,[2] a minor, by and through his natural mother, Dana Hamilton, 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:

[1] The language utilized by Defendants in the filing of their motion to dismiss is confusing. According to the ECF filing notification, Defendant filed a "MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM Based on Immunity, MOTION to Dismiss for Lack of Jurisdiction." While a reading of that caption would suggested Defendants have filed a motion to dismiss based on immunity, the body of the brief contains the following language: "All Defendants are entitled to dismissal of all federal claims asserted by TC as no claim upon which relief can be granted is stated under the First, Fourth, Eighth or Fourteenth Amendment." Such language is identical to FRAP 12(b)(6), which holds, a party may seek the dismissal of a complaint based upon a plaintiff's "failure to state a claim upon which relief can be granted." Things are further muddled by the fact that, in the body of their motion, Defendants' style the said motion as "MOTION TO DISMISS BASED ON IMMUNITY." Quite frankly, Plaintiff is left to try and decipher whether Defendants' motion to dismiss is solely based on immunity, FRCP 12(b)(6) or both. After a careful reading of Defendants' motion, it appears that two distinct motions are raised within the one filing. Defendants, in filing their motion, are asking for both a dismissal of the claims against Tate County School District based on Fed. R. Civ. P. 12(b)6) and well as a motion to dismiss the claims against the individual defendants based on Uniform Local Rule 16.1 (B). Plaintiff does not waive his argument that such a filing runs afoul of Uniform Local Rule 7(b)(2)(A)'s requirement that each affirmative defense by raised by a **separate** motion. Furthermore, Plaintiff has attached documents outside the pleadings. These documents are to be used to address, **solely**, the immunity portions of Defendants' motions. If the Court finds that such documents were attached erroneously, the proper response would be to require Defendants to file two separate motions, dismiss their motions outright or permit Plaintiff to amend his complaint to add the documents. *See Brown v. Texas A&M University*, 804 F.2d 327, 334 (5th Cir. 1986) (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)). It would be wholly improper for the Court to convert this motion into a summary judgment motion. Plaintiff is entitled to rely on documents outside the pleadings for the immunity based motion to dismiss, but not for the 12(b)(6) motion to dismiss. By combining the motions, Defendants placed Plaintiff in a delicate situation of forgoing evidence to avoid a summary judgment conversion or use the evidence and potentially be subjected to a summary judgment conversion. Therefore, Defendants should bear the brunt of the blowback.

INTRODUCTION

This case is not TCSD's first trip to the paddling rodeo. As Defendants noted in their moving papers, albeit incorrectly, this Court addressed the issue of corporal punishment and the Tate County School District (hereinafter "TCSD") in *Childress ex rel. Childress v. Tate County Sch. Dist.*, 2:10CV024-P-A, 2010 WL 5057463 (N.D. Miss. Dec. 6, 2010). This court **never** held, as Defendants articulated, "Mississippi's allowance of corporal punishment in public schools does not raise Constitutional concerns."[3]

Let's be clear. The order issued by this Court addressed issues raised by a qualified immunity motion.[4] It was under this framework that the claims against the individual defendants were dismissed. This Court **did not** address the constitutionality of corporal punishment as applied to TSCD and expressly ruled "Since the Complaint generally refers to "defendants" in its § 1983 claims, the court will, out of an abundance of caution, assume that these claims were also meant to be asserted against Tate County. Accordingly, these claims will remain pending."[5] Defendant incorrectly states the following 42 U.S.C. §1983 claims were dismissed against TCSD in *Childress* – (i) Failure to Train, (ii) Fourteenth Amendment Intrusion into Bodily Integrity, (iii) Fourteenth Amendment Procedural and Substantive Due Process, (iv) Eighth/Fourteenth Amendment Excessive Force, (v) Eighth/Fourteenth Amendment Cruel and Unusual Punishment, and (vi) Fourteenth Amendment Equal Protection. These claims, despite Defendants' argument **were not "previously found to fail as a matter of law on the same operative facts."**[6]

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[2] Defendant's concern over Federal Rule of Civil Procedure 5.2 is misplaced. While FRCP 5.2(a) holds a minor child should be referred to only by his initial in court documents, FRCP 5.2(h) permits a plaintiff to waive the Protection of Identifiers. ("A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal").

[3] *See* Defendant's Memorandum Brief in Support of Motion to Dismiss Based on Immunity, p. 3.

[4] *See Childress*, 2:10-cv-00024-WAP-SAA. Order on Motion to Dismiss, attached hereto as Exh. "A," p. 1-2. ("As to Tate County, the parties did not specifically argue the merits of the §1983 claims against Tate County"). In other words, this Court never addressed the merits of the claims against TSCD questioning the constitutionality of corporal punishment.

[5] *Id.*

[6] *See* Defendant's Memorandum Brief in Support of Motion to Dismiss Based on Immunity, p. 3.

Because the motion **presently** before this Court raised defenses under both qualified immunity **and** Rule 12(b)(6) and the *Childress* motion referred to by Defendants raised just a qualified immunity defense, **it is entirely disingenuous for Defendants to issue a blanket proclamation that this Court previously discount similar corporal punishment claims**.

Corporal punishment at TCSD is not just dangerous, as demonstrated by this case, it is constitutionality corrupt. While TCSD and the individual defendants downplay Plaintiff's claims, they systematically ignore the following facts – (i) TCSD does not have policies in place to protect students from arbitrary paddling and (ii) TCSD admitted it paddles male students on the constitutionally impermissible assumption that male students get into more trouble simply because they contain "testosterone." It is for these reasons, as well as those articulated *infra*., this Court should deny Defendants' motion to dismiss.

FACTUAL BACKGROUND

Plaintiff was a fifteen (15) year-old student enrolled in TCSD at the time a TCSD employee, Defendant Jerome Martin (hereinafter "Martin"), physically struck Plaintiff with a paddle causing him to faint and fall face first into a concrete floor.[7] The span between the paddling and Plaintiff's fainting was seconds.[8] When Plaintiff regained consciousness, he had a broken jaw and five (5) of his teeth were shattered.[9] He was in severe pain and he never made it back to class.[10] This occurred at approximately 9:30 am on or about March 10, 2011.[11] Defendants notified Plaintiff's mother of the need to pick him up at school, but they **never** informed her that her son was sitting, in severe pain, with a broken jaw and shattered teeth.[12] It was only when Plaintiff's mother arrived at the school

[7] *See* Complaint, ¶¶ 14, 31.
[8] *Id.*
[9] *Id.*, ¶ 32.
[10] *Id.*
[11] *Id.*
[12] *Id.*, ¶¶ 34-37.

that **Martin informed her that Plaintiff had passed out after he was paddled**.[13] Despite Plaintiff's severe injuries, Defendants never once thought it appropriate to call for medical assistance even though Plaintiff eventually had to have his jaw wired shut for two (2) weeks.[14]

In its moving papers, Defendants argued that the facts leading up to, during, and after the paddling are irrelevant. It does not take a rocket scientist to understand why Defendants want to ignore the facts stated *supra*. Defendants, however, are partially right on one observation – the facts concerning the paddling are irrelevant if corporal punishment was administered in a constitutional fashion. The buck, however, stops there for Defendant as the facts clearly demonstrate that corporal punishment was not, and cannot, be administered in a constitutional fashion.

Corporal punishment at TCSD is not just suspect, but constitutionally corrupt. The facts demonstrate that: (i) boys are disproportionately paddled over girls,[15] (ii) the national trend has abandoned corporal punishment a as valid form of student discipline,[16] (iii) Defendants were aware of the constitutional questions surrounding its corporal punishment policy,[17] (iv), TCSD's corporal punishment policy subjects students to the discretionary whims of TCSD officials,[18] (ii) TCSD has the institutionalized, and wildly unconstitutional, view that boys get into more trouble than girls because of testosterone[19] and (iii) TCSD employees do not receive training on how to administer corporal punishment.[20]

[13] *Id.*, ¶ 36.
[14] *Id.*, ¶ 34.
[15] *Id.*, ¶¶ 47-56.
[16] *Id.*, ¶¶ 49-50.
[17] *Id.*, ¶ 46.
[18] Walker depo., pp. 21-24.
[19] *Id.*, ¶ 57.
[20] Defendant did not produce a shred of evidence that would indicate its employees are sufficiently trained in how to administer corporal punishment.

TCSD does not have a policy that protects students from being paddled arbitrarily.[21] Under TCSD policy there are no circumstances is corporal punishment mandatory at any of the schools in TCSD. Instead, the principal has the sole discretion on when and how to paddle a student.[22] This discretion is so strong that a principal can override written TCSD policy to paddle a student.[23]

According to TCSD policy, corporal punishment should apply to students whom were found to commit minor offenses.[24] Corporal punishment is not a permissible punishment for those offenses deemed severe or worse[25]. TCSD employees, however, are not bound by this policy.[26] As explained by Gary Walker, who was testifying as TCSD's 30(B)(6) representative, "the principal has discretion" in applying the corporal punishment policy.[27] Put another way, when faced with a student who committed a severe violation, the principal can downgrade the "offense" to a minor violation and then proceed to paddle the student.[28] A principal is not bound by policy and can use his subjective biases in determining who gets hit with the paddle and who is spared.[29]

The paddler's ability to downgrade offenses obliterates any objectivity in the administration of corporal punishment because a principal, faced with a male student who committed a serious offense, can paddle that child by downgrading the offense and grabbing the paddle.[30] So, as is proven *infra*., if a paddler holds the discriminatory view that boys are more troublesome than girls, that paddler, under TCSD policy, can downgrade any offense by a male student in order to paddle

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[21] *See* Deposition of Gary Walker, attached to Response to Defendant's Motion to Dismiss as Exh. "B," pp. 10, 11, 12, 13, 17-20. Moreover, the depositions obtained in the *Childress* case are relevant to the case before this Court. As Defendant admitted in its moving papers, the facts in *Childress* are the "same operative facts" as the facts in this case. By Defendant's on admission, the *Childress* depositions – which involved the same school district and the same attorneys – are relevant.

[22] *Id.*

[23] *Id.*

[24] *See* TCSD Corporal Punishment Policy, attached to Plaintiff's Response to Defendant's Motion to Dismiss as Exh. "C." *See also* Handbook for Independence High School, attached to Plaintiff's Response to Defendant's Motion to Dismiss as Exh. "D."

[25] *Id.*

[26] *See* Walker depo., pp. 18-19.

[27] *Id.*, p. 19.

[28] *Id.*, pp. 18-20.

[29] *Id.*

[30] *Id.*

that boy and teach him a lesson. TCSD, therefore, cannot guarantee that corporal punishment is not employed on a discriminatory basis.[31]

Corey Blaylock (hereinafter "Blaylock"), a former principal with TCSD, admitted that this is how the principals viewed the corporal punishment policy.[32] Blaylock testified that the corporal punishment policy gives TCSD employees the discretion to override the punishment recommended by TCSD policy.[33] Parents don't even need to be involved.[34] This arbitrary flexibility permits principals to make an end run around TCSD policy.

TCSD's corporal punishment policy, therefore, amounts to nothing more than a principal's discretion. TCSD has no way of knowing whether the principals are following the policy because the very same principals have the arbitrary authority to deviate from policy; they have no way of curtailing any discriminatory motives.[35] Walker all but admitted the policy was arbitrary during his deposition. When asked whether students would be better protected if TCSD policy **required** a paddling for a minor violation, thus removing the ability of a principal's subjectivity from the equation, Walker stated, "possibly."[36]

The arbitrary nature of TCSD's policy is fundamental to this case because the school district, as well as those entrusted to physically strike students, hold a constitutionally perverse belief that boys typically get in more trouble than girls. In an interview with the *New York Times*, Malone, conservator of TCSD, went on the record stating boys are more troublesome than girls and that is the reason why male students are paddled more frequently than female students.[37] No evidence was

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[31] *Id.*, pp. 21-24.
[32] *See* Deposition of Corey Blaylock, attached to Plaintiff's Response to Defendant's Motion to Dismiss as Exh. "E," pp. 10-11.
[33] *Id.*
[34] *Id.*, p. 7.
[35] Walker depo., pp. 24-32.
[36] *Id.*, p. 28.
[37] *See* Frosch, Dan. *Schools Under Pressure to Spare the Rod Forever*. New York Times (March 29, 2011), attached to Plaintiff's Response to Defendant's Motion to Dismiss as Exh. "F." http://www.nytimes.com/2011/03/28/education/30paddle.html

offered to support the policy statement. Further, when questioned on Malone's statement, Walker could not rule out the possibility that gender bias, as articulated by Malone, does not shape a person's decision to paddle a student.[38]

Walker, nonetheless, defended Malone's assessment of corporal punishment. Testifying as the 30(B)(6) representative for TCSD[39], Walker stated boys get in more trouble because they have "testosterone."[40] Walker added that "[b]oys just tend to act out."[41] TCSD, nor any of its agents and/or employees, has produced a shred of evidence to support its constitutionally questionable conclusion that boys, due to biology, get in more trouble because of testosterone.

As indicated by the lack of sound policy and accountability, TCSD cannot state its employees are trained in the constitutional administration of corporal punishment. Pushing aside the fact that the institutionalized view that testosterone causes boys to be more unruly, Walker explained that TCSD does not provide its employees with formal training on how and when it is appropriate to paddle a student.[42] Blaylock further explained that TCSD employees did not receive substantive training in the administration of corporal punishment.[43] When asked what training he received on how to administer corporal punishment, Mr. Blaylock pointed to his father.[44] That is right, TCSD did not train Blaylock; his father did with an assist from some random school law classes he took while in college.[45] This, sadly, is the extent of TCSD's training policy on corporal punishment.

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[38] *Id.*, pp. 21-25.
[39] Defendants will argue that Mr. Walker's comments concerning testosterone were his **personal opinion** and not his **testimony as a 30(B)(6) representative**. This argument is without merit. While it is true that Mr. Walker was deposed as an individual and as a corporate representative on the day in question, the deposition transcript demonstrates that when he was asked about why TCSD took the position that boys got in more trouble than girls he was testifying in his capacity as the 30(B)(6) representative. *See* Walker depo., p. 21-28.
[40] Walker depo., p. 28.
[41] *Id.*
[42] *Id.*, p. 6.
[43] *See* Blaylock depo pp. 13-14
[44] *Id.*
[45] *Id.*

STANDARD OF REVIEW

Defendants brought a Motion to Dismiss based on Plaintiff's failure to state a claim and various immunity defenses. Because it is unclear exactly what framework Defendant is operating, Plaintiff, out of abundance of caution, will address both frameworks.[46]

A. Failure to State a Claim

A Rule 12(b)(6) motion is disfavored and is rarely granted.[47] To survive a Rule 12(b)(6) motion to dismiss, Plaintiff's Complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief."[48] "'[D]etailed factual allegations' are not required."[49]

However, the complaint must allege "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'"[50] "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[51] Thus, if a complaint contains factual allegations describing "how, when and where" the Plaintiff suffered injury, he will have nudged his claims "across the line from conceivable to plausible" and the complaint will satisfy the pleading standard detailed in *Iqbal*.[52] When faced with a Fed. R. 12(b)(6) motion to dismiss, the Court must conduct a two part analysis.[53] "First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions."[54] Additionally,

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[46] Plaintiff is by no means waiving any objections or rights by addressing both of Plaintiff's motions, nor is is attempting to convert the Rule 12(b)(6) motion into a summary judgment motion. Because Defendants should have filed two separate motions and because Defendants were not clear in this motion, if there is a defect the proper remedy should be to require Defendant to file two separate motions.
[47] *Sosa v. Coleman*, F.2d 991, 993 (5th Cir. 1981).
[48] *See* Fed.R.Civ.P. 8(a)(2).
[49] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).
[50] *Id.* at 1949 (*quoting Twombly*, 550 U.S. at 570).
[51] *Id.* at 1949 (*citing Twombly*, 550 U.S. at 556).
[52] *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3rd Cir. 2009) (*citing Twombly,* 550 U.S. at 570).
[53] *Id.* at 210.
[54] *Id.* at 210-211 (*citing Iqbal,* 129 S.Ct. at 1949).

"[T]he pleadings must have sufficient precision and factual detail to reveal that more than guesswork is behind the allegation."[55]

"Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'"[56] "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*, 129 S. Ct. at 1950. "In other words, the height of the pleading requirement is relative to circumstances."[57] In accordance with prevailing precedent, there are only three instances in which the Supreme Court has elevated the pleading standard in a case: (i) complexity,[58] (ii) immunity[59] and (iii) conspiracy[60].

Because this case does not fall within the three categories outlined[61], dismissal is appropriate only when the court accepts as true all the well-pled allegations of fact and "it appears beyond doubt that the [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief."[62] "If it is possible to hypothesize a set of facts consistent with the complaint that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate."[63]

Finally, even if Plaintiff's complaint is deficient, Plaintiff should be permitted to amend his complaint or it is reversible error.[64]

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[55] *Floyd v. City of Kenner*, 08-30637 (FED5). *See also Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc).
[56] *Id.* at 210-211 (*citing Iqbal,* 129 S.Ct. at 1950).
[57] *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009).
[58] *Bell Atl. Corp. v. Twombly*, 550 U.S. 554
[59] *Ashcroft v. Iqbal*, 129 S.Ct. 1937
[60] "Even before the Supreme Court's new pleading rule, as we noted, conspiracy allegations were often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough. *Cooney*, 583 F.3d 971.
[61] Even if this Court were to apply *Iqbal*, Plaintiff has pled facts sufficient to overcome the elevated pleading standard.
[62] *Thomas v. Smith*, 897 F.2d 154, 156 (5th Cir. 1989) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *See also Hishon v. King & Spaulding*, 467 U.S, 69, 73 (1984); *McLean v. International Harvester Co.,* 817 F.2d 1214, 1217 n. 3 (5th Cir. 1987); *Jones v. U.S.*, 729 F.2d 326, 330 (5th Cir. 1984).
[63] *Veazey v. Communication and Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).
[64] *Brown v. Texas A&M University*, 804 F.2d 327, 334 (5th Cir. 1986) (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

B. Qualified Immunity

The standard for qualified immunity 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."[65] 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.[66] In determining whether a right is clearly established, the courts begin with the assumption that the defendants knew all applicable law.[67]

Moreover, **the burden of pleading and proving a qualified immunity defense rests exclusively upon Defendant**.[68] 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."[69] 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."[70]

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,"[71] 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."[72] In determining whether Plaintiff has pleaded facts sufficient to prove a

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[65] *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982),
[66] *U.S. v. Lanier*, 520 U.S. 259, 137 L.Ed.2d. 432, 117 S.Ct. 1219, 1227 (1997).
[67] *Elder v. Hollo*way, 510 U.S. 510 U.S. 510, 127 L.Ed.2d 344, 114 S.Ct 1019 (1994).
[68] *Gomez v. Toledo*, 446 U.S. 635, 640, 64 L.Ed2d 572, 100 S/Ct. 1920 (1980) (**emphasis added**); *Harlow* at 815.
[69] *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992).
[70] *Id.*
[71] *Saucier v. Katz,* 533 U.S. 194, 200 (2001), overruled in part on other grounds by *Pearson v. Callahan*, 129 S. Ct. 808 (2009)
[72] *Pearson*, 129 S. Ct. at 816.

constitutional violation has occurred, the Court **must accept, as true, Plaintiff's allegations Defendants violated his constitutional rights**.[73]

Although Plaintiffs must point to analogous cases to demonstrate that a constitutional right is clearly established,[74] 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."[75] As the United States Supreme Court has 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."[76] 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."[77]

ARGUMENT

In responding to Defendants' motion, Plaintiff will first address the argument it has failed to state a claim for which relief can be granted and, after debunking that argument, will turn its attention to the immunity arguments.

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[73] *Morgan v. Swanson*, No. 09-40373, slip. Op. at 10 (5th Cir. Jun. 30, 2010) (**emphasis added**).
[74] *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993).
[75] See *Perry v. Sheahan*, 222 F.3d 309, 315 (7th Cir. 2000). 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 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)).
[76] *Eberhardt*, 17 F.3d at 1028.
[77] *Le Clair v. Hart*, 800 F .2d 692, 696 (7th Cir.1986) (citations omitted).

I. DEFENDANTS' ARGUMENT THAT PLAINTIFF FAILED TO STATE A CLAIM IS WITHOUT MERIT.

Defendant, making its failure to state a claim argument, divides Plaintiff's claims into two categories – (i) those it, incorrectly, states were previously addressed by the Court under "the same operative facts" and (ii) those for which there is no legal support and for which Plaintiff has not sufficiently pled a claim as a matter of law. These distinctions are largely irrelevant except for the fact Defendant has misread this Court's opinion in *Childress* to erroneously conclude, "This Court has already determined, on functionally identical facts, that Mississippi's allowance of corporal punishment in public schools does not raise Constitutional concerns." Defendant is dead wrong.

In making this wildly misleading statement, Defendants' relied on this Court's order in *Childress*. Make no mistake; this Court **never** made such a proclamation. While it is true this Court dismissed the individual capacity claims against the individual defendants named in *Childress* based on qualified immunity, it **denied** TCSD's motion to dismiss in regards to the following claims against the district – (i) Eighth/Fourteenth Amendment Excessive Force, (ii) Eighth/Fourteenth Amendment Cruel and Unusual Punishment, (iii) Fourteenth Amendment Procedural and Substantive Due Process, (iv) Fourteenth Amendment Intrusion into Bodily Integrity, (v) Fourteenth Amendment Equal Protection, and (vi) Failure to Train. These claims, despite Defendants' argument, **were not "previously found to fail as a matter of law on the same operative facts."**[78] In fact, the Childress-plaintiffs engaged in extensive discovery on those claims, discovery Plaintiff is using to defeat the motion that is presently before this Court.

Because Defendants adopted a false reading of the Court's order in *Childress*, they did not address, both legally and factually, the merits of all of Plaintiff's claims. Since Plaintiff anticipates Defendants doing so, improperly, in their rebuttal brief, Plaintiff will briefly address the merits of all claims pleaded in this lawsuit.

[78] *See* Order, attached as Exh. "A,", p. 3.

A. Eighth Amendment.[79]

In trying to dodge liability, Defendants, citing *Ingraham v. Wright*,[80] argue the protections afforded to prisoners under the Eighth Amendment are not applicable to students. Defendants' analysis, however, is woefully inadequate.

The *Ingraham* Court's decision stripping students of their Eighth Amendment rights was not then, and is not today, an order etched in stone. The Supreme Court made it clear that its ruling holding corporal punishment did not violate the Eighth Amendment was based on the social acceptance of corporal punishment at the time the case was decided and **the ruling would change if the social acceptance of corporal punishment changed**. The 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, and has been for more than a century. **Yet we can discern no trend toward its elimination**.[81]

Id., 430 U.S. at 660-661. Times, however, have changed and there is a clear trend towards corporal punishment's elimination.[82]

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

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[79] Plaintiff will spend the bulk of his argument addressing the cruel and unusual punishment clause of the Eighth Amendment. Plaintiff, however, does not abandon his claim under the excessive force clause. When addressing a claim of excessive force under the Eighth Amendment a plaintiff need only prove a state actor "maliciously and sadistically used force to cause harm, contemporary standards of decency always are violated." *Hudson*, 503 U.S.at 8 (*citing Whitley v. Albers,* 475 U.S. 312, 327 (1986)). In Plaintiff's case, he was paddled so severely it caused him to faint within a matter of seconds. He fell face first into a concrete floor. When he regained consciousness he had a broken jaw and shattered teeth. Mr. Martin, nor any other TCSD official called for medical help. Instead, Mr. Martin called Plaintiff's mother and told her she needed to come and get Plaintiff from school. Mr. Martin **never** told Plaintiff's mother of Plaintiff's serious injuries. Thus, not only was Plaintiff beaten to the point of fainting, he was forced to sit in agony with a broken jaw for over thirty (30) minutes because Mr. Martin never conveyed his injuries to his mother.

[80] 430 U.S. 651 (1977).

[81] *Id.*, 430 U.S. at 660-661

[82] *See* Complaint, ¶¶ 47-58.

maturing society."[83] "A penalty … permissible at one time in our Nation's history is not necessarily permissible today." *Id. Ingraham's* precedent conditioned corporal punishment's constitutionality on the national, not regional, acceptance of the punishment. It clearly recognized that social norms could evolve in such a way that rendered corporal punishment a cruel and unusual punishment.

Since *Ingraham* was decided thirty-two (32) years ago, statistics and cultural acceptance has changed. A year after the Court ruled in *Ingraham*, 1.4 million students were subjected to corporal punishment.[84] Three decades later, just 223,190 students were at the wrong end of the paddle.[85] Further, just 21 states have laws permitting corporal punishment, while the vast majority of states have enacted laws banning its use or have denied educators the right to use the discipline.

The result is corporal punishment has become a marginalized and regional practice with forty (40) percent of corporal punishment limited to Mississippi and Texas.[86] When Arkansas, Alabama and Georgia are added to the mix, those five states are responsible for seventy-five (75) percent of the nation's corporal punishment.[87] In other words, the corporal punishment is no longer socially acceptable for the nation.

Even more disturbing, there are zero guidelines governing corporal punishment in Mississippi.[88] 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 or because they are unruly boys. Moreover, TCSD's policy concerning corporal punishment is wildly arbitrary.[89] Instead of requiring paddling for students who committed minor offenses, the policy permits the

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[83] *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.'").
[84] Complaint, ¶ 72.
[85] *Id.*
[86] *Id.*, ¶ 49.
[87] *Id.*
[88] *Id.* at ¶ 3.
[89] *See* Exh. "D." *See also* handbook for Independence High School, attached to Plaintiff's Response to Defendants' Motion to Dismiss as Exh. "E."

paddler to inject his own subject biases into the decision-making process, thus corrupting the policy. 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."[90]

This much is true in Plaintiff's case. Plaintiff has demonstrated TCSD's corporal punishment policy is arbitrary and susceptible to discriminatory animus. Principals have complete discretion to ignore school policy and administer corporal punishment.[91] For example, TCSD policy holds that corporal punishment is only applicable to minor violations.[92] The application, however, is not mandatory. Instead, a principal faced with a student believed to have committed a minor violation has the sole discretion to pick which form of discipline is administered. In other words, a principal has the sole discretion to chose, subject to his/her biases, to paddle a student. Because such discretion rests with the principal and is not uniformly applied to all students, there is compelling evidence, based on the statistics Plaintiff provided and the fact TCSD believes testosterone causes boys to misbehave more than girls, corporal punishment is not just cruel and unusual, but applied in a discriminatory fashion.

It is clear *Ingraham* opened the door for corporal punishment to one day be deemed unacceptable.[93] Statistical evidence shows this day has arrived for TCSD and, because such a determination is dependent on societal norms, such a question is for a jury, not a judge.

B. Fourteenth Amendment.

Plaintiff brought the following Fourteenth Amendment claims: (i) Equal Protection, Procedural and Substantive Due Process, and (iii) Intrusion into Bodily Integrity.

[90] *Ingraham*, 430 U.S. at 691 (WHITE, J., *dissenting*).
[91] *See* Exhs. "D & E."
[92] *See* Exh. "E."
[93] *Hope*, 536 U.S. at 741

1. Equal Protection.[94]

"'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"[95] 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."[96] A separate showing of animus or malice is not a necessary element of an equal protection claim. Discrimination is unlawful when there is no rational relation between a discriminatory classification and a legitimate government objective.[97]

Defendants have admitted that they paddle boy students at a rate disproportionate to female students. When asked about this gender gap, Malone stated boys get into more trouble than girls. Malone did not provide evidence to support this claim.[98] Defendants are attempting to downplay Malone's statement, but what else can they do? Malone – not speaking as a private citizen by as conservator of TCSD – told a national audience that TCSD justifies paddling because boys just get into more trouble. **This statement is a disaster for TCSD and kills any chance of a 12(b)(6) motion to dismiss because Plaintiffs have the right to conduct discovery on that issue**

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[94] 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.

[95] *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (*quoting Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)).

[96] *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).

[97] *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). *See also Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 374 (2001)(Kennedy, J., concurring)(observing that invidious discrimination can result from "simple want of careful, rational reflection").

[98] *See* Complaint, ¶¶ 47-58. *See also* Walker depo., pp. 27-30 and Frosch, Dan. *Schools Under Pressure to Spare the Rod Forever.* New York Times (March 29, 2011). http://www.nytimes.com/2011/03/28/education/30paddle.html

because, to date, Defendants have not produced any evidence in their core disclosures to support the conclusory statement that boys are more troublesome than girls. This conclusion, made without the benefit of objective data, demonstrate Defendants implement their corporal punishment "policy" through a sexist lens.

Men are a protected class under the Equal Protection Clause.[99] "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination."[100] Such discrimination, however, is not always flagrant and insidious but can take the form of a seemingly innocent statute, law or policy.[101] 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.[102] If the impact is not glaring, the court than has to determine whether there is a discriminatory purpose.[103]

It is pivotal to note a protected class need not be totally excluded in order to demonstrate an equal protection violation.[104] Just because twenty-five percent (25%) of females were paddled does not mean an equal protection violation is absent. Such an disproportionate impact can, and usually is, found to be discriminatory.

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.[105] It was

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[99] *See Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma statute imposing gender-based differentials in regulating the sale of alcoholic drinks). *See also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (holding a state school could not exclude males from enrolling in a state-supported nursing school).

[100] *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)).

[101] *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[102] *Id.*, 118 U.S. 356.

[103] *Washington v. Davis*, 426 U.S. 229 (1976).

[104] 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).

[105] *Feeney*, 442 U.S. at 259.

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 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."[106] 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**.[107]

In the case at bar, the students paddled in Mississippi paddled **are** substantially male, while those students not paddled are female.[108] 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.[109] This is a key

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[106] *Feeney*, 442 U.S. at 275.
[107] *Id.* (**emphasis added**).
[108] *See* Complaint, ¶¶ 47-58.
[109] 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 ¶¶ 47-58. 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.*.

distinction that proves the paddling males over females cannot be rationally explained; especially in light of the fact TCSD credits testosterone as the reason why more boys are paddled over girls.[110]

Defendants attempt to undermine Plaintiff's claim by arguing his collection of statistics that amount to nothing more than apples and oranges. Defendants further argue the fact that twenty-five percent (25%) of female students were paddled tank Plaintiff's claim. This is not true. 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 and school desegregation, dictates the statistical evidence is sufficient to prove an equal protection violation.[111]

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's explanation of "testosterone" falls fatally short of rationally explaining the 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. [112] The statistics explained *supra* are clear: male students receive seventy-five (75) percent of the corporal punishment administered in

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[110] Walker depo., p. 28.

[111] 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.

[112] *Arlington Heights*, 429 U.S. at 266-68.

Mississippi even though they represent just a slim fifty-one (51) percent majority of Mississippi students.[113] Such statistics compliment the notion gender classifications suggest a social acceptance to subject males to corporal punishment instead of females.

Assuming arguendo that statistics are not enough, Plaintiff has compelling facts that put a not-so-pleasant spin on paddlings in Mississippi and, more importantly TCSD. In an interview with the *New York Times*, Malone went on the record stating boys are more troublesome than girls, thus creating the disproportionate paddlings.[114] No evidence was offered to support the policy statement. Moreover, this statement was made to the *New York Times* **after** Plaintiff was paddled. The fact that Malone spoke to the media after the incident and maintained his gender biased view of corporal punishment is direct evidence that Malone held such a view, and enforced it, when Plaintiff was paddled on March 10, 2011.[115] It gives this Court a window into Malone's motivations and cuts any attempt to dismiss this claim off at the knees and demonstrates, as required by *Feeney*, it harbored discriminatory animus towards male students.

The fact is TCSD sees boys as more troublesome than girls. This is troubling because TCSD does not have a policy which protects the rights of students. Instead, any principal has the complete discretion to administered corporal punishment even if policy says otherwise. So, if a male student is found committing a "severe violation" – a violation in which corporal punishment is not an option – the principal can "downgrade" the offense to a minor violation and proceed to paddle the student. This is grossly arbitrary and open to gender animus. TCSD already told the world that it holds the unsubstantiated, discriminatory belief that boys get into more trouble than girls and, due to the fact its policy is subject to the discretion of the principals, it cannot affirmatively state officials paddling

[113] Complaint, ¶¶ 47-58.
[114] *See* Frosch, Dan. *Schools Under Pressure to Spare the Rod Forever*. New York Times (March 29, 2011), attached to Plaintiff's Response to Defendant's Motion to Dismiss as Exh. "F." http://www.nytimes.com/2011/03/28/education/30paddle.html
[115] Complaint, ¶¶ 28, 32.

students are without the stain of discriminatory animus. Moreover, the fact that Defendant holds such animus is evidence they paddle "unruly" boys more often in order to teach those boys a lesson.

Moreover, Defendants argue that Plaintiff must point to similarly situated female students. Plaintiff has done so with his empirical data. Because TCSD's corporal punishment policy subject to the discretion of TCSD officials and because TCSD is on the record making discriminatory remarks, such data provides context.

2. Substantive & Procedural Due Process.

"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.'"[116] 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."[117] "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."[118]

Protections of due process violations, however, are not merely confined to the procedural, but encompass the substantive, as well.[119] Included in the substantive rights protected by the Due

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[116] *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)).

[117] *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)).

[118] *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)).

[119] *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992) "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).

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."[120]

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."[121] Thus, "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.[122]

The crux of Plaintiff's legal theory is simple – Defendants singled Plaintiff out for punishment because of his gender, ignored school policy in punishing Plaintiff, arbitrarily decided to physically strike Plaintiff, and disregarded Plaintiff's substantive due process right "to engage in any of the common occupations of life." As stated *supra*., TCSD's policy is discretionary and arbitrary.[123] Officials at TCSD have unfettered discretion in applying corporal punishment. Even when a student has committed a serious violation – a violation in which TCSD policy states corporal punishment is not warranted – the official can downgrade the violation to a minor one and proceed to paddle the student.[124] This is troublesome because TCSD maintains the unfounded policy that (i) boys tend to act out and get into more trouble than girls.[125] When the arbitrary nature of TCSD's policy is combined with its admittedly gender-bias attitude towards discipline, the Court is faced with a Fourteenth Amendment violation.

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[120] *See Doe*, 15 F.3d at 450. 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)
[121] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
[122] *Roth*, 408 U.S. at 571 (citations omitted).
[123] *See* Exhs. "D-F."
[124] *Id.*
[125] *Id.*.

3. Bodily Integrity.

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."[126] 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 Catch-22 for plaintiffs; a fatal flaw recognized by Justice White in his *Ingraham* dissent.[127] The same can be said of Plaintiff's case.

C. Failure to Train.

A plaintiff seeking to impose §1983 liability on local governments must prove that their injury was caused by "action pursuant to official municipal policy," which includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.[128] A local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for §1983 purposes, but the failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."[129] Deliberate indifference in this context requires proof that city policymakers disregarded the "known

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[126] *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).

[127] "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." *Ingraham*, 430 U.S. at 693-95 (WHITE, J., *dissenting*).

[128] *See Monell v. New York City Dept. of Social Servs* , 436 U.S. 658 (1978).

[129] *See Canton v. Harris*, 489 U. S. 378 (1989)

or obvious consequence" that a particular omission in their training program would cause city employees to violate citizens' constitutional rights.[130]

As stated *supra*., Plaintiff has shown his Eighth and Fourteenth Amendment rights were violated when he was paddled in accordance to TCSD policy and, therefore, a constitutional violation occurred. That being said, TCSD has not produced a shred of evidence in its core disclosures to demonstrate it adequately trained its employees. Plaintiff is entitled to discovery on these issues.

Because TCSD did not train its employees, coupled with the discriminatory admission to the nation that TCSD's application of corporal punishment to boys is based on out-dated stereotypes, Plaintiff was injured. As further evidence TCSD does not train its employees, Plaintiff was permitted to sit in school for thirty (30) minutes with a broken jaw and shattered teeth.[131] Mr. Martin, nor any other TCSD employee, called for medical help. When Martin called Plaintiff's mother to come retrieve Plaintiff, he never told her about her son's dramatic injuries.

There is evidence of a pattern of constitutional violations similar to those Plaintiff suffered caused by this grossly inadequate training. Throughout their motion papers, Defendants, albeit incorrectly, direct this Court to *Childress*. Ironically, by pointing the Court to *Childress*, which Defendants admitted raised claims "on the same operative facts," Defendants acknowledge they were (i) put on notice their practice was constitutionally questionable and (ii) had a similar incident in which their paddling policy appeared to be inadequate.[132]

D. First & Fourth Amendments.

Plaintiff agrees to dismiss his First Amendment claim brought under the Establishment Clause and his Fourth Amendment Clause brought under the Search & Seizure Clause.

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[130] *See Board of Comm'rs of Bryan Cty. v. Brown*, 520 U. S. 397 (1997).
[131] Complaint, ¶¶ 33-38.
[132] The paddling in *Childress* occurred prior to the paddling in this case.

E. Assuming Plaintiff has not pled his claim sufficiently, this Court should grant him leave to file an amended complaint.

The Fifth Circuit stated, "Unless we have search every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that 'even the most sympathetic reading of the plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability,' we must remand and permit plaintiff to amend [her] claim." *Brown v. Texas A&M University*, 804 F.2d 327, 334 (5th Cir. 1986) (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

II. DEFENDANTS' IMMUNITY ARGUMENTS ARE WITHOUT MERIT.

Defendants raised the following defenses for individual Defendants Malone and Martin based on immunity: (i) qualified immunity, (ii) Eleventh Amendment immunity and (iii) state law immunity.

A. Qualified Immunity.

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"[133] 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."[134] Because Argument I of this brief established facts demonstrating Plaintiff's Eighth and Fourteenth Amendment rights were violated, he, in the name of judicial economy, incorporates the relevant parts of Argument I into this section of his brief.

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. Likewise, the actions

[133] *Saucier v. Katz*, 533 U.S. 194, 200 (2001), overruled in part on other grounds by *Pearson v. Callahan*, 129 S. Ct. 808 (2009).
[134] *Pearson v. Callahan*, 129 S. Ct. at 816.

of Defendants Malone and Martin were not objectively reasonable as a result of: (i) Martin first departing from policy by paddling Plaintiff, (ii) Martin striking Plaintiff to the he fainted, (iii) Malone's institutionalized view of encouraging the paddling of boys because of their gender, (iv) Malone's failure to properly train his employee after he was put on notice, thanks to Childress, that corporal punishment at TCSD was potentially constitutionally corrupt. Thus, such an issue of reasonableness must be decided by a jury.[135]

In arguing for qualified immunity concerning Equal Protection, Malone and Martin make a stunning, if not constitutionally reckless argument. Malone and Martin argue "[n]o decision from Mississippi District Courts, the Fifth Circuit or the Supreme Court or other federal circuits have determined that the consideration of gender in the use of constitutionally is constitutionally prohibited …." Put simply, because no other school district was stupid enough to paddle children based on gender, qualified immunity must attach to Malone and Martin's actions. Such an argument is not legally sound.

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."[136] 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.[137] Courts, therefore, have understood, "The

[135] *See Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998); *Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993).
[136] *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Casteel* 3 F.3d at 1053).
[137] *See, e.g., K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

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.'"[138]

Moreover, as demonstrated *supra*., men enjoy the right of equal protection.[139] This protection extends to students, as Mississippi University for Women was forced to admit a male student. **Under Defendant's rationale, it is wrong for a Mississippi college to base its admissions on gender, but a Mississippi elementary school can base its decision to lay hands on a child on gender**. The fact that no other district was reckless enough to paddle based on gender does not mean the law was not defined sufficient enough for state actors to be put on notice. First, the absence of case law merely suggests no other school district was so reckless as to blatantly paddle students based on gender. Second, 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."[140]

Moreover, Malone argues his damning comments to the *New York Times* should not be considered because "he spoke to the media after the incident."[141] The fact that he spoke to the media after the incident and maintained his gender biased view of corporal punishment is direct evidence that Malone held such a view, and enforced it, when Plaintiff was paddled on March 10, 2011.[142] It gives this Court a window into Malone's motivations. The fact he may not have known Plaintiff would be paddled is irrelevant because he, as the conservator, sets the tone for TCSD. He

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[138] *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)).

[139] *See Craig v. Boren*, 429 U.S. 190 (1976) (invalidating an Oklahoma statute imposing gender-based differentials in regulating the sale of alcoholic drinks). *See also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (holding a state school could not exclude males from enrolling in a state-supported nursing school).

[140] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks and citations omitted).

[141] P. 14

[142] Complaint, ¶¶ 28, 32.

clearly admitted he held a gender biased view of corporal punishment and it is not a leap of faith to say others, following his orders, focused on paddling boys over girls.

When this Court considers TCSD's policy on corporal punishment – which gives complete control to the official paddling the student – and the "testosterone" mentality of those who paddle, there is sufficient evidence to suggest Plaintiff's gender rights were clearly established and violated. For these reasons, the doctrine of qualified immunity should not attach to Malone and Blaylock.

2. Official Capacity Claims/Immunity.

Malone argues he is an agent of the State of Mississippi and entitled to Eleventh Amendment immunity in regards to Plaintiff's **official** capacity claims.[143] Plaintiff makes the good faith argument that *Hans v. Louisiana*, 134 U.S.1 (1890) improperly expanded Eleventh Amendment immunity.

In *Hans* the Supreme Court expanded the Eleventh Amendment's conveyance of sovereign immunity and held a U.S. citizen of a state cannot sue that same state in federal court. By barring such a lawsuit, the Supreme Court relied on, and continues to rely on, "flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect."[144]

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[145] Thus, the plain text of the Amendment seeks to bar "only federal actions brought against a State by citizens of another State or by aliens."[146] By interpreting the Eleventh Amendment's grant of sovereign immunity to extend to a resident citizen

[143] The Eleventh Amendment does not bar the Plaintiff's Section 1983 claims brought against Defendant Malone in his individual capacity.
[144] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 248 (1985) (BRENNAN, J., dissenting).
[145] U.S. Const., Amendment Eleven
[146] *Welch v. Texas Department of Highways*, 483 U.S. 468, 504 (1987) (BRENNAN, J, dissenting).

of a state suing his home state in federal court to vindicate a deprivation of civil and constitutional rights, the Court has skewed the delicate balance between state and federal power.[147]

Because the Court has relied on a "misguided history" of the Eleventh Amendment the essential function of the federal courts – to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land – is undermined.[148] Even further, federal jurisprudence has developed a "complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur" and such rules, as evidenced by this case, creates "manifest injustices."[149]

3. State Law Immunity.

Defendants argue they are entitled to complete immunity under state law. Defendants Malone and Martin also argue they are entitled to individual immunity under state law. Both arguments fail as a matter of law.

a. Complete 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).

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."[150] 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

[147] *Atascadero State Hospital*, 473 U.S. at 255.
[148] *Id.* at 256.
[149] *Id.*
[150] *L.W. v. McComb Separate Municipal School District*, 754 So.2d 1136, 1142 (Miss. 1999).

to provide a safe school environment."[151] 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**.[152]

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[153], "it only seems logical that the state should then require school personnel to use ordinary care in administering our public schools."[154]

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).[155]

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

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[151] *Id.* at 1143 (*citations omitted*).
[152] Miss.Code Ann. § 37-9-69 (**emphasis added**).
[153] *See* Miss. Code Ann. § 37-13-91 (1972).
[154] *L.W.*, 754 So.2d. at 1142.
[155] 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."

only if they used ordinary care in controlling and disciplining their students." [156]Additionally, "The issue of ordinary care is a fact question."[157]

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

How Defendants handled Plaintiff's paddling provides this Court a window to their world. Plaintiff was paddled so violently that he passed out within **seconds** of the paddle leaving his backside.[158] Defendant tries to sneak in their version of the facts by arguing the time span between the paddling and fainting was fifteen (15) minutes, but, for the purposes of this motion, Defendants facts are as useful as the Euro. The fact is Plaintiff was paddled, passed out, broke his jaw, and shattered his teeth.[159] Defendants' response? Let Plaintiff sit in agony for thirty (30) minutes, forgo a call for medical help and nonchalantly tell Plaintiff's mother to come pick him up.[160] This is not ordinary care.

Defendants further evidenced bad faith when they admitted they paddle more boys than girls simply because boys have testosterone.[161] Such an idea is based upon the sexist, outdated idea girls are made of "sugar and spice and all things nice," while boys are made of "snips and snails, and puppy dogs tails." Their discriminatory attitude towards male students is evidence of bad faith.

Defendants cannot claim ordinary care when they have (i) a policy that amounts to nothing more than the unfettered discretion of the principal and (ii) have gone on the record stating that boys get in trouble more than girls because they have "testosterone." This is not ordinary care.

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[156] *L.W.*, 754 So.2d. at 1142.
[157] *Id.*
[158] Complaint, ¶¶14, 31.
[159] *Id.*, ¶ 32.
[160] *Id.*, ¶¶ 34-37.
[161] Walker depo. p. 28.

b. Individual Immunity for Malone & Martin.

Under Mississippi common law, government actors enjoy only a limited immunity from tort liability.[162] 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."[163]

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.[164]

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. Remember this – Plaintiff was paddled

[162] *Evans v. Trader*, 614 So.2d 955, 957 (Miss. 1993).
[163] *Barrett v. Miller*, 599 So.2d 559, 567 (Miss.1992).
[164] Black's Law Dictionary, 8th Ed. (1999).

and within **seconds** he fainted.[165] When he regained consciousness he had a broken jaw, shattered teeth and was bleeding.[166] Martin never once called for medical help. Instead, he called Plaintiff's mother and told her to come retrieve her son.[167] Martin **never** informed Plaintiff's mother that her son was seriously injured.[168] Instead, Martin let Plaintiff sit, agonizing over his broken jaw, in the school.[169] This is not the conduct of a man acting in good faith.

Malone also demonstrated malice. He has stated that boys get in more trouble than girls.[170] He cannot defend that statement with facts, so Walker explained that reason boys get in more trouble is because they have testosterone.[171] Walker was speaking as the TCSD representative.[172] This evidence, coupled with the statistical data showing boys get paddled more than girls in Mississippi, demonstrated a discriminatory animus and, therefore, malice held by Malone and Martin.

When Martin's actions are coupled with Malone's prejudice, the picture becomes clear. Boys are singled out for paddling because of the outdated belief they boys will be boys. A jury, therefore, could find that the Martin and Malone acted out of malice. Further, Plaintiff's allegations that the Defendant 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.[173]

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[165] Complaint, ¶ 32.
[166] *Id.*, ¶¶ 34-36
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *See* Frosch, Dan. *Schools Under Pressure to Spare the Rod Forever*. New York Times (March 29, 2011), attached to Plaintiff's Response to Defendant's Motion to Dismiss as Exh. "F." http://www.nytimes.com/2011/03/28/education/30paddle.html
[171] Walker depo. p. 28.
[172] Defendants will argue that Mr. Walker's comments concerning testosterone were his **personal opinion** and not his **testimony as a 30(B)(6) representative**. This argument is without merit. While it is true that Mr. Walker was deposed as an individual and as a corporate representative on the day in question, the deposition transcript demonstrates that when he was asked about why TCSD took the position that boys got in more trouble than girls he was testifying in his capacity as the 30(B)(6) representative. *See* Walker depo., p. 21-28.
[173] 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.

III. PLAINTIFF IS ENTITLED TO PUNITIVE DAMAGES AGAINST DEFENDANTS MALONE AND MARTIN.

Plaintiff is not seeking punitive damages from TCSD under § 1983. Plaintiff is, however, seeking such damages from Defendants Malone and Martin because they are not entitled to raise the defense of qualified immunity.[174]

CONCLUSION

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

Respectfully Submitted,

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[174] *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").

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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