CASE NO._____

SUPREME COURT OF THE UNITED STATES

S.O., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON B.O.
Petitioner,
vs.
HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ASSISTANT PRINCIPAL MICHELLE RAY, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Abby Robinson and Associates Law Firm PLLC.
(Bar # 312964)
227 E. PEARL STREET
JACKSON, MISSISSIPPI 39201
(601) 321-9343
Email: arobinsonlawfirm@yahoo.com
secondary Email: abby@askabbylaw.org
Counsel for S.O. and B.O. a minor

QUESTIONS PRESENTED

1. Whether Fifth Circuit has again refused to follow the United States Supreme Court Per Curiam as found in ***Charles Earl Davis v. United States,*** cites as 589 U.S. decided March 23, 2020.

2. When Fifth Circuit refuse to follow the United States and almost every other Court of Appeals in conducting a plain-error review of unpreserved argument, including unpreserved factual arguments is in line with the U.S. Supreme Court holding in ***United Sates v. Gonzalez-Castillo,*** 562 F. 3d 80, 83084 (CA12009); ***United States v. Romeo***, 385 Fed. App. 45, 49-50 (CA2 2010); ***United States v. Griffiths,*** 504 Fed. App. 122, 126127 (CA3 2012); ***United States v. Wells,*** 163 F. 3d 889, 900 (CA4 1998); ***United States v. Sargent***, 19 Fed. App. 268, 272 (CA6 2001) (kper curium); ***United States v. Sahakian,*** 446 Fed. App. 861, 863 ((CA7 2011); ***United States v. Thomas,*** 518 Fed. App. 610, 612-613 (CA11 2013) (per curium); ***United States v. Saro,*** 24 F. 3d 283, 291 (CADC 1994).

3. Whether Fifth Circuit outlier practice of refusing to review certain unpreserved factual arguments for plain error warrants review of a writ certiorari.

PARTIES

Petitioners are S.O. and minor, B.O.
of Counsel: Abby Robinson esq.
Abby Robinson & Associates Law Firm PLLC.
227 E. Pearl Street
Jackson, Mississippi
Ph. 601-321-9343
Fax. 601-487-6326

Respondents are Hinds County School District et.al
Horton Coker and Bell Law Firm
Christy Vinson Malatesa, James Weems
4400 Old Canton Road,
Suite 400
Jackson, Mississippi 3921
Phone: 601-969-7607
Facsimile: 601-969-1116

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly owned corporation owning ten (10) percent or more of stock.

JURISDICTIONAL STATEMENT

Petitioners S.O. and minor son B.O., motion for en banc rehearing was denied on March 20, 2020. Additionally, S.O. and minor son B.O.'s motion to stay the mandate pending potion for writ of certiorari was denied on April 13, 2020. As a result, S.O. and minor son B.O. invokes this Court's jurisdiction under 28 U.S.C. §1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Fifth Circuit Court of Appeals judgment. S.O. and minor son B.O. also invokes this court's extended time to file under the COVID-19 pandemic.

TABLE OF CONTENTS

1. S.O. the mother of minor B.O. sued Hinds County School District for the unwarranted touching of her minor son, B.O., in his penis privacy area. See Amended Complaint "ROA.19-60650.60." The Fifth Circuit Panel, like the district court committed a plain error, when in reading the facts as sworn in affidavits, depositions and pleadings, ignored facts material to the minor's claim. In fact, the Panel appear to have reached so far beyond the facts of this case, and began a theory that was not applicable to this case.

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but uno probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

PETION FOR WRIT OF CERTIORARI

Petitioners S.O. and B.O. respectfully petitions this court for a writ of certiorari to review the judgment of the United States Fifth Circuit of Appeals.

OPINIONS BELOW

The decision by the Fifth Circuit Court of Appeals denying Petitioners appeal of the district court is reported as S.O., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON B.O., Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ASSISTANT PRINCIPAL MICHELLE RAY, IN HER INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants- Appellees

On Appeal from the United States District Court, Southern District of Mississippi (Northern (Jackson) No. 3:17 - CV - 00383,

STATEMENT OF THE CASE

Just this year on March 23, 2020 this Court ordered that Fifth Circuit practice of refusing to review certain unpreserved factual arguments for plain error was erroneous, ***Charles Earl Davis v. United States,*** cites as 589 U.S. decided March 23, 2020. Similarly, this case presents the question of whether this Court will require Fifth Circuit to again cease from refusing to review certain factual arguments for plain error.

On April 1, 2020, this Court's Panel denied Plaintiff's/Appellants petition to rehear en banc. Additionally, April 7, 2020, this Court's same Panel, denied Petitioners motion for an Oral argument, as well as Petitioners motion to vacate and remand its opinion. Petitioner sought the Oral argument and/or vacate and remand because the United States Supreme Court issued, an on point Per Curiam in ***Charles Earl Davis v. United States,*** cites as 589 U.S. decided March 23, 2020. Therefore, to preserve the status quo of the U.S Supreme Court's holdings ordering the Fifth Circuit from ignoring the United States Supreme Court's on point opinions regarding Fifth Circuit's refusing to review certain facts of plain error by federal district courts as well as unwarranted searches of minors, to protect the U.S. Constitution, and to have uniformity within district courts, and to prevent District Courts from ruling contrary to the United States Supreme Court, Plaintiffs/Appellants request that this Court grant Petitioners request for Writ of Certiorari.

In the case before this honorable Court, 5th Circuit affirmation of the District Court's holding in this case is conflicting with the decision of the U.S. Supreme Court in ***Charles Earl Davis v. United States***, cites as 589 U.S. decided March 23, 2020, which held that it rejects, "Fifth Circuit's practice of refusing to review certain unpreserved factual arguments for plain error. The Court recalls that Rule 52(b) states in full: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Supreme Court further held that " Finding no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error, the Supreme Court vacates the judgment of the Fifth Circuit and remands the case for further proceedings." Petitioner avers that the Fifth Circuit has declined Petitioners weighty matter of material facts which completely destroys the U.S. Supreme Court's uniformity in Federal Courts.

Additionally, the Panel's decision ignores binding precedent holding that appellate judges must generally defer to the district court's factual findings and credibility determinations. ***Anderson v. City of Bessemer City***, 470 U.S.S.564, 573,-74 (1985). Found within Judge Dennis observation, he wrote that "the panel majority's retrial of facts on appeal was so "egregious and pervasive" that, if allowed to stand, the decision ***will have dire implication beyond this case***.

In the absence of uniformity as required by this Court, cases involving facts that are substantial and material to the case will be at the whim of the courts and com-

pletely uninformed. Additionally, material facts in minor children cases in schools across the country will be subjectively determined by judges, instead of reasonably decided by jurors. Moreover, the orders of this Court will continue to be ignored by Fifth Circuit and thereby causing the strength of the United States Supreme Court's democracy of justice to appear flawed and inequality across the Circuits.

This case is before the court based on credible case law that has been decided just last month, March 23, 2020, and to continue to ignore the Supreme Court's decision will cause severe damage to the judicial uniformness in the every Federal Court. Therefore, to ignore the U.S. Supreme Court's recent decision, as well as the case law cited in Petitioners brief on appeal,would be a severe blow to the very reason why laws of the United States Supreme Court are called to be uniformed in this country.

Uniformity of the Fifth Circuit must be manifestly shown in our appeal process, otherwise, what would be the purpose of the U.S. Supreme Court or the U.S. Constitution and its amendments. If each appeal Circuit, picks and chooses which U.S. Constitution they intend to hold their oath in, or choose to ignore the same, then the laws of this nation does not work. Petitioner avers that such is the case *sub judice*, and therefore, this Court should grant Petitioner's motion for Writ of Certiorari.

Petitioners contend that the district court made a plain error in reading the facts, deposition, and affidavits of Plaintiffs. Based upon this clear and obvious error of the district court, and Fifth Circuit, without any public or otherwise opinion on the merits of the case has now committed the same error. In fact, the panel from Fifth Circuit, appears to not have even read the facts, instead, began a censoring of Petitioners facts as "gay bashing." Which was not found in the facts presented in the appeal. Additionally, Petitioner had to apologize to the Fifth Circuit for any gay sounding bites in the document all while trying not to disturb Petitioners right to appeal to the Fifth Circuit, and to ensure the Fifth Circuit that the facts presented were not the opinion of the Petitioners counsel, but facts as the child represented in his deposition, affidavits, and briefs.

The minor maintains that his Fourth Amendment right to be free from unwarranted searching of his body was wrong, when he was searched, by intrusive offensive touching into the minor's front pockets (the moving of the assistant principal's hands in the minor boy's penis area for candy). At all times during the intrusive search of the minor's front pockets, the minor swore in his affidavit that he was very uncomfortable being felt in the area where his penis was located. See Affidavit of S.O. and B.O "ROA.19-60650.1000." and "ROA.19-60650.1001."

As a result, S.O. the mother of minor B.O. sued Hinds County School District for the unwarranted touching of the minor in his privacy area as found in the com-

plaint. See Amended Complaint "ROA.19-60650.60." It has never been found throughout Plaintiffs' complaint that the Defendant "grabbed" the minor boy's penis itself. However, somehow, and after the District Court had, in a previous ruling for summary judgment, ruled that based on the facts as presented in Plaintiff's pleadings, that the issue was about the offensive and intrusive in light of the circumstances revolving around candy, not weapons nor drugs nor any other criminal activity allegedly done by the minor while in his school classroom. District Courts first Order filed July 3, 2018. See "ROA.19-60650-454.

Within weeks of filing the appeal with the Fifth Circuit, this the [3] Panel Justices entered and published an opinion on February 7, 2020. The Panel did not state any law to support a denial based on their holding that the appeal on its face, showed no right to relief for the appellant. Instead, the Panel opined in it's footnote and that opinion seemingly was to flare up fear in the appellant's attorney for bring the lawsuit of what the Panel believed was gay bashing. Appellants attorney responded with a motion to reconsider the facts and an apology if the writing of the claimed gay intention of the assistant principal offended the court. It was then that the court withdrew it's February 7, 2020 opinion. Appellants counsel received several call from across the country, of person[s] desiring an opinion regarding the Court's censoring the attorney. As a result, counsel, avers that although the Court withdrew its previous opinion, the mistake of making such incorrect and mean spirited remarks were never taken back from the Court. In fact, there was one per-

son stated to this counsel, "I thought the Appeals Court Justices were sworn to uphold the United States Constitution, including the 1st Amendment, freedom of speech. As counsel for appellants, I tend to agree. Where the facts are what they purport to be, then why is the 5th Circuit the one violating the very U.S. Constitution that they swore to uphold, by censoring freedom of speech.

It follows that even after the panel withdrew it's opinion (which was not found in law), it still did not render any law to support the findings, as such, Appellants filed a motion for En Banc Rehearing, it too, was denied. A motion for Oral Argument, denied, and a motion to vacate and remand was also denied. The later two motion were denied, April 7, 2020. Thereby leaving Petitioner to seek this Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT REFUSAL TO FOLLOW THE SUPREME COURTS RECENT ON POINT OPINION IN *Charles Earl Davis v. United States*, cites as 589 U.S. decided March 23, 2020

The U.S. Supreme Court held in **United States v. Davila**, 738 Fed. Appx. 257 (5th Cir. 2018), *sua sponte,to* grants rehearing of its opinion dated May 16, 2018. This has the effect of vacating that decision. Moreover, even 5th Circuit's Court of Appeals, honorable judge, James E. Graves, Jr., Circuit Judge, held that change in law, desire to avoid unwarranted sentencing disparities, and defendant's due diligence weighed in favor of withdrawal of the Court's mandate.

The Supreme Court has recognized that courts of appeals have an inherent power to recall their mandates." **Goodwin v. Johnson**, 224 F.3d 450, 459 (5th Cir. 2000) (citing ***Calderon v. Thompson***, 523 U.S. 538, 549, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)). "Our authority to recall our mandate is clear." ***United States v. Tolliver***, 116 F.3d 120, 123 (5th Cir.1997). "Nonetheless, the Supreme Court has instructed that we may exercise that power only upon a showing of 'extraordinary circumstances.' " ***United States v. Fraser***, 407 F.3d 9, 10 (1st Cir.2005). In this circuit, the court's mandate "will not be recalled **except to prevent injustice.**" 5th Cir. R. 41.2. Under these standards, I conclude that the mandate in this criminal appeal of Bennie D. Emeary, Jr. shall be recalled ***United States v. Emeary***, 794 F. 3d 526, 527–28 (5th Cir. 2015). Likewise, here, Plaintiff-Appellants have shown where the U.S. Supreme Court has decided an opinion regarding plain error that is on point with this case, but conflicts with 5th Circuits affirmation, therefore, this request is necessary to prevent injustice as required by the 5th Circuit.

THIS COURT SHOULD GRANT THE PETITION TO STOP THE RIPPLE EFFECT OF EXPANDING IRREPARABLE HARM AS FIFTH CIRCUIT CONTINUE TO ENACT LAWS IN DIRECT CONFLICT WITH THIS COURT'S ABROGATED CASES BY THE FIFTH CIRCUIT.

The threshold requirement for a recall of the mandate,— i.e., a *"reasonable probability"* that Plaintiffs petition for writ of certiorari is provided to help the Fifth Circuit recognize it's error in reviewing material facts.

According to the Supreme Court, certiorari is principally warranted when a decision of the court of appeals "conflicts with relevant decisions of [the Supreme] Court." Sup. Ct. R. 10. The panel majority's decision directly conflicts with the Supreme Court case of ***Charles Earl Davis v. United States***, cites as 589 U.S. decided March 23, 2020, which is identical to the claims made by Petitioner in the instant case, (regarding plain errors made by the district court and now Panel).

The Supreme Court has also stated that **certiorari is warranted when a decision of the court of appeals "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power." Sup. CT. R. 10.** These criteria are met as well. As found in ***Charles Earl Davis v. United States***, cites as 589 U.S. decided March 23, 2020, the *Supreme Court stated that it rejects*, "Fifth Circuit's practice of refusing to review certain unpreserved factual arguments for plain error. The Supreme Court further held that "*Finding no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error*, the Supreme Court vacates the judgment of the Fifth Circuit and remands the case for further proceedings."

Certiorari is necessary to restore the national uniformity in constitutional law of precedent cases that have already been decided by Federal Courts.

Additionally, Neither Judge Higginbotham, nor Engelhardt, or even judge HO, provided an opinion based on the facts of this case. In fact, even the censoring as provided in the February 7, 2020 opinion of the Court, suggest that Justice, HO, did not write the footnote nor the opinion that was provided because found within this footnote, the writer states: "In addition, Judge HO would have directed S.O.'s counsel to explain why she should not be sanctioned for filing a frivolous appeal." This suggest that the writer and the honorable Justice are likely not the same, which might explain why this matter was denied (3) times even with recent U.S. Supreme Court case law cited. Petitioner avers that the appeal system is flawed if it allows such error to continue in the face of democracy whereby the people are relying on the Courts to honor it's oath of affirmation to withhold the U.S. Constitution. The recent law decided by the U.S. Supreme Court dated last month, March, 23, 2020 justifies a stay due to the possibility of reversal by the Supreme Court in this case.

Fifth Circuit like the district court committed a plain error in reading the facts as sworn in affidavits, depositions and pleadings. In fact, the panel of the Fifth Circuit appear to have reached so far beyond the facts of this case, and began a theory that was not applicable to this case. B.O. never said that he knew Mr. Brumfield was gay, and that if gay that was why he felt around the child's penis. Instead, Petitioner offered evidence from his deposition that "he and other students believed the assistant principal was gay and *that the child was not homophobic."*

Such statement was the only mention of gay, the issue was about the male assistant principal feeling in the child's pockets around his arousal area for candy that this same assistant principal already had proof of from the book bag . Please See "ROA.19-60650.618." and "ROA.19-60650-619." As well as B.O.'s deposition excerpt of when he was asked by Defendant, what part of his body did Defendant, Mr. Brumfield, touch. Moreover, **The minor, B.O. stated on line 16 and 17. See "ROA.19-60650.800. and "ROA.19-60650.802." More specifically line 14,15 and 16.** ***Stating: "Well, he touched in the —my penis area and was very close to it. It made me very uncomfortable."***

Petitioner cited ***Safford Unifed Sch. Dist. No.1 v. Reddings,*** 557 U.S. 634, 372-73 (2009), to show one of the most on point cases to show the intrusiveness of a school district over reaching power in ***searching a minor's body for prescription strength ibuprofen and naproxen at school.*** Appellant, cited the case to show that this child was accused of distributing bite size "candy." not drugs, nor weapons, only what children are often found on school grounds with, "candy." As such, Appellant prescribed the offensive and intrusive nature of the circumstances, that is being searched around the penis for candy by a male teacher of whom the minor believed to be gay acting, the minor did not say he knew that Mr. Brumfield was gay. Please See "ROA.19-60650.618." and "ROA.19-60650-619."

Plaintiff-Appellants will suffer irreparable harm if this Petition for Writ of Certiorari is denied. If this Writ of Certiorari is denied then the U.S. Supreme Court

holding in Reddings, and ***Charles Earl Davis v. United States***, cites as 589 U.S. decided March 23, 2020, is un-uniformed and inconsistent with the U.S. Constitutional provisions, "The Law of the Land," as well as 5th Circuit unconstitutional acts regarding plain errors of the district courts.

Fifth Circuit failed to follow the holdings in ***Safford Unifed Sch. Dist. No.1 v. Reddings*** 557 U.S. 634, 372-73 (2009), and ***United States v. McPhail,*** 112 F.3d 197, 199 (5th Cir.1997), where the Supreme Court held:" Under the plain error standard, we may exercise our discretion to correct errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings if the appellant shows clear or obvious error that affects his substantial rights."

Fifth Circuit failed to distinguished why ignoring the Supreme Court's case law regarding searches of minors while at school for candy that had already been found did not fall in the purviews of the minor's substantial rights being violated.

5th Circuit has held that a party must establish three elements to satisfy the plain error standard of review. (1) the district court committed an error, (2) the error was plain, and (3) the error affected his substantial rights. ***United States v. Handy***, 647 Fed. Appx. 296, 299 (5th Cir. 2016). As such, Plaintiff has established that the district court in its ruling and Order, committed an error, and that error was plain because the facts were in the four pages of the pleadings, depositions, and affidavits, as well as Plaintiff/Appellants' complaint.

THIS COURT SHOULD GRANT THE PETITION TO PROVIDE DEFINITIVE GUIDANCE ON WHAT CONSTITUTES OUTLIER PRACTICE FOR THE FIFTH CIRCUIT'S REFUSING TO REVIEW CERTAIN UNPRESERVED FACTUAL ARGUMENTS FOR PLAIN ERROR

The balance of equities overwhelmingly favors Petitioners being granted this writ of certiorari. Here, the Fifth Circuit never opined on the facts of the case, instead. Fifth Circuit only opined on accusing Petitioners counsel of gay bashing, which was not the subject of the issue. 5th Circuit holds that for a dispute to be genuine as required by F.R.C.P. 56, "The dispute must be genuine, and the facts must be material." ***Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis***. 799 F. 2d 218, 222 (5th Cir. 1986). Additionally, 5th Circuit held in ***Phillips Oil Company v. OKC Corporation***. 812 F.2d 265, 272 (5th Cir. 1987) that, "With regards to 'materiality', only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment."

In summation, Petitioners has provided Fifth Circuit and now this Court with indisputable material facts regarding plain clear and obvious error[s] made by the district court. As a result, Petitioners contend that it is apparent that the outcome of the case was substantially affected by the mis-interpreted facts that were assumed by the district court, as well as ignored by Fifth Circuit, and as such granting of Petitioners writ of certiorari is necessary for guidance.

In the case sub judice, the Fifth Circuit blatantly ignored it's on holding decided by 5th Circuit: "Legal error is plain where it is "clear or obvious, rather than subject to reasonable dispute." ***United States v. Handy*** 647 Fed. Apps. 296, 300 (5th Cir. 2016.)

5th Circuit further held that "court held that it exercises its discretion to reverse the district court only if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. ***United States v. Luna-Montoya,*** 80 Fed. Apps. 334, 338 (5th Cir. 2003). Petitioner adamantly swears that the district court nor the Fifth Circuit, has given this minor the fairness that the law requires.

The fact is that Petitioner has competently and zealously established that Petitioners issue was that the child was felt in his private area by Defendant Brumfield, and not the grabbing of the minor's penis as subscribed by the district court, and that touching/feeling was an unwarranted search. Please see. "ROA. 19-60650.1000." and "ROA.19-60650.1001." where the minor swore in his affidavit that he was very uncomfortable being felt in the area where his penis was located. Also, B.O.'s deposition excerpt of when he was asked by Defendant, what part of his body did Defendant, Mr. Brumfield, touch. The minor, B.O. stated on line 16 and 17. See "ROA.19-60650.800. and "ROA.19-60650.802." More specifically line 14,15 and 16. ***Stating: "Well, he touched in the —my penis area and was very close to it. It made me very uncomfortable."***

V. A Bond Is Not Necessar

CONCLUSION

For the reasons set forth above, Petitioner prays that this most honorable court of the United States of America will grant this petition for a Writ of Certiorari.

Respectfully submitted, this the 125th day of June 2020.

/s/Abby Robinson (Bar #312964)
227 E. Pearl Street
Jackson, MS 39201
Ph. 601-321-9343
Fax. 601-487-6326
Email: **arobinsonlawfirm@yahoo.com**

CERTIFICATE OF SERVICE

I certify that on June 25, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Supreme Court by following the rules of the United States Supreme Court for petition for writ of certiorari. I further certify that all participants in the case are registered CM/ECF users and that service will be notified by the clerk of the United States Supreme Court.

Honorable Daniel Jordan, III, United States District Chief Judge
501 E. Court Street
Suite 2.500
Jackson, Mississippi 39201
jordan_chambers@mssd.uscourts.gov
Ph. 601-608-4120

Christy Vinson Malatesa
DANIEL, COKER, HORTON & BELL
4400 Old Canton Road, Suite 400 (39211)
E-mail: cmalatesa@danielcoker.com
M. James Weems
jweems@danielcoker.com
Counsel for Appellees

John S. Hooks
Adams and Reese LLP
1018 Highland Colony Parkway, Suite 800
Ridgeland, Mississippi 39157
E-mail johnhooks@arlaw.com
Counsel for Appellees

By: /s/Abby Robinson, esq.
Abby Robinson & Associates Law Firm PLLC
Counsel for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60650

S. O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

ORDER:

(√) The Appellant's motion for ( ) stay (√) recall and stay of the mandate pending petition for writ of certiorari is DENIED.

( ) The Appellant's motion for ( ) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED through _____.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 13, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-60650 S. O. v. Hinds County School District, et al
USDC No. 3:17-CV-383

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Rebecca L. Leto, Deputy Clerk
5004-310-7703

Mr. John Simeon Hooks
Mr. Arthur B. Johnston III
Mrs. Christy Vinson Malatesta
Ms. Abby Gale Robinson
Mr. M. James Weems

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60650

S. O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities.

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:

Appellant has multiple motions pending before this court. IT IS ORDERED that all of Appellant's pending motions are DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 07, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-60650 S. O. v. Hinds County School District, et al
USDC No. 3:17-CV-383

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

Mr. John Simeon Hooks
Mr. Arthur S. Johnston III
Mrs. Christy Vinson Malatesta
Ms. Abby Gale Robinson
Mr. M. James Weems

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60650

S. O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion 02/18/2020, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 20, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-60650 S. O. v. Hinds County School District, et al
USDC No. 3:17-CV-383

Enclosed is an order entered in this case.

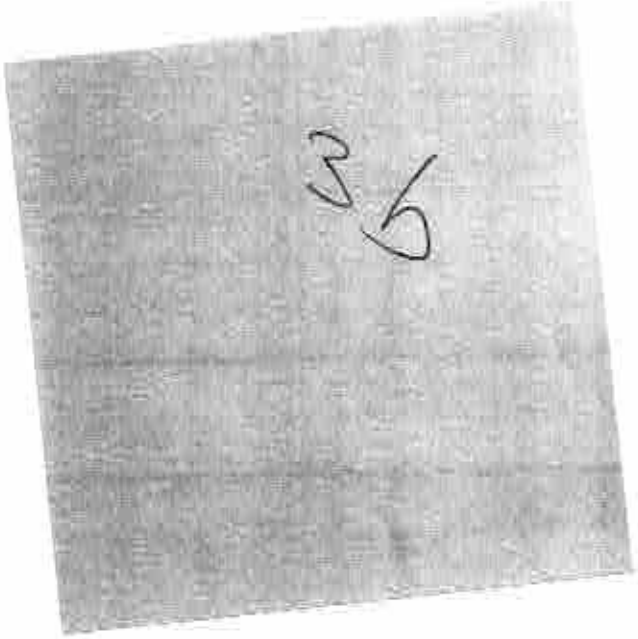
Sincerely,

LYLE W. CAYCE, Clerk

Rebecca L Leto

By: _____
Rebecca L. Leto, Deputy Clerk
504-310-7703

Mr. John Simeon Hooks
Mr. Arthur S. Johnston III
Mrs. Christy Vinson Malatesta
Ms. Abby Gale Robinson
Mr. M. James Weems



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 18, 2020

Lyle W. Cayce
Clerk

No. 19-60650
Summary Calendar

D.C. Docket No. 3:17-CV-383

S. O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Mississippi

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed. *See* 5th Cir. R. 47.6.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Apr 07, 2020

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 18, 2020
Lyle W. Cayce
Clerk

No. 19-60650
Summary Calendar

S.O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-383

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

The panel acknowledges counsel's apology expressed in the petition for panel rehearing. The petition for panel rehearing is denied. The opinion filed

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

on February 7, 2020, is hereby withdrawn. The judgment of the district court is affirmed. *See* 5th Cir. R. 47.6.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60650
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
February 7, 2020
Lyle W. Cayce
Clerk

S.O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-383

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

JAMES C. HO, Circuit Judge:

S.O. brought this suit on behalf of her then twelve-year old son, B.O. She claims that Timothy Brumfield, an assistant principal at B.O.'s school, violated her son's Fourth Amendment rights by searching his pockets after a teacher caught him selling contraband candy.

When she first filed this suit, S.O. initially alleged that Brumfield had grabbed her son's genitalia. So the district court denied Brumfield qualified immunity. But undisputed record evidence later demonstrated that, at most,

Brumfield had only searched the boy's pocket and did not grab his genitalia. Accordingly, the district court granted Brumfield qualified immunity.

On appeal, S.O. complains that the district court misunderstood her earlier argument. She contends that she never claimed that Brumfield grabbed her son's genitalia—only that Brumfield unreasonably searched his pockets. But accepting her contention as true, it only means that the district court should have granted qualified immunity to Brumfield even earlier.

On the face of the appeal, then, it is patently obvious that there is no relief to which S.O. is entitled. We accordingly affirm.[1]

---

[1] In addition, Judge Ho would have directed S.O.'s counsel to explain why she should not be sanctioned for filing a frivolous appeal, *see* FED. R. APP. P. 38—if not also for "conduct unbecoming a member of the bar," *see* FED. R. APP. P. 46(b)–(c). As explained above, the appeal is demonstrably frivolous on the face of counsel's briefs. Moreover, those briefs not only contain countless misspellings and grammatical errors—they also appear to appeal to prejudice. Counsel's opening brief repeatedly contends that "Brumfield was touching around in minors [sic] pocket, making minor believe the Defendant was gay." Her reply brief then concludes that B.O. "believed that . . . Broomfield [sic] was gay, making the touch of the minor's privacy area that more offensive." That is circular logic: Brumfield searched B.O.'s pockets, so he must be gay—and because he is gay, he shouldn't have searched B.O.'s pockets. And the demonstrable failure of counsel's logic makes one wonder why counsel bothers to bring up sexual orientation at all. It should go without saying that members of the bar are expected to engage in legal argument—not prejudice. *But cf. Glass v. Paxton*, 900 F.3d 233, 238 (5th Cir. 2018) (quoting a professor's declaration, which counsel urged district court to review, that she feared "religiously conservative" and "libertarian" students because they hold "extreme views," are prone to "anger and impulsive action," and are "more likely to own guns given their distaste for government").

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60650
Summary Calendar

D.C. Docket No. 3:17-CV-383

S. O., individually and on behalf of her minor son, B.O.,

Plaintiff - Appellant

v.

HINDS COUNTY SCHOOL DISTRICT; PRINCIPAL BEN LUNDY, in his individual and official capacities; ASSISTANT PRINCIPAL TOMMY BRUMFIELD, in his individual and official capacities; ASSISTANT PRINCIPAL MICHELLE RAY, in her individual and official capacities,

Defendants - Appellees

Appeal from the United States District Court for the
Southern District of Mississippi

Before HIGGINBOTHAM, HO, and ENGELHARDT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

S.O., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, B.O. — PLAINTIFFS

V. — CIVIL ACTION NO. 3:17-CV-383-DPJ-KFB

HINDS COUNTY SCHOOL DISTRICT, ET AL. — DEFENDANTS

ORDER

There are four motions pending in this § 1983 case: Defendants filed three separate Motions to Dismiss [10, 18, 20], each raising arguments as to why particular claims should be dismissed as to certain defendants, and Plaintiffs moved to amend their complaint [50]. For the reasons that follow, Defendant Hinds County School District's motion to dismiss [18] is granted in part; Defendants Ben Lundy, Tommy Brumfield, Michelle Ray, and Shannon Rankin's motion to dismiss [20] is granted in part; Defendants Byram Police Department and Officer Ricardo Montez Kincaid's motion to dismiss [10] is denied; and Plaintiffs' motion to amend [50] is denied.

I. Background

Plaintiffs are suing Defendants due to alleged conduct that occurred during a disciplinary action at Byram Middle School. Plaintiffs' Amended Complaint [3] alleges that, on April 4, 2017, Defendant Shannon Rankin, a social-studies teacher, accused Plaintiff B.O., a seventh-grade student, of selling candy bars during class and directed him to go to the assistant principal's office. Once there, Defendant Tommy Brumfield, an assistant principal, proceeded to pat-down and empty B.O.'s pockets in search of evidence pertaining to the candy-bar sales but found nothing. During this pat-down, B.O. alleges that he felt his penis being touched.

When Brumfield found nothing in B.O.'s pockets, Defendant Michelle Ray, another assistant principal, emptied B.O.'s school bag and found various items, including a purse and three Hinds County School District ("HCSD") calculators. B.O. claims that his math teacher authorized him to carry these calculators and that the purse belonged to his aunt.

After these searches, B.O. says he was forced to dig in a trash can to search for any candy wrappers that were thrown away during his trip to the assistant principal's office. B.O. alleges that all of this occurred in the presence of Defendant Officer Ricardo Montez Kincaid, an officer with the Byram Police Department.

Based on these events, S.O. filed this suit individually and on behalf of her minor son B.O. They assert claims under § 1983 for violating the Fourth, Thirteenth, and Fourteenth Amendments as well as various state-law causes of action. Defendants, who were sued in their individual and official capacities, have since filed multiple motions to dismiss [10, 18, 20] that identify purported deficiencies in Plaintiffs' Amended Complaint. Having been fully briefed, the Court is ready to rule on these motions and otherwise clean up the docket.

II. Motions

A. Hinds County School District's Motion to Dismiss

Plaintiffs say Defendant HCSD is liable under § 1983 and state law because its employees violated B.O.'s constitutional rights and otherwise assaulted him. HCSD raises two issues in its motion to dismiss [18]. First, HCSD says that Plaintiffs' Amended Complaint should be dismissed because it is unsigned. Second, HCSD contends that the Court cannot hear

Plaintiffs' state-law claims because Plaintiffs failed to comply with the Mississippi Tort Claims Act's ("MTCA") notice provisions. *See* Miss. Code Ann. § 11-46-11.[1]

First, in regards to the unsigned Amended Complaint, Plaintiffs filed a signed version of the signature page on June 26, 2017. *See* Attachment [15]. While this entry is dated 35 days after Plaintiffs filed the Amended Complaint, the Court finds that Plaintiffs cured the defect and HCSD was not prejudiced. Therefore, the Court will focus on HCSD's second argument.

There is no dispute that Plaintiffs failed to give HCSD notice of their state-law claims. Under the MTCA, a plaintiff wishing to bring a tort claim against a government entity must provide written notice of the claim "at least ninety (90) days before instituting suit." Miss. Code Ann. § 11-46-11(1). This pre-suit-notice requirement is jurisdictional and "imposes a condition precedent to the right to maintain an action." *Bunton v. King*, 995 So. 2d 694, 695 (Miss. 2008) (quoting *Miss. Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662, 665 (Miss. 1999)). But Plaintiffs hope to evade the notice requirement by arguing that the Court has original jurisdiction over their § 1983 claims and may exercise supplemental jurisdiction over the tort claims. *See* Pls.' Mem. [29] at 4 (citing 28 U.S.C. § 1367(a)). Thus, they seem to suggest that no notice was required.

Plaintiffs offer no authority for this argument, and it is not persuasive. Bringing federal and state-law causes of action in the same federal suit may create supplemental jurisdiction under § 1367(a), but it does not circumvent conditions precedent to a state's consent to such suits. *Cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541–42 (2002) ("[W]e cannot read § 1367(a) to authorize district courts to exercise jurisdiction over claims against nonconsenting States, even though nothing in the statute expressly excludes such claims. Thus, consistent with [*Blatchford*

[1] HCSD also contested service of process, but Plaintiffs later remedied that defect as to this Defendant. *See* HCSD Reply [32] at 2.

v. Native Village of Noatak, 501 U.S. 775 (1991)], we hold that § 1367(a)'s grant of jurisdiction does not extend to claims against nonconsenting state defendants."); *see also Montgomery v. Mississippi*, 498 F. Supp. 2d 892, 905 (S.D. Miss. 2007) (refusing to hear plaintiff's state-law claims brought with federal claims under § 1367 and concluding that "[b]ecause [plaintiff] failed to provide any notice whatsoever, the Court finds that all state law tort claims for 'wrongful demotion' are procedurally barred due to his failure to comply with the notice provisions of the MTCA"). As such, Plaintiffs' failure to provide statutory notice is fatal to their state-law causes of action against HCSD. HCSD's Motion to Dismiss [18] is granted in part as to Plaintiffs' state-law claims.

B. Defendants Brumfield, Lundy, Ray, and Rankin's Motion to Dismiss

These defendants raise two issues: (1) that service of process was never perfected; and (2) that Plaintiffs failed to give notice under the MTCA. The first argument seems moot, and the second is at least partially correct.

Starting with service of process, Plaintiffs' initial attempts to serve these Defendants individually failed to comply with Federal Rule of Civil Procedure 4(e). But Plaintiffs have since taken another stab at it, and this time they appear to have complied with the rules. *See* Summons Returns [43–49]. Because these subsequent attempts occurred within 90 days of filing the Amended Complaint, the issue appears to be moot.[2]

As for MTCA notice, Plaintiffs bring state-law claims against Defendants Brumfield and Lundy in their individual and official capacities. *See* Am. Compl. [3] at 12–13. Yet, as with

[2] All of this occurred after the parties completed briefing, so the Court has some concern that Defendants may have issues regarding the most recent attempts. That said, ineffective service of process may be waived, and these new returns were docketed at the latest on August 15, 2017. So far, there have been no objections.

HCSD, there is no dispute in the record that Plaintiffs never provided notice of their intent to bring these claims. Defendants therefore assert that "this Court lacks personal jurisdiction over same." Defs.' Mem. [21] at 2. But Defendants fail to elaborate or explain whether their argument relates to the official and/or individual-capacity claims against Brumfield and Lundy.

In *Johnson v. City of Shelby, Mississippi*, the Fifth Circuit summarized the MTCA notice requirements as they apply to individual state employees:

> This "notice requirement applies to suit brought against an employee, acting in his official capacity." *McGehee v. DePoyster*, 708 So. 2d 77, 79 (Miss. 1998). Moreover, "an action against a government employee in his individual capacity may be subject to notice of claim requirements if the act complained of occurred within the scope and course of his employment." *Id.* at 80. The MTCA, however, does not "requir[e] notice to . . . government authorities of suit brought against [them] individually for acts outside of the scope of [their] employment." *Id.* at 81.

743 F.3d 59, 63 (5th Cir. 2013), *rev'd on other grounds*, 135 S. Ct. 346 (2014) (alternations in original).

Under these standards, the official-capacity state-law claims are dismissed. But the individual-capacity claims are trickier to address without relevant argument from the parties. The Court therefore denies that portion of the motion [20] without prejudice.[3]

C. Defendants Byram Police Department and Officer Kincaid's Motion to Dismiss

These Defendants say that Plaintiffs' claims should be dismissed for failure to provide MTCA notice and failure to perfect service of process as to the Byram Police Department.

First, regarding the MTCA-notice issue, Defendants assert that the lack of notice destroys the Court's "jurisdiction to hear the claims against" them. Defs.' Mem. [11] at 2. But the only

[3] Of course any individual-capacity claims regarding acts taken within the course and scope of employment would be barred under Mississippi Code section 11-46-7. That issue is not before the Court at this time.

claims against these Defendants arise under § 1983, so there are no state-law claims for which MTCA notice would be required. *See Felder v. Casey*, 487 U.S. 131, 153 (1988) (holding that failure to comply with pre-suit-notice requirement under state law could not bar action under § 1983). Defendants' notice argument lacks merit.

Second, Plaintiffs have since cured the service-of-process defect as to the Byram Police Department. Five days after these defendants filed their motion to dismiss, Plaintiffs effected service upon the City of Byram's municipal clerk. *See* Pls.' Mem. [17] at 3. Defendants filed no reply challenging this portion of Plaintiffs' response, and for these reasons, their Motion to Dismiss [10] is denied.

D. Motion to Amend

Plaintiffs filed a motion to amend their Amended Complaint on August 28, 2017. Plaintiffs' motion is defective, however, since Plaintiffs did not attach a proposed amended pleading as an exhibit. *See* L.U. Civ. R. 15. ("If leave of court is required under Rule 15, a proposed amended pleading must be an exhibit to a motion for leave to file the pleading, and, if the motion is granted, the movant must file the amended pleading as a separately docketed item within seven (7) days from entry of the order granting the motion."). Therefore, the Court denies Plaintiffs' motion to amend [50].[4]

VI. Conclusion

The Court has considered all the parties' arguments. Those not specifically addressed do not change the outcome. For the foregoing reasons, first, the Court grants Defendant HCSD's Motion to Dismiss [18] solely as to the state-law claims. Second, the Court grants Defendants'

[4] The Court is also concerned that Plaintiffs' proposed amendment is futile as it seeks to add state-law claims against Defendants Byram Police Department and Officer Kincaid. The Court would not have jurisdiction over these claims if Plaintiffs failed to give notice under the MTCA.

Motion to Dismiss [20] solely as to the state-law claims asserted against Defendants Brumfield and Lundy in their official capacities. Third, the Court denies Defendants' Motion to Dismiss [10]. Finally, the Court denies Plaintiffs' Motion to Amend Complaint [50].

The Court also orders that the stay entered on August 28, 2017, by United States Magistrate Judge F. Keith Ball be lifted, and proceedings may continue consistent with these holdings.

Finally, the parties are directed to contact Judge Ball's chambers within ten days of the entry of this Order to set the case for a case-management conference.

SO ORDERED AND ADJUDGED this the 18th day of October, 2017.

s/ *Daniel P. Jordan III*
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

S.O., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, B.O. — PLAINTIFFS

V. — CIVIL ACTION NO. 3:17-CV-383-DPJ-FKB

HINDS COUNTY SCHOOL DISTRICT, ET AL. — DEFENDANTS

ORDER

Defendants Tommy Brumfield, Ben Lundy, Shannon Rankin, and Michelle Ray (the "District Defendants"), and Byram Police Department and Ricardo Montez Kincaid (the "Byram Defendants") have filed motions to dismiss based on qualified immunity [57, 59]. For the reasons that follow, the Court denies the District Defendants' motion [57] as to Brumfield and Ray in their individual capacities regarding the Fourth Amendment claim but otherwise grants the Defendants' motions [57, 59].

I. Background

Plaintiff S.O., individually and on behalf of her child B.O., is suing Defendants due to alleged conduct that occurred during a school disciplinary action. At the time of the incident, B.O. was a 12-year-old seventh-grade student at Byram Middle School. S.O. says that, on April 4, 2017, Defendant Shannon Rankin, a social-studies teacher, accused B.O. of violating school policy by selling bite-sized candy bars during class. She therefore directed B.O. to go to Assistant Principal Tommy Brumfield's office. *See* Am. Compl. [3] at 4–8. On his way to the office, B.O. encountered Defendant Michelle Ray, another assistant principal. B.O. admitted to Ray that he had hidden some candy in a trashcan while on his way to Brumfield's office. Following this encounter, B.O. says Ray forced him to don rubber gloves and dig the candy out of the trashcan.

In Brumfield's office, Brumfield searched B.O. for evidence of the alleged violation. According to B.O., Brumfield put his hands in B.O.'s pockets and touched his penis during the search. Brumfield and Ray, who was present, adamantly deny this allegation and say instead that Brumfield merely instructed B.O. to pull his pockets out to check their contents. In any event, nothing was found. The Brumfield and Ray also searched B.O.'s school bag and found various items, including a purse, expo-board cleaner, feminine looking OtterBox cases, and six calculators, three of which were school property. Although B.O. claimed that his math teacher authorized him to carry the calculators and that the purse belonged to his aunt, Brumfield wrote B.O. up for theft of school property. B.O. alleges that all of this occurred in the presence of Defendant Ricardo Montez Kincaid, a sergeant with the Byram Police Department.

Based on these events, S.O. filed this suit asserting claims under § 1983 for violating the Fourth, Thirteenth, and Fourteenth Amendments as well as various state-law causes of action. Defendants have since filed motions to dismiss based primarily on qualified immunity [57, 59]. Having both subject-matter and personal jurisdiction, the Court is ready to rule on these motions.

II. Standards

A. Motions to Dismiss

Both sets of Defendants seek dismissal under Federal Rule of Civil Procedure 12(b)(6). Under that rule, the Court must determine—based on the face of the complaint—whether Plaintiffs have stated a claim. *See* Fed. R. Civ. P. 12(d). But here, all parties submitted record evidence that is beyond Rule 12(b)(6)'s scope of review. When that happens, "Rule 12(d) gives a district court 'complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion.'" *Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 194 n.3 (5th Cir. 1988) (citation omitted). But if "matters

outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed. R. Civ. P. 12(d); *see also In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2011). In this case, the Court will exercise its discretion and consider the motions and supporting materials under Rule 56.

B. Summary Judgment

Summary judgment is warranted under Federal Rule of Civil Procedure 56(a) when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The nonmoving party must then "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). When such contradictory facts exist, the court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a

genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *Little*, 37 F.3d at 1075; *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

C. Qualified Immunity

Defendants assert qualified immunity. "The privilege is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001). As the Fifth Circuit recently summarized:

> [T]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal. This immunity protects all but the plainly incompetent or those who knowingly violate the law. Accordingly, we do not deny immunity unless existing precedent must have placed the statutory or constitutional question beyond debate.

Anderson v. Valdez, 845 F.3d 580, 599-600 (5th Cir. 2016) (footnotes and citations omitted, punctuation altered). Furthermore, "[w]hen a defendant raises qualified immunity, the burden is on the plaintiff to 'demonstrate the inapplicability of the defense.'" *Coleman v. Marion Cty.*, No. 2:14-CV-185-DPJ-FKB, 2015 WL 5098524, at *6 (S.D. Miss. Aug. 31, 2015) (quoting *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)).

Courts use a two-step analysis to determine whether qualified immunity applies. The traditional first step asks whether "the plaintiff has adduced facts sufficient to establish a constitutional or statutory violation." *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) (citing *Saucier*, 533 U.S. at 201). Second, if a violation has been alleged, the Court must determine "whether [the officer's] actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." *Id.* (alteration in original) (quoting *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007)). In appropriate cases, courts can skip the

first step and ask whether the alleged violation violates clearly established law. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

Whether a law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004) (citing *Saucier*, 533 U.S. at 201). Thus,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Id. (citations omitted). "This does not require that 'the very action in question has previously been held unlawful,' merely that a reasonable officer would understand that his or her conduct was unlawful." *Weisler v. Jefferson Parish Sheriff's Office*, No. 17-30951, 2018 WL 3031437, at *2 (5th Cir. June 18, 2018) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

III. Analysis

Defendants' motions focus on Plaintiffs' federal claims under 42 U.S.C. § 1983. That statute "provides a claim against anyone who, under color of state law, deprives another of his or her constitutional rights." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 (5th Cir. 1994) (en banc) (quotation marks omitted). Here, Plaintiffs say Defendants violated their rights under the Fourth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Defendants offer a number of arguments for dismissal.

A. District Defendants

1. Official-Capacity Claims

The District Defendants first assert that official-capacity suits are "in all respects other than name, to be treated as a suit against the entity." Defs.' Mem. [58] at 4 (citing *Ashe v.*

Corley, 992 F.2d 540 (5th Cir. 1993); *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). And because the school district has been sued, the claims should be dismissed. *Id.* (citing *Godby v. Montgomery Cty. Bd. of Educ.*, 996 F. Supp. 1390, 1403 (M.D. Ala. 1998)).

Plaintiffs do not *appear* to contradict this position with respect to *official*-capacity claims. Instead, they offer a few arguments for allowing the claims against the District Defendants in their *individual* capacities; which is not the issue. *See* Pls.' Mem. [64] at 4. That said, Plaintiffs offer conclusory statements that may signal their disagreement with Defendants' arguments. Plaintiffs say the District Defendants can be liable "for claims asserted against them in their individual and *professional* capacit[ies]." *Id.* at 1 (emphasis added); *see also id.* at 5. Section 1983 cases speak in terms of official- or individual-capacity claims, but even if Plaintiffs are using the term "professional" to mean "official," then they still fail to offer a substantive reason why the official-capacity claims survive. This part of the motion is therefore granted.

2. Fourth Amendment Claims

The parties contest whether B.O. suffered a Fourth Amendment violation when he was searched in Brumfield's Office. To begin, not all District Defendants were involved in the search. Neither Rankin nor Lundy was there. Accordingly, the claims against them must be viewed separately from those against Brumfield and Ray.

a. Rankin and Lundy

Rankin is the teacher who sent B.O. to the principal's office for allegedly selling candy. And Lundy is the school principal who recommended suspension after the disputed search. Although neither defendant was present during the search, Plaintiffs generally assert they knew

or should have known that their actions would lead to a Fourth Amendment violation. *See, e.g.*, Pls.' Resp. [64] at 11–12, 14, 17.

Rankin and Lundy are entitled to qualified immunity because neither had anything to do with the search. "The Supreme Court and [the Fifth Circuit] have long held that Fourth Amendment violations occur only through intentional conduct." *Watson v. Bryant*, 532 F. App'x 453, 457 (5th Cir. 2013). Plaintiffs' conclusory and speculative statements connecting Rankin and Lundy to a search that occurred outside their presence fail to show these defendants acted in an objectively unreasonable way with respect to that search. *See TIG Ins. Co.*, 276 F.3d at 759 (holding that conclusory allegations are not sufficient under Rule 56). The Fourth Amendment claims against these defendants related to the search are dismissed.[1]

b. Brumfield and Ray

The claims against Brumfield and Ray are different because those defendants allegedly participated in the search. According to B.O., Brumfield searched him in Ray's presence for evidence of illegal candy sales by "put[ting] his hands in [the child's] pockets touching [his] privacy." S.O. Aff. [63-1] at 13; *see also id.* (stating that Brumfield touched his "thang"). Brumfield and Ray flatly deny ever placing hands on B.O., but the Court must view the evidence in the light most favorable to the non-movant. And in that light, the Court must decide whether

[1] Plaintiffs offer a host of other accusations against Rankin and Lundy in their brief that seem to exceed the claims pleaded in their Amended Complaint. Ordinarily, a plaintiff may not assert new claims or theories in response to a dispositive motion. *See Cutrera v. Bd. of Sup'rs of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005). But because the issues are not entirely clear, this ruling is limited to the Fourth Amendment search claim the District Defendants address in their motion.

searching a 12-year-old's genital area for evidence that he sold candy at school violates his Fourth Amendment rights.[2]

The Fourth Amendment protects students from unreasonable searches, but the scope of that protection is limited. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court explicitly held that students do not "shed their constitutional rights . . . at the schoolhouse gate." 393 U.S. 503, 506 (1969). The Court recognized, however, that those rights are restricted to some extent because school officials must "prescribe and control conduct in the schools." *Id.* at 507.

The Supreme Court revisited those competing interests in *New Jersey v. T.L.O.*, where it held:

> We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place[.]" Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the

[2] As the District Defendants correctly observe, the substance of these allegations are found in S.O.'s affidavit. Defs.' Rebuttal [67] at 1–2. Obviously, the Court may not consider hearsay under Rule 56, and Plaintiffs certainly complicated matters by putting the substance of the child's allegations in the mother's affidavit. That said, it is at least possible that these statements were excited utterances or present-sense impressions, issues neither party addresses. Moreover, B.O. confirmed the statements in his affidavit. *See* B.O. Aff. [63-1] at 10. Finally, there is evidence in S.O.'s affidavit that is based on first-hand knowledge—she claims that Brumfield essentially acknowledged the touching when S.O. confronted him. *See* S.O. Aff. [63-1] at 14. The Court will therefore consider the facts Plaintiffs assert.

> objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

469 U.S. 325, 341–42 (1985) (internal citations omitted).

Since *T.L.O.* was decided, it has become clearly established that searching bags or outerwear requires a lower level of suspicion than more intrusive searches. Most notably, in *Safford Unified School District Number 1 v. Redding*, school officials had a reasonable suspicion that the 13-year-old plaintiff was distributing prescription-strength ibuprofen and naproxen at school. 557 U.S. 364, 372–73 (2009). They therefore searched her bag and outerwear before subjecting her to what amounted to a near strip search, instructing her to "pull out her bra" and stretch the elastic on her underpants. *Id.* at 374.

The Court found that the initial search was proper but that the strip search violated the Fourth Amendment because "the content of the suspicion failed to match the degree of intrusion." *Id.* at 375. The Court then made an observation that speaks directly to the present case:

> mak[ing] it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

Id. at 377 (emphasis added) (internal citations omitted).

In the present case, the Court believes reasonable suspicion existed to search B.O. But if things happened the way B.O. says, then the excessively intrusive nature of the search was objectively unreasonable in light of *Redding*. Indeed, the facts here are even worse. *Redding* involved the suspected distribution of drugs, whereas B.O. supposedly sold bite-sized candy. The *Redding* plaintiff was 13 years old, B.O. was 12. And while the *Redding* plaintiff was strip

searched, she was never touched; B.O. says Brumfield touched his penis as part of the search. As in *Redding*, "the content of the suspicion failed to match the degree of intrusion." *Id.* at 375.

For these reasons, the Court finds that if B.O. is factually correct, then the search was objectively unreasonable in light of clearly established law. Whether B.O. is correct must be decided by the jury. *See Snyder v. Trepagnier*, 142 F.3d 791, 800 (5th Cir. 1998).

3. Thirteenth Amendment Claim

S.O. says Ray violated B.O.'s Thirteenth Amendment right to be free from involuntary servitude when Ray told B.O. to retrieve the candy he had hidden in the trashcan. *See* Am. Compl. [3] at 10–11. This claim is clearly frivolous.

The Supreme Court addressed the scope of the Thirteenth Amendment in *United States v. Kozminski*:

> The Thirteenth Amendment declares that "[n]either slavery nor involuntary servitude, . . . shall exist within the United States, or any place subject to their jurisdiction." . . . The primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose: the phrase "involuntary servitude" was intended to extend "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 332, 36 S. Ct. 258, 259, 60 L. Ed. 672 (1916). *See also Robertson v. Baldwin*, 165 U.S. 275, 282, 17 S. Ct. 326, 329, 41 L. Ed. 715 (1897); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 21 L. Ed. 394 (1873).
>
> While the general spirit of the phrase "involuntary servitude" is easily comprehended, the exact range of conditions it prohibits is harder to define. The express exception of involuntary servitude imposed as a punishment for crime provides some guidance. The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law. Moreover, from the general intent to prohibit conditions "akin to African slavery," *see Butler v. Perry*, *supra*, 240 U.S.[] at 332–333, 36 S. Ct.|| at 259, as well as the fact that the Thirteenth Amendment extends beyond state action, *compare* U.S. Const., Amdt. 14, § 1, we readily can deduce an intent to prohibit compulsion through physical coercion.

487 U.S. 931, 942 (1988).

Here, B.O. was not subjected to "compulsory labor akin to African slavery." *Id.* And Plaintiffs have otherwise failed to show that Ray's actions were objectively unreasonable. The Court dismisses the Thirteenth Amendment claim against Ray.[3]

4. Fourteenth Amendment Claim

The District Defendants say Plaintiffs have failed to plead a cognizable Fourteenth Amendment due-process claim. They infer two possible theories from the Amended Complaint: (1) that the search violated due process because S.O. was not present and did not consent, and (2) that the disciplinary proceedings against B.O. violated due process. *See* Defs.' Mem. [58] at 10–11. Only the first is readily apparent in Count Three of the Amended Complaint [3].

Plaintiffs never address these arguments in their response and never mention "due process" or the Fourteenth Amendment. *See generally* Pls.' Mem. [64]. Accordingly, the Court finds Plaintiffs waived these grounds for relief. *See Pratt v. Mut. of Omaha Ins. Co.*, No. 4:15-CV-09-DMB-JMV, 2016 WL 1248885, at *8 (N.D. Miss. Mar. 28, 2016) ("The failure to raise an argument in response to a motion to dismiss operates as a waiver of such argument." (citing *Jaso v. The Coca Cola Co.*, 435 F. App'x. 346, 358 n.12 (5th Cir. 2011))). In any event, Plaintiffs have not attempted to show that any of the individual defendants violated clearly established due-process law.[4]

[3] Plaintiffs have not shown that the other District Defendants had anything to do with this incident, so for that additional reason, any Thirteenth Amendment claims against Brumfield, Lundy, or Rankin are dismissed.

[4] As with other claims, it is not apparent how each individual District Defendant would be responsible for the alleged due-process violations. The claims against the defendants who were not involved in the due-process allegations can be dismissed for this additional reason.

B. Byram Defendants

According to the Byram Police Department, both it and Kincaid are entitled to qualified immunity because Kincaid acted reasonably. *See* Defs.' Mot. [59] at 1. This raises two threshold issues neither party addresses. First, it is not apparent that the Byram Police Department—as opposed to the City of Byram—is a proper defendant under § 1983. *See Bradley ex rel. Wrongful Death Beneficiaries of Bradley v. City of Jackson*, No. 3:08-CV-261-TSL-JCS, 2008 WL 2381517, at *2 (S.D. Miss. June 5, 2008) (holding that Jackson Police Department was not a proper defendant under § 1983). But the Byram Defendants do not assert this argument, so it will not form the sole basis for the opinion. Second, if the Department is a proper party, the Court is not convinced that it can assert qualified immunity. Qualified immunity is a defense for individual defendants, not municipalities. *See Owen v. City of Indep., Mo.*, 445 U.S. 622, 638 (1980). Accordingly, this order focuses on Kincaid's right to qualified immunity and will separately note the arguments that affect the Department.

1. Fourth Amendment Claim

In the Amended Complaint, Plaintiffs say Kincaid "watched, observed, looked upon and intimidated minor B.O. as he was being inappropriately touched in his penis area." Am. Compl. [3] ¶ 23. They then say "upon belief and understanding, officer Kincaid saw the twelve year old minor being violated and did nothing." *Id.* ¶ 24. In other words, Kincaid violated B.O.'s Fourth Amendment rights by failing to intervene and stop the illegal search. *See id.* at ¶ 36.

The Byram Defendants generally contend that these averments fail to state a plausible claim under *Iqbal/Twombly* and otherwise fail to allege sufficient facts to overcome qualified immunity. They may have a point. But as stated above, both sides submitted record evidence, and the Court has elected to consider it. That means Plaintiffs must now go beyond the

pleadings and point to specific record evidence to establish their claim. *See Celotex Corp.*, 477 U.S. at 324. Under that standard, Plaintiffs have failed to support their Fourth Amendment claims against the Byram Defendants.

Plaintiffs' Fourth Amendment theory against the Byram Defendants depends on proof that Kincaid was actually present during the search. Yet Plaintiffs offer no credible record evidence to prove their otherwise conclusory assertion that he was there. For example, Plaintiffs rely on statements found in the Byram Defendants' own memorandum, arguing:

> Defendant Kincaid, came into the office and questioned B.O. as admitted by Defendant Kincaid in [Doc. 60, page 2 Paragraph 2, (stating: in fact, Sgt. Kincaid simple happened to walk back to the assistant principal's office while the school's investigation was ongoing) regarding purportedly stolen (2) hand held used calculators that are pictured in this memorandum as (Exhibit C).

Pls.' Mem. [66] at 2. True enough, the Byram Defendants state in their memorandum that Kincaid walked into the office during the investigation. Defs.' Mem. [60] at 3. But Plaintiffs omit the very next sentence, where defendants say that by then the search "was already over." *Id.* Defendants have not admitted Kincaid's presence during the search.

Plaintiffs next say that Defendant Ray "contradicts Defendant Kincaid's testimony when she swore the following: 'Officer Kincaid ***was not present at*** the time of the search. I never witnessed Officer Kincaid make physical contact with B.O.'" Pls' Mem. [66] at 2–3 (citing Ray Aff. [57-2] at 3) (emphasis in Plaintiffs' memorandum). They also argue that Ray contradicts herself when she says Kincaid was not present during the search yet claims she never saw him make "physical contact" with B.O. *Id.* Obviously, none of these statements are in conflict. Kincaid says in the portion of his brief that Plaintiffs rely upon that he arrived after the search but that he participated in the questioning. Ray—who was in the room—says the same thing in

her affidavit, *see* Ray Aff. [57-2], as does Kincaid in his subsequently submitted affidavit, *see* Kincaid Aff. [68-1].

Finally, neither affidavit that B.O. and S.O. submitted in response to this motion says Kincaid was present, and Plaintiffs have otherwise failed to cite any record evidence showing that he was. Absent that factual predicate, Plaintiffs have not shown that Kincaid violated B.O.'s constitutional rights with respect to the search. The Byram Defendants' motion is therefore granted as to the Fourth Amendment claim related to the search.

2. Fourteenth Amendment Claim

The Byram Defendants also seek dismissal of S.O.'s Fourteenth Amendment claim based on Kincaid's alleged failure to read B.O. his *Miranda* rights before he questioned him. *See* Pls.' Resp. [66] at 4; *see also Miranda v. Arizona*, 384 U.S. 436 (1966). Kincaid says this claim must be dismissed as a matter of law because B.O. was not formally arrested and was not otherwise entitled to *Miranda* warnings. Defs.' Mem. [60] at 14.

There is a threshold problem with this claim. "Violations of the prophylactic *Miranda* procedures do not amount to violations of the Constitution itself and, as such, fail to raise a cause of action under § 1983." *Foster v. Carroll Cty.*, 502 F. App'x 356, 358 (5th Cir. 2012) (citing *Chavez v. Martinez*, 538 U.S. 760, 772 (2003)); *see also Rollerson v. City of Freeport, Tex.*, No. H-12-1790, 2013 WL 2189892, at *14 (S.D. Tex. May 16, 2013) (collecting cases holding that remedy for *Miranda* violation is exclusion from evidence of any compelled self-incrimination, not a § 1983 action), *aff'd*, 555 F. App'x 404 (5th Cir. 2014). In this case, it is undisputed that no criminal charges were brought against B.O. And "the absence of a 'criminal case' in which [B.O.] was compelled to be a 'witness' against himself defeats his core" claim. *Chavez*, 538 U.S. at 772–73.

Aside from that, Plaintiffs have not shown that Kincaid violated clearly established law when he questioned B.O. about the contents of his backpack without administering *Miranda* warnings. Numerous courts have held that "[u]nder the federal constitution, students facing disciplinary action in public schools are not entitled to *Miranda* warnings." *Jarmon v. Batory*, No. 94-0284, 1994 WL 313063, at *11 (E.D. Pa. 1994); *see also K.A. ex rel. J.A. v. Abington Heights Sch. Dist.*, 28 F. Supp. 3d 356, 366 (M.D. Pa. 2014) (collecting cases); *Brian A. ex rel. Arthur A. v. Stroudsburg Area Sch. Dist.*, 141 F. Supp. 2d 502, 511 (M.D. Pa. 2001). And courts have reached that same conclusion even when the questioning occurs in the presence of law enforcement. *See, e.g., DeCossas v. St. Tammany Par. Sch. Bd.*, No. 16-3786, 2017 WL 3971248, at *21 (E.D. La. Sept. 8, 2017) (granting summary judgment).

Plaintiffs' only authority on this point is no different. In *N.C. v. Commonwealth of Kentucky*, the Kentucky Supreme Court considered whether to suppress a confession the plaintiff made during in-school questioning by an assistant principal and a school resource officer. 396 S.W.3d 852, 853–54 (Ky. 2013). A divided court concluded that when "questioning is done in the presence of law enforcement, *for the additional purpose of obtaining evidence against the student to use in placing a criminal charge*, the student's personal rights must be recognized." *Id.* at 864 (emphasis added). The evidence was therefore suppressed in the criminal trial. But the court also noted that not "[e]very custodial interrogation, when law enforcement is involved will . . . necessarily invoke the giving of *Miranda* warnings." *Id.* at 865; *see also id.* at 853 (recognizing that "questioning by school officials . . . are not impacted by *Miranda* when only school discipline is involved").

N.C. arose in the context of a criminal suppression hearing. It does not demonstrate that B.O. had a clearly established right to *Miranda* warnings in this context, and Plaintiffs offer no

additional authority on this point. Accordingly, Kincaid is entitled to qualified immunity on the Fourteenth Amendment due-process claim.[5]

VI. Conclusion

The Court has considered all the parties' arguments. Those not specifically addressed do not change the outcome. For the foregoing reasons, the Court denies the District Defendants' Motion to Dismiss [57] as to S.O.'s Fourth Amendment claim against Brumfield and Ray in their individual capacities. Defendants' motions [57, 59] are otherwise granted.

SO ORDERED AND ADJUDGED this the 3rd day of July, 2018.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

[5] As stated, the Byram Police Department is not entitled to qualified immunity. But failing to give *Miranda* warnings does not create liability under § 1983 in this context. Moreover, the Department briefly argues that Plaintiffs failed to establish a policy or custom that was the "moving force" behind the constitutional deprivation. *See* Defs.' Mem. [60] at 16 (quoting *Bankston v. Pass Rd. Tire Ctr., Inc.*, 611 So. 2d 998, 1008–09 (Miss. 1992)). This argument speaks to municipal liability, *see Piotrowski v. City of Hous.*, 237 F.3d 567, 580 (5th Cir. 2001), and Plaintiffs did not address it. The claim is therefore dismissed as to this defendant as well.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

S.O., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, B.O. — PLAINTIFFS

V. — CIVIL ACTION NO. 3:17-CV-383-DPJ-FKB

HINDS COUNTY SCHOOL DISTRICT, ET AL. — DEFENDANTS

ORDER

Plaintiffs say that Assistant Principal Tommy Brumfield inappropriately touched B.O., a minor, while searching his pockets. They therefore sued Defendants under 42 U.S.C. § 1983. There are five pending motions. For the following reasons, Defendants Tommy Brumfield and Michelle Ray's second motion to dismiss based on qualified immunity [117] is granted; Defendants Brumfield, Hinds County School District ("HCSD"), and Ray's summary-judgment motion [119] is granted; Defendant Brumfield's motion to dismiss Plaintiffs' proposed amendment or alternatively, motion for summary judgment [121] is denied; Defendants Brumfield, HCSD, and Ray's motion to strike Plaintiffs' expert [123] is granted; and Defendants Brumfield and Ray's motion to strike Plaintiffs' sur-rebuttal [141] is granted.

I. Background

The parties dispute the reasonableness of a search Defendant Brumfield allegedly performed on Plaintiff B.O., a seventh-grade student suspected of selling candy during school. The Court previously denied a motion to dismiss, holding that based on Plaintiffs' affidavits—viewed in the light most favorable to them—Brumfield reached in the child's pocket and "touched [B.O.'s] penis as part of the search." July 3, 2018 Order [70] at 10 (denying qualified immunity). Subsequent discovery established that Brumfield never touched B.O.'s penis, so Defendants again assert qualified immunity and now seek summary judgment on Plaintiffs'

Fourth Amendment unreasonable-search claim. The Court has considered all briefs and relevant law and is now ready to rule on the two dispositive motions as well as the collateral motions to strike.

II. Dispositive Motions

There are two dispositive motions, one for dismissal and one for summary judgment. Both will be addressed under Rule 56. Motions to dismiss filed after a defendant answers the complaint typically fall under Federal Rule of Civil Procedure 12(c). In this case, Defendants did not cite the applicable rule of procedure, but Plaintiffs construed the motion as a motion for summary judgment and based their response on evidence outside the record. *See* Pls.' Mem. [133] at 4. The Court will therefore convert the motion to dismiss to one for summary judgment. *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *see also Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, LLC*, 255 F. App'x 775, 783 (5th Cir. 2007) ("It is well known that when 'matters outside the pleading' are presented with a motion to dismiss under Rule 12(b)(6), a district court has complete discretion to either accept or exclude the evidence." (citation omitted)).

Summary judgment is warranted under Rule 56(a) when evidence reveals no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The nonmoving party must then "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). When such contradictory facts exist, the court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *Little*, 37 F.3d at 1075; *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

A. Defendants' Motion to Dismiss

Defendants Brumfield and Ray assert qualified immunity. "The privilege is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (internal quotation marks and citations omitted). As the Fifth Circuit has summarized:

> [T]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal. This immunity protects all but the plainly incompetent or those who knowingly violate the law. Accordingly, we do not deny immunity unless existing precedent must have placed the statutory or constitutional question beyond debate.

Anderson v. Valdez, 845 F.3d 580, 599–600 (5th Cir. 2016) (footnotes and citations omitted, punctuation altered). Furthermore, "[w]hen a defendant raises qualified immunity, the burden is

on the plaintiff to "demonstrate the inapplicability of the defense." *Coleman v. Marion Cty.*, No. 2:14-CV-185-DPJ-FKB, 2015 WL 5098524, at *6 (S.D. Miss. Aug. 31, 2015) (quoting *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002)).

Courts use a two-step analysis to determine whether qualified immunity applies. The traditional first step asks whether "the plaintiff has adduced facts sufficient to establish a constitutional or statutory violation." *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) (citing *Saucier*, 533 U.S. at 201). Second, if a violation has been sufficiently alleged, the Court must determine "whether [the officer's] actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." *Id.* (alteration in original) (quoting *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007)). In appropriate cases, such as here, courts can skip the first step and ask whether the alleged conduct violates clearly established law. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

The inquiry whether a law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004) (quoting *Saucier*, 533 U.S. at 201). Thus,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Id. (citations omitted). "This does not require that 'the very action in question has previously been held unlawful,' merely that a reasonable officer would understand that his or her conduct was unlawful." *Weisler v. Jefferson Parish Sheriff's Office*, No. 17-30951, 2018 WL 3031437, at *2 (5th Cir. June 18, 2018) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

This is not the first time that Brumfield and Ray have moved for dismissal based on qualified immunity. As noted above, the Court denied Defendants' first motion on July 3, 2018. There, the Court applied Rule 12(d) and held that a question of fact precluded summary judgment. July 3, 2018 Order [70] at 10. In previous affidavits, B.O. and his mother had sworn that Brumfield touched his "thang" while searching his pockets for money from the alleged sale of candy during school. *See* S.O. Aff. [63-1] at 13; B.O. Aff. [63-1] at 10. The Court viewed those sworn statements in the light most favorable to Plaintiffs and concluded "that if B.O. is factually correct [that Brumfield touched his penis], then the search was objectively unreasonable in light of clearly established law." July 3, 2018 Order [70] at 10; *see also id.* at 9 (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 372–73 (2009)).

But Plaintiffs' sworn affidavits withered as discovery progressed. Although they assert that their positions have remained consistent, it is now clear that Brumfield never touched B.O.'s penis as the affidavits suggested—the salient fact supporting the Court's initial ruling. *See* B.O. Dep. [117-8] at 5 ("Q: Did he actually touch your penis" "A: No, ma'am, he didn't grab it, but he touched near the vicinity."); *see also* S.O. Dep. [117-9] at 5–6 ("Q: Okay. And so at any point – and I understand what you're telling me as far as what B. said, but at any point, did B. actually say that Mr. Brumfield touched his penis? A: Touched? Q: Yes, ma'am. A: No. [B.O.] said that Mr. Brumfield had his hands in his pockets feeling around his private area, and it made him very uncomfortable, and he did not like it."); S.O. June 10, 2019 Affidavit [132-14] ¶ 6 ("B.O., my son, being a minor contends that he has always, since a child, called his penis areas 'my thang,' and when B.O. speaks of his thang he is talking about the pubic area that is connected to his thigh . . . .").

Brumfield has steadfastly denied ever touching B.O. at all, claiming that he merely asked the student to pull out his pockets for inspection. *See* Brumfield Aff. [57-3] at 3. But viewing the evidence in the light most favorable to the non-movants, the Court must decide whether they have shown that searching a student's pockets under these circumstances—without touching his genitalia—violates clearly established law.

The only case Plaintiffs cite as establishing clearly established law is *Safford Unified School District No. 1 v. Redding*. Pls.' Mem. [133] at 16. But in that case, the school searched a 13-year old's bag for suspected drugs and then subjected her to a near strip search, instructing her to "pull out her bra" and stretch the elastic on her underpants. 557 U.S. at 374. Nothing remotely similar has been alleged in this case, and as the United States Supreme Court held in *Mullenix v. Luna*:

> We have repeatedly told courts . . . not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.

136 S. Ct. 305, 308 (2015) (citation and punctuation omitted).

Redding is distinguishable, and Plaintiffs fail to cite any other cases addressing a Fourth Amendment claim under similar facts. Defendants, on the other hand, cite at least one case where a district court found no constitutional violation when school officials reached in students' pockets searching for money. *See H.Y. ex rel. K.Y. v. Russell Cty. Bd. of Educ.*, 490 F. Supp. 2d

1174, 1186 (M.D. Ala. 2007) (holding that "these searches did not violate the Fourth Amendment"). Brumfield and Ray are entitled to qualified immunity.[1]

B. Defendants' Summary-Judgment Motion

Having granted qualified immunity to Brumfield and Ray on Plaintiffs' individual-capacity Fourth Amendment claims, the Court turns to the official-capacity claims against those Defendants and the municipal-liability claim against HCSD. Defendants first say no Fourth Amendment violation occurred during the search, but they also say that even if one did, Plaintiffs "have not shown an official policy or custom caused the deprivation." Defs. Brumfield, HCSD, and Ray Mem. [120] at 11. Because the Court agrees that municipal liability is lacking, it is unnecessary to determine whether a Fourth Amendment violation occurred.

As an initial point, the official-capacity claims against Brumfield and Ray are treated as claims against the municipality itself. *Hafer v. Melo*, 502 U.S. 21, 25 (1990). Thus, the analysis for those claims mirrors the § 1983 analysis for the claim against HCSD.

Section 1983 precludes deprivation of a right "secured by the Constitution and the laws" of the United States by a person acting under color of state law. 42 U.S.C. § 1983; *Daniel v. Ferguson*, 839 F.2d 1124, 1128 (5th Cir. 1988). A municipality may be held liable as a "person" under § 1983, but that liability may not rest on *respondeat superior* and instead must be

[1] Plaintiffs offer a few other arguments for denying summary judgment. For example, they try to assert judicial estoppel. *See* Pls.' Resp. [132] at 3. But as their own response acknowledges, judicial estoppel does not apply unless the Court accepts the party's prior inconsistent position. *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999) (listing elements of judicial estoppel). That did not occur here because Defendants' position has not changed and the Court rejected their first motion. Plaintiffs also argue various non-material factual issues. But "only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. Factual disputes that are irrelevant or that are unnecessary will not be counted." *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir. 1987) (citation omitted). None of Plaintiffs' arguments overcome the failure to prove Defendants violated clearly established law.

premised upon "'some official action or imprimatur.'" *Valle v. City of Hous.*, 613 F.3d 536, 541 (5th Cir. 2010) (quoting *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001)).

To establish § 1983 liability against a municipality, "[a] plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy or custom.'" *Id.* at 541–42 (quoting *Pineda v. City of Hous.*, 291 F.3d 325, 328 (5th Cir. 2002)). Plaintiffs fail to meet any of these elements.

Plaintiffs attempt to satisfy the first element by pointing to an official policy. A plaintiff may illustrate official policy by "point[ing] to a policy statement formally announced by an official policymaker." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 168 (5th Cir. 2010) (citing *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). Alternatively, a plaintiff may point to a "'persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.'" *Id.* at 169 (quoting *Webster*, 735 F.2d at 841).

Here, Plaintiffs travel under the first option, claiming that Defendants violated HCSD's own policy regarding student searches. Pls.' Mem. [129] ¶ 4. That policy states: "At least two adults must be present while any search is conducted. If, in the discretion of the administrator or employee conducting the search, the search is particularly intrusive, the person conducting the search and the witness should be the same sex as the student." Policy [119-7].

Assuming the policy was violated as Plaintiffs say—which is not evident—violating a municipal policy does not equate to a constitutional violation. *Harris v. Payne*, 254 F. App'x 410, 417 (5th Cir. 2007) ("That Zugg and Waldrop also violated internal policies does not

transform Harris's claim into one of constitutional dimension."). More significantly, Plaintiffs must show that the policy itself "cause[d] an employee to violate another's constitutional rights." *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 751 (1989) (citation and internal quotation marks omitted). Violating a policy does not establish that the policy caused the deprivation of a right. *See Williams v. City of Cleveland*, No. 2:10-CV-215–SA–JMV, 2012 WL 3614418, at *17 (N.D. Miss. Aug. 21, 2012) (holding that employee's violation of municipal policy creates no liability for municipality under § 1983). Imposing municipal liability because an employee violated policy on one occasion would amount to *respondeat superior* liability, which is not permitted under § 1983. *Id.*

Plaintiffs likewise fail to identify a custom or policymaker. *See Valle*, 613 F.3d at 541–42. They could have attempted to show a custom in two ways: (1) a single act of unconstitutional conduct by a policymaker or (2) a pattern of constitutional violations by municipal employees. *Zarnow*, 614 F.3d at 169. Plaintiffs offer no such evidence. As for identifying a policymaker, the Fifth Circuit held in *Piotrowski* that "[t]his is not an opaque requirement . . . . Actual or constructive knowledge of a custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority." 237 F.3d at 579 (quoting *Webster*, 735 F.2d at 842). Again, Plaintiffs offer no summary-judgment evidence to satisfy this element. Thus, Plaintiffs have not established official-capacity claims against Defendants Brumfield and Ray and failed to demonstrate a basis for municipal liability against HCSD. Plaintiffs' Fourth Amendment claim fails as a matter of law.

III. Collateral Issues

A. Defendants' Motion to Strike Plaintiffs' Expert

Defendants Brumfield, HCSD, and Ray ask the Court to strike Plaintiffs' expert, Kim Basinger. Defs. Brumfield, HCSD, and Ray Mot. [123]. The moving Defendants say that if their motions as to the Fourth Amendment claim are granted, then the expert's "opinions will be irrelevant." Defs. Brumfield, HCSD, and Ray Mem. [124] at 3. The Court agrees. Plaintiffs' expert's conclusions relate solely to Plaintiffs' alleged damages based on their Fourth Amendment claim. That claim has been dismissed, so the motion to strike is granted.

B. Defendants' Motion to Strike Plaintiffs' Sur-Rebuttal

On June 26, 2019, Defendants filed a rebuttal in support of their second qualified-immunity-based motion to dismiss. *See* Defs.' Rebuttal [139]. Believing that Defendants' brief was actually a delinquent sur-rebuttal filed without leave of court, Plaintiffs filed their own sur-rebuttal—without leave of court—which seemingly asks the Court to strike Defendants' submission. *See* Pls.' Sur-Rebuttal [140]. Defendants responded with a motion to strike Plaintiffs' sur-rebuttal. *See* Defs.' Mot. [141]. Defendants' motion is granted on procedural and substantive grounds.

Procedurally, neither the Federal Rules of Civil Procedure nor this Court's local rules provide parties the right to file a sur-rebuttal. So—as Plaintiffs themselves observe—"a [s]ur-[r]ebuttal requires the Court's leave." Pls.' Sur-Rebuttal [140] at 2. Yet Plaintiffs failed to seek leave before filing their sur-rebuttal. In addition, Plaintiffs' sur-rebuttal is in effect a motion to strike Defendants' rebuttal memorandum. But under Uniform Local Rule 7(b)(3)(C), "[a] response to a motion may not include a counter-motion in the same document. Any motion must

be an item docketed separately from a response." In other words, if Plaintiffs wanted the Court to strike Defendants' rebuttal, they should have filed a separate motion—as Defendants did.

Substantively, Plaintiffs' arguments for striking Defendants' rebuttal mischaracterize the record. As stated, Plaintiffs say the rebuttal filed by Defendants Brumfield and Ray is, in reality, an untimely sur-rebuttal filed without leave of court. Pls.' Sur-rebuttal [140] ¶¶ 1–2. Not so. When discovery proved that Plaintiffs' accounts no longer supported the Court's initial ruling, Brumfield and Ray filed a second qualified-immunity-based motion on June 4, 2019. Plaintiffs responded in opposition on June 13, 2019. Then, Brumfield and Ray moved for an extension of time "until June 27, 2019" to file their rebuttal. Defs.' Mot. [134]. Although Plaintiffs opposed that motion, the Court granted it in a June 19, 2019 text-only order. Thus, Defendants had until June 27, 2019, to file their rebuttal, and they did so one day early. *See* Defs.' Rebuttal [139]. The rebuttal was neither untimely nor an unauthorized sur-rebuttal. Brumfield and Ray's motion to strike Plaintiffs' sur-rebuttal is granted.[2]

C. State-Law Claims and Supplemental Jurisdiction

Having dismissed the federal claims, the only remaining question is whether there are any state-law claims, and if so, whether the Court should exercise supplemental jurisdiction over them under 28 U.S.C. § 1367.

To begin, Defendant Brumfield asks the Court to dismiss Plaintiffs' *proposed* second amended complaint under Rule 12(b)(6), or alternatively under Rule 56. Brumfield Mot. [121]. On October 25, 2018, Plaintiffs sought leave to add an assault claim against Brumfield in a

[2] Plaintiffs badly misconstrue the Court's text order granting Defendants' requested extension. They argue that the order merely gave Defendants "until the end of the day to file his [sic] rebuttal." Pls.' Resp. [142] at 2. But the text order clearly states that the Court was granting Defendants' motion for time, which expressly sought a June 27, 2019 deadline.

second amended complaint. Pls.' Mot. [83]. The Court granted the motion on April 12, 2019. Order [116]. Accordingly, under the Court's local rules, Plaintiffs had "seven (7) days from entry of the order granting the motion" to "file the amended pleading as a separately docketed item." L.U. Civ. R. 7(b)(2). They never did. Brumfield now seeks dismissal of the never-filed pleading. *See* Brumfield Mot. [121].

In the body of their response to Brumfield's motion, Plaintiffs ask the Court to allow more time to file the second amended complaint based on excusable neglect. But this delinquent request for more time was made in a responsive pleading rather than by motion. It therefore violates the Court's local rules. *See* L.U. Civ. R. 7(b)(3)(C) ("A response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response."). Substantively, the amendment, discovery, and dispositive-motions deadlines have long since passed. So even if there was a proper motion, prejudice would exist, and the motion would be denied.

In short, there is no second amended complaint for the Court to address under either Rule 12(b)(6) or 56. Nor is there a motion before the Court seeking leave to file the proposed second amended complaint. As such, Brumfield's motion is denied to the extent it seeks judgment because there is nothing to dismiss.

That said, there may be one state-law claim that has never been dismissed. Although the Court granted summary judgment as to most state-law claims, it denied—without prejudice—Defendant Ben Lundy's motion as it related to his individual-capacity claims. *See* Oct. 18, 2017 Order [53] at 5. It does not appear that Lundy joined in the latest motions, but to the extent this claim remains, the Court declines supplemental jurisdiction.

Title 28 U.S.C. § 1367(c)(3) states, "The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." "District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state law claim once all federal claims are dismissed." *Heggemeier v. Caldwell Cty.*, 826 F.3d 861, 872 (5th Cir. 2016) (quoting *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993)). The Fifth Circuit has "elucidated the general rule that 'a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial.'" *Id.* (quoting *Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc.*, 554 F.3d 595, 602 (5th Cir. 2009)). That is the case here. So to the extent the remaining state-law claim against Defendant Lundy has not previously been dismissed, it is dismissed without prejudice.

IV. Conclusion

The Court has considered all arguments raised; those not addressed would not change the outcome. For the reasons stated, Defendants Brumfield and Ray's second motion to dismiss based on qualified immunity [117] is granted; Defendants Brumfield, HCSD, and Ray's summary-judgment motion [119] is granted; Defendant Brumfield's motion to dismiss Plaintiffs' proposed amendment or alternatively, motion for summary judgment [121] is denied; Defendants Brumfield, HCSD, and Ray's motion to strike Plaintiffs' expert [123] is granted; and Defendants Brumfield and Ray's motion to strike Plaintiffs' sur-rebuttal [141] is granted. Any remaining state-law claims against Defendant Lundy are dismissed without prejudice. A separate judgment will be prepared under Rule 58.

SO ORDERED AND ADJUDGED this the 30th day of August, 2019.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

S.O., INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, B.O. — PLAINTIFF

V. — CIVIL ACTION NO. 3:17cv383-DPJ-FKB

HINDS COUNTY SCHOOL DISTRICT, ET AL. — DEFENDANTS

FINAL JUDGMENT

For the reasons given in the Order granting Defendants' Motion to Dismiss and Motion for Summary Judgment, entered in this case on this date, the Court hereby enters a judgment, pursuant to Rule 58 of the Federal Rules of Civil Procedure, in favor of Defendants and against Plaintiff.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed with prejudice and any remaining state-law claims against Defendant Lundy are dismissed without prejudice.

SO ORDERED AND ADJUDGED this the 30th day of August, 2019.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE