APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 17, 2021]

No. 20-20225

T.O., *a child;* TERRENCE OUTLEY; DARREZETT CRAIG,

Plaintiffs-Appellants,

versus

FORT BEND INDEPENDENT SCHOOL DISTRICT;
ANGELA ABBOTT, *a teacher,*

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-331

Before WIENER, COSTA, and WILLETT, *Circuit Judges.*

WIENER, *Circuit Judge*:

Plaintiffs-Appellants T.O. and his parents, Terrence Outley and Darrezett Craig (collectively, "Plaintiffs-Appellants") appeal the dismissal of their claims arising under the Fourth and Fourteenth Amendments, Title II of the Americans with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act of 1974 ("§ 504"), in connection with a primary school disciplinary incident experienced by T.O. We agree that the injuries T.O. allegedly sustained in an altercation with a teacher resulted from a disciplinary incident. We are therefore bound by our precedent to affirm the

dismissal of Plaintiffs-Appellants' constitutional claims. For different reasons, we affirm the district court's dismissal of their statutory claims.

I. BACKGROUND

This case arises from injuries that the minor child T.O. alleged to have sustained during an altercation with a teacher at Hunters Glen Elementary School, when he was a first-grade student there. T.O. has Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. Based on these conditions, Defendant-Appellee Fort Bend Independent School District ("FBISD") provided T.O. with a behavioral aide and a Behavioral Intervention Plan, which called for oral redirection and placement in a quiet area whenever T.O. misbehaved, and praise when he engaged in appropriate behavior.

After T.O. exhibited disruptive classroom behavior on a day in 2017, his aide took him into the hallway and instructed him to remain there until he calmed down. Defendant-Appellee Angela Abbott, a fourth-grade teacher, happened to be walking down the hall at the same time and offered her assistance. Although T.O.'s aide explained that the situation was under control, Abbott positioned herself between T.O. and the classroom door while he yelled that he wanted to return to class. In an attempt to re-enter the classroom, T.O. tried to push Abbott away from the classroom door and hit her right leg. Abbott responded by seizing T.O.'s neck, throwing him to the floor, and holding him in a choke hold for several minutes. During that incident, Abbott yelled that T.O. "had hit the wrong one" and needed "to keep his hands to himself." She released T.O. after his aide asked Abbott "to release him . . . because he needed air and she was holding him the wrong way." FBISD investigated the

incident on three separate occasions, but Abbott was never fired or otherwise disciplined.

Plaintiffs-Appellants sued Abbott under 42 U.S.C. § 1983 for violations of T.O.'s Fifth and Fourteenth Amendment liberty interest in his bodily integrity, and his Fourth Amendment right to be free from unreasonable seizure. They also sued FBISD for disability discrimination in violation of the ADA and § 504.

In lieu of filing an answer, Abbott and FBISD moved to dismiss all claims. A magistrate judge issued a memorandum and recommendation, concluding that (1) Abbott was entitled to qualified immunity because her use of force was not a constitutional violation under *Fee v. Herndon*,[1] and (2) T.O. had failed to state a claim for disability discrimination against FBISD. The district court adopted the recommendation in full, dismissing all claims and denying Plaintiffs-Appellants leave to file a proposed second amended complaint.

Plaintiffs-Appellants timely appealed, challenging the dismissal of their § 1983 claims and their discrimination claims. They also appealed the denial of their motion to file a second amended complaint.

II. STANDARDS OF REVIEW

A motion to dismiss granted on the basis of qualified immunity is reviewed *de novo*, accepting all well-

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[1] 900 F.2d 804, 808 (5th Cir. 1990) ("Our precedents dictate that injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions.").

pleaded facts as true and drawing all inferences in favor of the plaintiff.[2] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[3] Conclusional allegations, naked assertions, and "formulaic recitations of the elements of a cause of action will not do."[4]

The denial of a motion for leave to amend a complaint is reviewed for abuse of discretion.[5] A trial court abuses its discretion when its ruling is "based on an erroneous view of the law or a clearly erroneous assessment of the evidence."[6]

III. ANALYSIS

A. Section 1983 Claims

"To state a claim under 42 U.S.C. § 1983, a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law."[7] However, "[t]he doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have

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[2] *Marks v. Hudson*, 933 F.3d 481, 485 (5th Cir. 2019).

[3] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[4] *Id.*

[5] *Moore v. Manns*, 732 F.3d 454, 456 (5th Cir. 2013).

[6] *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003).

[7] Atteberry v. Nocona Gen. Hosp., 430 F.3d 245, 252-53 (5th Cir. 2005), abrogated on other grounds, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).

been believed to be legal."[8] Once the defense of qualified immunity has been asserted, the plaintiff has the burden of demonstrating that "(1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time."[9]

Plaintiffs-Appellants claim that Abbott violated T.O.'s right to be free from (1) state-sanctioned harm to his bodily integrity under the Due Process Clause of the Fourteenth Amendment and (2) unreasonable seizure under the Fourth Amendment, when Abbott held him down and choked him. Based on our precedent, we disagree.

The Fourth Amendment is applicable in a school context.[10] In this circuit, however, claims involving corporal punishment are generally analyzed under the Fourteenth Amendment.[11] It is well-established in this circuit that "corporal punishment in public schools implicates a constitutionally protected liberty interest" under the Fourteenth Amendment.[12] But, "as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive

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[8] *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc) (citation omitted).

[9] *Benfield v. Magee*, 945 F.3d 333, 337 (5th Cir. 2019) (citation omitted).

[10] *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (applying the Fourth Amendment to searches conducted in public schools); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (same).

[11] *Campbell v. McAlister*, 162 F.3d 94, 1998 WL 770706, at *2 (5th Cir. 1998) (unpublished) ("Since our en banc decision in *Ingraham v. Wright*, we have consistently applied a substantive due process analysis to claims of excessive force in the context of corporal punishment at public schools." (citation omitted)).

[12] *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

due process through excessive corporal punishment."[13] This rule was developed in *Ingraham v. Wright*[14] and applied in *Fee v. Herndon.*[15] It recognizes that, while "corporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,'" when the state provides alternative post-punishment remedies, the state has "provided all the process constitutionally due" and thus cannot "act 'arbitrarily,' a necessary predicate for substantive due process relief."[16]

Based on the foregoing, we have consistently dismissed substantive due process claims when the offending conduct occurred in a disciplinary, pedagogical setting. For example, we dismissed substantive due process claims (1) when a student was instructed to perform excessive physical exercise as a punishment for talking to a friend;[17] (2) when a police officer slammed a student to the ground and dragged him along the floor after the student disrupted class;[18] (3) when a teacher threatened a student, threw him against a wall, and choked him after the student

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[13] *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000).

[14] 430 U.S. 651.

[15] 900 F.2d 804.

[16] *Id.* at 808 (quoting *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)); *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977).

[17] *Moore*, 233 F.3d at 873, 875.

[18] *Campbell*, 162 F.3d at *1, *5.

questioned the teacher's directive;[19] (4) when an aide grabbed, shoved, and kicked a disabled student for sliding a compact disc across a table;[20] and (5) when a principal hit a student with a wooden paddle for skipping class.[21]

In contrast, we have allowed substantive due process claims against public school officials to proceed when the act complained of was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[22] For example, we held that a substantive due process claim could proceed when a teacher allegedly molested a student,[23] and when a teacher tied a student to a chair for two days as part of an experimental technique.[24] We allowed those claims to proceed because, unlike disciplinary measures, these alleged acts were "unrelated to any legitimate state goal."[25]

Fidelity to our precedent requires us to affirm the dismissal of the instant claim of substantive due process. The aide removed T.O. from his classroom for disrupting class, and Abbott used force only after T.O.

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[19] *Flores v. Sch. Bd. of Desoto Par.*, 116 F. App'x 504, 506 (5th Cir. 2004) (unpublished).

[20] *Marquez v. Garnett*, 567 F. App'x 214, 215, 218 (5th Cir. 2014) (unpublished).

[21] *Serafin v. Sch. of Excellence in Educ.*, 252 F. App'x 684, 685-86 (5th Cir. 2007) (unpublished).

[22] *See Woodard*, 732 F.2d at 1246.

[23] *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (en banc).

[24] *Jefferson v. Yselta Indep. Sch. Dist.*, 817 F.2d 303, 305-06 (5th Cir. 1987).

[25] *Moore*, 233 F.3d at 875 (distinguishing *Taylor Indep. Sch. Dist.*, 15 F.3d 443).

pushed and hit her. Even if Abbott's intervention were ill-advised and her reaction inappropriate, we cannot say that it did not occur in a disciplinary context. The facts alleged simply do not suggest that T.O. was the subject of a "random, malicious, and unprovoked attack,"[26] which would justify deviation from *Fee*. To borrow from the unpublished opinion in *Marquez*, in which this court dismissed § 1983 claims brought by an autistic seven-year old whose aide yelled at, grabbed, shoved, and kicked that student for sliding a compact disk across a desk, "the setting is pedagogical, and [T.O.'s] action was unwarranted."[27] Furthermore, we have consistently held that Texas law provides adequate, alternative remedies in the form of both criminal and civil liability for school employees whose

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[26] *Flores*, 116 F. App'x at 511.

[27] 567 F. App'x at 217. Moreover, T.O.'s case is easily distinguishable from *Jefferson* and *Taylor Independent School District*. In both of those cases, we allowed § 1983 claims against school officials to proceed because the offending conduct had no conceivable pedagogical justification. For example, in *Jefferson*, we held that a teacher violated a student's constitutional rights by tying him to a chair over the course of two days without any apparent justification. 817 F.2d at 305-06. The *Jefferson* court specifically noted that *Ingraham* was inapplicable because the complaint alleged that the student "was not being punished, but was the subject of an instructional technique." *Id.* at 305. Similarly in *Taylor Independent School District*, we allowed claims to proceed against a teacher who sexually molested a student because "there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it." 15 F.3d at 452. In contrast, the facts here suggest that Abbott's actions had a disciplinary purpose, as she attempted to help T.O.'s behavioral aide address T.O.'s behavior and asserted force only after T.O. hit her.

use of excessive disciplinary force results in injury to students in T.O.'s situation.[28]

Plaintiffs-Appellants' Fourth Amendment claim fares no better. This court has not conclusively determined whether the momentary use of force by a teacher against a student constitutes a Fourth Amendment seizure. We have rejected Fourth Amendment claims brought by a student who was choked by a teacher on the basis that allowing such claims to proceed would "eviscerate this circuit's rule against prohibiting substantive due process claims" stemming from the same injuries.[29] But we have also noted that the claims of excessive force and unlawful arrest against other school officials "are properly analyzed under the Fourth Amendment."[30] In light of this inconsistency in our caselaw, we cannot say that it was clearly established, at the time of the incident, that Abbott's actions were illegal under the Fourth Amendment.

Plaintiffs-Appellants unpersuasively attempt to avoid this outcome by suggesting that *Fee* has been

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[28] *Moore*, 233 F.3d at 875 & n.20 (citing TEXAS PENAL CODE ANN. § 9.62 (West 1994); TEXAS EDUC. CODE ANN. § 22.051(a) (West 2013)); *see also Cunningham v. Beavers*, 858 F.2d 269, 272 (5th Cir. 1988) (holding that adequate traditional common law remedies existed in Texas to protect students who were subjected to excessive disciplinary force).

[29] *Flores*, 116 F. App'x at 510.

[30] *Keim v. City of El Paso*, 162 F.3d 1159, 1998 WL 792699, at *1, *4 n.4 (5th Cir. 1998) (per curiam) (unpublished) (involving claims that security guards assaulted and beat a student); *see also Curran v. Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015) (analyzing claim that sheriffs deputy "slamm[ed] a student's head into the wall" under the Fourth Amendment).

abrogated by *Knick v. Township of Scott*[31] and *Kingsley v. Hendrickson*.[32] Not so. *Knick* concerns Fifth Amendment Takings claims, and *Kingsley* concerns excessive force claims brought by pretrial detainees—circumstances markedly distinguishable from substantive due process claims brought in an educational context.[33] In any event, *Knick* was decided after the offending incident in this case, and *Kingsley* has never been interpreted by this court as altering the law in the manner Plaintiffs-Appellants suggest. Even if these cases do call *Fee*'s validity into question,[34] they

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[31] 139 S. Ct. 2162, 2163 (2019) (holding that a property owner may bring a Fifth Amendment takings claim in federal court without first exhausting state remedies). T.O. argues that under *Knick*, the availability of state remedies is irrelevant to the validity of a constitutional claim.

[32] 576 U.S. 389, 389 (2015) (holding that to prevail on an excessive force claim, a pretrial detainee must "show only that the force purposely or knowingly used against him was objectively unreasonable"). T.O. argues that under *Kingsley*, all Fourteenth Amendment excessive force claims must be evaluated for objective reasonableness.

[33] Under our rule of orderliness, for a Supreme Court decision to overrule a precedent of our course, it "must 'be unequivocal, not a mere "hint" of how the Court might rule in the future.'" *Mercado v. Lynch*, 823 F.3d 276, 278 (5th Cir. 2016) (quoting *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013)).

[34] T.O. argues that *Knick* implicitly abrogated *Fee* by stating, in dicta, that "the 'general rule' . . . that plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit . . . . is as true for takings claims as for any other claim grounded in the Bill of Rights." 139 S. Ct. at 2172-73 (quotation omitted). *Knick* does suggest that the availability of a state remedy might not supplant the availability of a federal forum for constitutional claims, but numerous other Supreme Court cases have called *Fee* into question by holding the same even more clearly. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("[T]he constitutional violation actionable under § 1983 is

would not have been sufficient to put Abbott on notice of the illegality of her conduct at the time of the incident. To defeat a claim of qualified immunity, the illegality of the conduct must be "clearly established" at the time it took place.[35] It is certainly true that "[b]y now, every school teacher . . . must know that inflicting pain on a student . . . violates that student's constitutional right to bodily integrity."[36] But, for more than thirty years, the law of this circuit has clearly protected disciplinary corporal punishment from constitutional scrutiny. Neither *Knick* nor *Kingsley* permits us to deviate from out established precedent in this regard.

B. Statutory Claims

Plaintiffs-Appellants also contend that the district court erred in dismissing their claims of disability discrimination under the ADA and § 504. Both the ADA and § 504 generally prohibit discrimination against persons with disabilities.[37] Claims brought under § 504 or the ADA, or both, are subject to the same analysis. "The only material difference between the two provisions lies in their respective causation

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complete when the wrongful action is taken. A plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." (citation omitted)). We have nevertheless historically adhered to *Fee* despite these pronouncements, and nothing about *Knick* in particular warrants the about-face reversal of our decades-old rule, at least not without en banc consideration.

[35] Taylor Indep. Sch. Dist., 15 F.3d at 454.

[36] *Moore*, 233 F.3d at 875.

[37] D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 453 (5th Cir. 2010).

requirements."[38] "Cases concerning either section apply to both."[39]

To prevent dismissal, a plaintiff must allege sufficient facts to show: "(1) that he is a qualified individual . . .; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability."[40] A plaintiff need not identify an official policy to sustain such a claim, and a public entity may be held vicariously liable for the acts of its employees under either statute.[41] Evidence of intentional discrimination is necessary to support a claim for monetary damages, but a plaintiff seeking only equitable relief may succeed on a disparate impact theory.[42]

Plaintiffs-Appellants' theory of liability for these claims is hardly evident from the face of their

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[38] *Bennett Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (explaining that a § 504 claim requires that the discrimination be "solely by reason" of the disability, whereas an ADA claim does not require the same) (emphasis omitted) (quoting 29 U.S.C. § 794(a)).

[39] Doe v. Columbia-Brazoria Indep. Sch. Dist. by & through Bd. of Tr., 855 F.3d 681, 690 (5th Cir. 2017).

[40] *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 672-73 (5th Cir. 2004). Unlike the ADA, § 504 is applicable only to entities receiving federal funds. *See Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 291 (5th Cir. 2005). The applicability of § 504 is not disputed in this case.

[41] *Delano Pyle v. Victoria Cnty., Tex.*, 302 F.3d 567, 574-75 (5th Cir. 2002).

[42] Miraglia v. Bd. of Supervisors of La. State Museum, 901 F.3d 565, 574 (5th Cir. 2018).

complaint. On appeal, however, they stress that their discrimination claims are based on (1) Abbott's physical acts against T.O. on January 31, 2017; (2) FBISD's failure to ensure that Abbott knew how to approach the situation; (3) FBISD's failure to investigate the incident; and (4) FBISD's failure to discipline Abbott.[43]

The trouble is that none of the factual allegations contained in the complaint permit the inference that T.O. was ever discriminated against because of his disability. With respect to vicarious liability for Abbott's involvement in the physical altercation, the only allegations linking Abbott's conduct to T.O.'s disability are conclusional ones that cannot withstand Rule 12(b)(6) scrutiny.[44] The complaint is devoid of any allegations concerning FBISD's failure to properly train Abbott,[45] and the complaint acknowledges that FBISD conducted at least three investigations into the incident. Plaintiffs-Appellants' assertion that these investigations were "designed to exonerate" Abbott and FBISD from liability are legal conclusions, not factual allegations that support their claim. Lastly, with respect to FBISD's alleged failure to discipline Abbott following the incident, there are no allegations that permit the inference that this decision was made because of T.O.'s disability status. In sum,

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[43] It is undisputed that T.O. is a qualified individual under the statutes.

[44] For example, Plaintiffs-Appellants allege that Abbott intervened because she was "angered by T.O.'s disabilities and that he was being treated in compliance with his Behavioral Intervention Plan" and that she was "motivated by . . . prejudicial animus to his disabilities" but then provide no factual allegations to support those allegations and conclusions.

[45] In fact, the complaint notes that Abbott claims to have been trained in proper restraint techniques.

the amended complaint contains no factual allegations that permit the inference that either Abbott's actions or FBISD's failure to train, investigate, or discipline Abbott, were "by reason of his disability" —an essential element of a discrimination claim.

C. Leave to Amend

Plaintiffs-Appellants lastly contend that the district court erred by denying them leave to amend their complaint. Federal Rule of Civil Procedure 15 provides that, even though leave of court is required when a party seeks to amend a pleading after the time for amending as a matter of course has passed, "[t]he court should freely give leave when justice so requires."[46] When, however, a party seeks to amend pleadings in a fashion that would alter a deadline imposed by a scheduling order, Rule 15 is superseded by Rule 16, which requires good cause and the judge's consent for modification.[47] Whether good cause exists depends on "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice."[48] "If a party shows good cause for missing the deadline, then the 'more liberal standard of Rule 15(a) will apply to the district court's denial of leave to amend.'"[49]

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[46] Fed. R. Civ. P. 15(a)(2).

[47] Fed. R. Civ. P. 16(b)(4); *see S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003).

[48] *Meaux Surface Prot., Inc. v. Fogleman*, 607 F.3d 161,167 (5th Cir. 2010) (internal quotation marks and citation omitted).

[49] *Filgueira v. U.S. Bank Nat'l Ass'n*, 734 F.3d 420, 422 (5th Cir. 2013) (quoting *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008)).

Plaintiffs-Appellants sought leave to file a second amended complaint more than seven months after the scheduling order's deadline for amending pleadings had passed. The proffered second amended complaint contained additional allegations about (1) statements Abbott made during the incident; (2) details of FBISD's investigation of the incident; and (3) FBISD's history of "underserving its students in need of special education services." Additionally, the proposed amendment asserts for the first time that FBISD violated the ADA and § 504 by failing to hold a "section 504 referral" meeting with T.O.'s parents in a timely manner.

We cannot hold that the district court abused its discretion by denying leave to amend. The proposed complaint expands on statements made by Abbott and T.O.'s aide at the time of the incident—information Plaintiffs-Appellants had at their disposal when they filed the original and first amended complaints. Further, the alleged failure to hold a § 504 referral meeting occurred in 2016, well before the incident underlying the original complaint. Similarly, two of the media articles cited in support of FBISD's history of mistreating students with disabilities were published before the deadline for amendments passed. Simply put, it is difficult to conceive of a reason why Plaintiffs-Appellants would not have been able to amend their complaint to include these various allegations in a timely manner. Because good cause did not exist, the district court did not abuse its discretion in denying leave to file the proposed amended complaint.

IV. CONCLUSION

For the foregoing reasons, all rulings of the district court are AFFIRMED.

WIENER, *Circuit Judge*, with whom JUDGE COSTA, *Circuit Judge*, joins, specially concurring:

Twenty years ago, I called for en banc reconsideration of *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651, and *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), in which we held that injuries resulting from corporal punishment do not violate the Fourteenth Amendment as long as the forum state provides adequate alternative remedies.[1] I write separately today to re-urge the same, hoping that the intervening decades of experience will have persuaded my colleagues that the rule is not only unjust, but is completely out of step with every other circuit court and clear directives from the Supreme Court.

At the time I concurred in *Moore*, our circuit was already isolated in its position, with the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all holding that corporal-punishment-related injuries implicate constitutional rights regardless of the availability of state remedies.[2] Since then, the

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[1] *See Moore v. Willis lndep. Sch. Dist.*, 233 F.3d 871, 876-80 (5th Cir. 2000) (Wiener, J., specially concurring).

[2] Which constitutional rights are violated by excessive corporal punishment is another matter. The Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits analyze such claims under the Fourteenth Amendment and require a student to demonstrate that the punishment "shocked the conscience" in order to prevail. *Metzger by & through Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988) (holding that excessive corporal punishment violates substantive due process); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (same); *Saylor v. Bd. of Educ. of Harlan Cnty., Ky.*, 118 F.3d 507, 514 (6th Cir. 1997) (same); *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 564 (8th Cir. 1988) (same); *Garcia by Garcia v. Miera*, 817 F.2d 650, 654 (10th Cir. 1987) (same); *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1074 (11th Cir. 2000)

Second Circuit has joined the fray, siding with the majority.[3] These cases, like our own, rely on the Supreme Court's acknowledgement in *Ingraham* that "corporal punishment in public schools implicates a constitutionally protected liberty interest."[4] In *Ingraham*, the Supreme Court held that procedural due process rights were not violated by corporal punishment if alternative remedies existed, but declined to consider whether such punishment implicated substantive due process rights.[5] Unlike this court, all other circuit courts have declined to apply *Ingraham*'s procedural due process reasoning to substantive due process claims, instead concluding that under particular circumstances, excessive corporal punishment can violate substantive due process rights (or Fourth Amendment rights), regardless of the availability of alternative remedies.

The Supreme Court has yet to be called on to resolve this dramatically lopsided circuit split, but it is only a matter of time. More importantly, subsequent writings by the Supreme Court highlight a major problem

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(same). The Seventh and Ninth Circuits, in contrast, consider corporal punishment to constitute a "seizure" and thus ask whether the punishment was objectively unreasonable under the Fourth Amendment. *See Wallace by Wallace v. Batavia Sch. Dist.101*, 68 F.3d 1010, 1016 (7th Cir. 1995); *Preschooler II v. Clark Cnty. Sch. Bd. of Tr.*, 479 F.3d 1175, 1182 (9th Cir. 2007).

[3] *See Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) (concluding that excessive corporal punishment violates substantive due process). Only the First and D.C. Circuits have yet to address the issue.

[4] 430 U.S. at 672. In *Ingraham*, the Supreme Court affirmed the Fifth Circuit's en banc decision with respect to the procedural due process question but denied cert. on the substantive due process issues.

[5] Id.

in the reasoning we applied in *Ingraham* and *Fee*. Specifically, the Supreme Court has made it clear that the availability of state remedies *does not* replace a cause of action under § 1983. In *Parratt v. Taylor*,[6] and *Hudson v. Palmer*,[7] the Supreme Court held that an individual deprived of a constitutionally protected property interest by the random and unauthorized act of a state actor could not bring procedural due process claims under § 1983 unless the forum state failed to provide adequate post deprivation remedies. Notably, the Supreme Court in *Parratt* approvingly cited its own ruling in *Ingraham*, affirming that *Ingraham*'s reliance on the availability of post-deprivation remedies was properly cabined to procedural due process claims.[8] The theory underlying *Parratt*/*Hudson* and their progeny is that a procedural due process violation challenges not the deprivation itself, but merely the procedure (or lack thereof) according to which the deprivation occurs.

But a *substantive* due process violation is fundamentally different, insomuch as a § 1983 substantive due process action challenges not the procedure attendant to the deprivation, but the deprivation itself. The Supreme Court stressed this distinction in *Zinermon v. Burch*,[9] in which it explained that, with respect to substantive due process claims, "the constitutional violation actionable under § 1983 is complete when the

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[6] 451 U.S. 527 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986).

[7] 468 U.S. 517 (1984).

[8] *Parratt*, 451 U.S. at 542 (noting that its analysis was "quite consistent with the approach taken by [the Supreme Court] in *Ingraham*," which arguably involved "facts . . . more egregious than those presented here").

[9] 494 U.S. 113 (1990).

wrongful action is taken. A plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights."[10] In other words, while a procedural due process violation may be eliminated by an adequate, state-provided, post-deprivation process, a substantive due process violation occurs at the moment of the deprivation itself, making the availability of alternative remedies wholly irrelevant.

Fee, decided just three months later, makes no mention of *Zinermon*'s explicit pronouncement, instead citing this circuit's decision in *Ingraham*, among others, for the proposition that the existence of state remedies forecloses any substantive due process violations in an educational context.[11] Nevertheless, this circuit has repeatedly recognized that *Parratt/Hudson*'s focus on alternative remedies is inapplicable to substantive due process claims in other contexts.[12]

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[10] *Id.* at 125.

[11] *See* 900 F.2d at 810 ("We hold only that since Texas has civil and criminal laws in place to proscribe educators from abusing their charges, and further provides adequate post-punishment relief in favor of students, no substantive due process concerns are implicated because no arbitrary state action exists.").

[12] *See Cozzo v. Tangipahoa Par. Council-President Gov't*, 279 F.3d 273, 290 (5th Cir. 2002) ("[V]iolations of substantive due process rights do not fall within the doctrine's limitations."); *Davis v. Bayless*, 70 F.3d 367, 375 (5th Cir. 1995) ("[T]he *Parratt-Hudson* doctrine can only be applied to negate an alleged violation of procedural due process."); *Arnaud v. Odom*, 870 F.2d 304, 310 (5th Cir. 1989) ("[T]he availability of state postdeprivation tort claims to Tolliver and Felix to remedy the injuries asserted by Tolliver and Felix in their complaint are not relevant to the instant substantive due process inquiry."); *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984) (noting that the "availability of notice and a hearing is therefore irrelevant" to substantive due process claims); *Chambers v. Stalder*, 999 F.2d 1580, 1993 WL

In other opinions, we have recognized that *Fee*'s reasoning is in conflict with *Zinermon*.[13]

For the foregoing reasons, I remain firm in my conviction that *Fee* and *Ingraham* were wrongly decided—a conviction that has only grown stronger with the clarity of hindsight and thirty years of watching this rule being applied to the detriment of public school students in Texas, Mississippi, and Louisiana.[14] This rule flies in the face of the many decisions by our colleagues in other circuits and those sitting on the highest court of this land. Let us fix the error before the Supreme Court decides to fix it for us.

307855, at *3 (5th Cir. 1993) (unpublished) ("*Parratt* does not affect our analysis when a plaintiff brings a § 1983 claim under the Due Process Clause of the Fourteenth Amendment, alleging violations of rights defined in the Bill of Rights or challenging the conduct of state actors under the substantive component of the Due Process Clause.").

[13] *See, e.g., Clayton ex rel. Hamilton v. Tate Cnty. Sch. Dist.*, 560 F. App'x 293, 297-98 & n.1 (5th Cir. 2014) (unpublished) (acknowledging that in *Zinermon*, the Supreme Court noted that a plaintiff may bring claims under § 1983 regardless of post deprivation remedies, but nevertheless dismissing a student's corporal-punishment related claims under *Fee* because it was "bound to apply this circuit's precedent"); *see also Moore*, 233 F.3d at 877 (Wiener, J., specially concurring) (questioning the validity of the Fifth Circuit's precedent in light of *Zinermon*); *see also* Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1186 (2009) (calling the Fifth Circuit's approach "a position contrary to Supreme Court precedent").

[14] As I mentioned in *Moore*, I am skeptical that the state remedies are adequate, because "Texas school districts generally do have state-law governmental immunity from tort claims brought by injured students." 233 F.3d at 878 (Wiener, J., specially concurring) (*citing Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978)).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed March 24, 2020]

Civil Action No. 4:19-CV-331

T.O., *et al*,

Plaintiffs,

vs.

FORT BEND INDEPENDENT SCHOOL DISTRICT, *et al*,

Defendants.

ORDER

Before the Court are United States Magistrate Judge Frances H. Stacy's Memorandum and Recommendation filed on January 29, 2020 (Doc. #28), Plaintiffs' Amended Objections (Doc. #35), Defendants' Response (Doc. #38), and Plaintiffs' Reply (Doc. #39). The Magistrate Judge's findings and conclusions are reviewed de novo. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). Having reviewed the parties' arguments and applicable legal authority, the Court adopts the Memorandum and Recommendation as this Court's Order.[1]

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[1] Because Plaintiffs' proposed Second Amended Complaint would not cure the deficiencies highlighted in the Magistrate Judge's January 29, 2020 Memorandum and Recommendation, Plaintiffs' Opposed Motion for Leave to File their Second Amended Complaint (Doc. #31) is hereby DENIED.

It is so ORDERED.

March 24, 2020
Date

/s/ Alfred H. Bennett
The Honorable Alfred H. Bennett
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed January 29, 2020]

Civil Action No. H-19-0331

"T.O.," a child, and TERRENCE OUTLEY and DARREZETT CRAIG, parents and next-friends of Plaintiff T.O.,

Plaintiffs,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT, and ANGELA ABBOTT, a teacher,

Defendants.

MEMORANDUM AND RECOMMENDATION

Before the Magistrate Judge, upon referral from the District Judge, is Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (Document No. 14), and Defendants' Motion for Protective Order as to Certain Topics in Plaintiffs' Notice of Rule 39(b)(6) Corporate Deposition and Request for Expedited Ruling (Document No. 23). Having considered the Motions, and the applicable law, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint be GRANTED, and Plaintiffs' Complaint be dismissed with prejudice, and the Defendants' Motion for Protective Order be DENIED as MOOT.

I. Background and Allegations

Plaintiffs Terrence Outley and Darrezett Craig filed the instant action on January 30, 2019, as parents

and next friends of their minor child, T.O. against the Fort Bend Independent School District ("FBISD") and Angela Abbott ("Abbott"), a teacher employed at FBISD, seeking redress against Defendant Abbott for violations of federal Constitutional law (Fourth, Fifth, and/or Fourteenth Amendments). They seek redress against Defendant FBISD for statutory violations of the Americans with Disabilities Act, 42 U.S.C. § 12131, "ADA", and Section 504 of the Rehabilitation Act of 1973. The live complaint is Plaintiffs' Amended Complaint. (Document No. 8).

The instant action relates to an incident that occurred on January 31, 2017. At the time, T.O. was a seven-year-old first-grade student in a special education program at FBISD's Hunters Glen Elementary School. (Document No. 8, ¶ 15). According to the Amended Complaint, T.O. has been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. (Document No. 8, ¶ 16). Because of these disabilities, T.O. had been provided a Behavioral Intervention Plan tailored to address "behavioral problems that are characteristic of his diagnoses." (Document No. 8, § 16). The plan "included use of verbal redirection, a quiet area for him to calm down in, and positive praise for returning to appropriate behavior." (Document No. 8, § 16). T.O. had also been assigned a behavioral support aide. (Document No. 19, ¶ 19). At the time of the incident, Defendant Abbott was employed as a fourth-grade math teacher, and "had no prior contact or experience" with T.O. (Document No. 8, ¶ 17). According to Plaintiffs, Abbott claims to have been trained to properly restrain students. Plaintiffs allege that Abbott "was prejudiced against, and hostile to, students diagnosed with disabilities." (Document No. 8, ¶ 17). Plaintiffs allege that, shortly before noon on January

31, 2017, T.O. "exhibited behaviors characteristic of his diagnoses" and was placed in the hallway outside his classroom with his behavioral aide "until he could calm down and return to his classroom." (Document No. 8, ¶ 19). While walking down the hallway, Abbott came upon T.O. and "apparently angered by T.O.'s disabilities and that he was being treated in compliance with his Behavior Intervention Plan, . . . took it upon herself to take charge and 'handle the situation.'" *Id.* Abbott "stood in front" of the door, blocking T.O. from "returning to the classroom." When T.O. began to yell that he wanted to return to the classroom, Defendant Abbott "yelled back" at him. When T.O. pulled at the arms of his behavioral aide, Defendant Abbott yelled at him to stop pulling on the aide's arms. According to the Amended Complaint, T.O's behavioral aide told Abbott that the situation was "okay" as "this was "T.O.'s normal behavior when he tries to calm down." T.O. attempted to move Defendant Abbott from the doorway to his classroom by "pushing her leg and hip" and "hitting her right leg one time when she would not budge." According to Plaintiffs, Abbott then "grabbed T.O., threw him to the floor and seized him by his throat/neck, choking and yelling" that he "had hit the wrong one" and "to keep his hands to himself." Abbott did not release T.O. until another witness arrived and T.O.'s behavioral aide asked Defendant Abbott to "release him . . . because he needed air and she was holding him the wrong way." Plaintiffs further allege that T.O. had started to "foam at the mouth", and that "after several minutes," Abbott released her "choke hold on T.O.", and that "T.O. calmed down and walked to the nurse's office." (Document No. 8, ¶ 20-25). "The nurse and other school personnel observed bruising and redness on T.O.'s neck." (Document No. 8, ¶ 37). Plaintiffs

conclude that Abbott's actions "were malicious, unreasonable, intentional, knowing and/or reckless, were in reckless disregard of T.O.'s rights, and were contrary to maintaining order and an appropriate educational environment." (Document No. 8, ¶ 26). They conclude that she abused her authority as a school teacher and that she should have known that her actions would be regarded by "T.O. as offensive or provocative," and have caused T.O. "substantial injuries, including physical and mental pain and suffering." (Document No. 8, ¶ 27-28). Plaintiffs allege that Abbott's actions "were motivated by her prejudicial animus to his disabilities" and "served no pedagogical, disciplinary or legitimate purpose." (Document No. 8, ¶ 33-34). Plaintiffs contend that Abbott's actions "shock the conscience. She was an adult (47 years old), he was a child (7 years old); she was a teacher who weighed 260 lbs., he was a first grader who weighed 55 lbs, and she claims to have been trained in applying proper restraint techniques but was strangling him. The only disinterested witness to the entire incident reported that the encounter may not have lasted five to ten minutes, but 'it felt like forever'" and that this constituted "an unreasonable seizure." (Document No. 8, ¶ 35-36).

Plaintiffs also allege that FBISD gave Abbott "some paid time off and did not discipline her" and thereby ratified Abbott's actions. (Document No. 8, ¶ 38). According to Plaintiffs, the incident was the "subject of at least three internal investigations, one by its Human Resources office, one by its police department (not an independent outside agency), and one by the campus principal, all of which appear designed to exonerate Defendant Abbott and protect FBISD from liability." (Document No. 8, ¶ 39).

Defendants seek dismissal of all of Plaintiffs' claims. Defendants argue that Plaintiffs' constitutional claims against Abbott fail as a matter of law and are barred by qualified immunity, and that Plaintiffs' ADA and Rehabilitation Act claims against FBISD fail because Plaintiffs fail to allege sufficient facts to state a plausible cause of action for disability discrimination.

II. Applicable law

Fed.R.Civ.P. 12(b)(6) allows a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 8(a) requires that each claim contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Because Defendants have filed a Rule 12(b)(6) motion, the undersigned Magistrate Judge construes the complaint in favor of the Plaintiffs and has accepted as true all well-pleaded facts. *Randall D. Wolcott, MD, PA v. Sebelius,* 635 F.3d 757, 763 (5th Cir. 2011) (citing *Gonzales v. Kay,* 577 F.3d 600, 603 (5th Cir. 2009)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)(quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. Plausibility will not be found where the claim alleged in the complaint is based solely on legal conclusions, or a "formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555. In addition, plausibility will not be found where the complaint "pleads facts that are merely consistent with a defendant's liability" but "stops short of the

line between possibility and plausibility" or where the complaint is made up of "'naked assertions devoid of further factual enhancement.'" *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 557)). The Supreme Court has further held that plausibility, not sheer possibility or even conceivability, is required to survive a Rule 12(b)(6) motion to dismiss. *Twombly,* 550 U.S. at 556-557; *Iqbal,* 556 U.S. at 678-680. "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" under Rule 12(b). *Iqbal,* 556 U.S. at 678. Therefore, a Plaintiff must plead specific facts, not merely conclusory allegations to avoid dismissal. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000). A court is not bound to accept as true "a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555 (quoting *Papasan v. Allain,* 478 U.S. 265, 286 (1986)).

To state a § 1983 claim, a Plaintiff must allege that the acts complained of occurred under color of state law and that the complaining parties were deprived of rights guaranteed by the Constitution or laws of the United States. *Piotrowski v. City of Houston,* 51 F.3d 512, 515 (5th Cir. 1995). Also a complaint under § 1983 must allege that the constitutional or statutory deprivation was intentional or due to deliberate indifference and not the result of mere negligence. *Farmer v. Brennan,* 511 U.S. 825 (1994). "[W]ithout an underlying constitutional violation, there can be no § 1983 liability imposed on the [defendant]." *Becerra v. Asher,* 105 F.3d 1042, 1048 (5th Cir. 1997). (emphasis omitted).

Under federal law, public officials acting within the scope of their authority are generally shielded from civil liability by the doctrine of qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *DePree v. Saunders,* 588 F.3d 282, 288 (5th Cir. 2009). Put simply, courts will not deny qualified immunity unless "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. 731 (2011). Even though qualified immunity is an affirmative defense, a plaintiff "has the burden to negate the assertion of qualified immunity once properly raised." *Collier v. Montgomery,* 569 F.3d 214, 217 (5th Cir. 2009). To meet this burden, a plaintiff must allege facts showing that the defendant committed a constitutional violation and that the defendant's actions were objectively unreasonable in light of the clearly established law at the time those actions were taken. *Atteberry v. Nocono Gen'l Hosp.,* 430 F.3d 245, 253 (5th Cir. 2005). The Supreme Court has instructed that to be "clearly established," the law must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards,* 566 U.S. 658, 664, 132 S.Ct. 2088, 2093 (2012). "A plaintiff seeking to overcome" a defense of immunity to suit "must plead specific facts that . . . allow the court to draw the reasonable inference that defeat[s]" the defense. *Backe v. LeBlanc,* 691 F.3d 645, 648 (5th Cir. 2012).

School children have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment, and abuse by a school employee may violate that right. *Doe v. Taylor I.S.D.,* 15 F.3d 443, 451-52 (5th Cir. 1994), *cert. denied,* 513 U.S. 815 (1994)(analyzing sexual abuse of a student by a teacher, on school premises). The Fifth Circuit has also made clear that "[s]tudents have a constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable search and seizures while

on school premises." *Porter v. Ascension Par. Sch. Bd.,* 393 F.3d 608, 621-22 (5th Cir. 2004). In considering such claims, "[t]he [Supreme] Court [has] indicated that although the Fourth Amendment applies in schools, the nature of those rights is what is appropriate for children in school." *Milligan v. City of Slidell,* 226 F.3d 652, 654-55 (5th Cir. 2000). The Fifth Circuit has also held that "discipline is clearly a legitimate state goal" because "[i]t must be maintained in school classrooms and gymnasiums to create an atmosphere in which students can learn" and that corporal punishment in public schools constitutes a deprivation of substantive due process "when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Moore v. Willis Indep. Sch. Dist.,* 233 F.3d 871, 875 (5th Cir. 2000) (quoting *Fee v. Herndon,* 900 F.2d 804, 808 (5th Cir. 1990)). "As long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage." *Id.* at 874. Thus the constitutional right to bodily integrity is not implicated when "the conduct complained of is corporal punishment—even unreasonably excessive corporal punishment—intended as a disciplinary measure" so long as "the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions." *Id.* (emphasis omitted) (*quoting Fee,* 900 F.2d at 808).

III. Analysis

A. Section 1983 and qualified immunity

Citing *Fee v. Herndon,* Defendants argue that Plaintiffs' Fourth-, Fifth-, and Fourteenth-Amendment

claims against Abbott in her individual capacity fail as a matter of law and are barred by qualified immunity because Texas law provides adequate remedies for claims relating to corporal punishment. In *Fee,* the parents of a sixth-grade special-education student commenced a § 1983 action against the school district and educators, asserting that their emotionally-disturbed son, who had become disruptive during classroom instruction, was allegedly beaten by the school's principal to restore discipline. The district court dismissed the section 1983 claims asserted against all defendants, and the Fifth Circuit affirmed, holding that "since Texas has civil and criminal laws in place to proscribe educators from abusing their charges, and further provides adequate post-punishment relief in favor of students, no substantive due process concerns are implicated because no arbitrary state action exists." 900 F.2d at 810. In reaching this conclusion, the Fifth Circuit wrote:

> We have stated that corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Woodard v. Los Fresnos Ind. School Dist.* 732 F.2d 1243, 1246 (5th Cir. 1984). Thus, *reasonable* punishment is not at odds with the fourteenth amendment and does not constitute arbitrary state action. Consistently with this case law, Texas has authorized educators to impose a *reasonable* measure of corporal punishment upon students when necessary to maintain school discipline, and the state affords students post-punishment criminal or civil remedies if

> teachers are unfaithful to this obligation. *Id*. at 808 (emphasis in original).
>
> * * *
>
> Thus, we have avoided having student discipline, a matter of public policy, shaped by the individual predilections of federal jurists rather than by state lawmakers and local officials. We find no constitutional warrant to usurp classroom discipline where states, like Texas, have taken affirmative steps to protect their students from overzealous disciplinarians.

Id. at 808-809.

Plaintiffs dispute any characterization of the incident as "discipline." According to Plaintiffs, Abbott's actions were a "savage attack" and not school discipline and Abbott is "hoping to take advantage of case law permitting school officials to use excessive force if it is a matter of discipline or punishment. Defendants repeatedly, almost gleefully, remind that the Fifth Circuit has permitted school officials to brutally beat students." (Document No. 16, p. 6). But "fairly characterizing an act as corporal punishment depends on whether the school official intended to discipline the student for the purpose of maintaining order or respect or to cause harm to the student for no legitimate pedagogical purpose." *Flores v. School Board of DeSoto Parish,* 116 Fed. Appx. 504, 511 (5th Cir. 2004)(stating that "[t]his circuit does not permit public school students to bring claims for excessive corporal punishment as substantive due process violations under § 1983 if the State provides an adequate remedy"). Although Plaintiffs conclude that Abbott's actions were "malicious, unreasonable, intentional,

knowing and/or reckless," and they speculate that her actions were "motivated by her prejudicial animus to his disabilities," they acknowledge in the Amended Complaint that Abbott "had no prior contact or experience with T.O." when she encountered the disturbance in a pedagogical setting. It is undisputed that T.O's behavioral aide was attempting to carry out his behavioral education plan by keeping him out of the classroom after an outburst; that T.O. was acting in a physically violent manner toward her and attempting to return to the classroom from which he had been removed; that Abbott first passively blocked T.O. from re-entering the classroom; and that she then resorted to physical restraint only after T.O. responded violently to her by pushing and hitting her in his attempt to return to the classroom. Under these circumstances, it cannot be disputed that Abbott's actions were taken in pursuit of a legitimate pedagogical purpose, whether another person may or may not find the amount of force she used in trying to restrain a violent, flailing child to be reasonable. *See Serafin v. School of Excellence in Educ.,* 252 Fed. Appx. 684, 685-686 (5th Cir. 2007)(reiterating that "[i]t is well settled in this Circuit that corporal punishment of public school students is only a deprivation of substantive due process rights 'when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning[,]'" and that "[a]s a matter of law, punishment is not arbitrary so long as the state affords local remedies for the alleged offensive conduct")(citing *Fee* and *Moore); Marquez v. Garnett,* 567 Fed. Appx. 214, 217 (5th Cir. 2014)(where teacher was alleged to have "cursed and yelled" at severely autistic, non-verbal, physically disabled student, and to have "grabbed him from behind in a forceful and frightening manner, shoved

him to the side and repeatedly kicked [him]" because he "was sliding [teacher's] compact disc across a table during class time, nonetheless finding that "the setting is pedagogical, and [the student's] action was unwarranted [thus] the inference must be that Garnett acted to discipline C.M., even if she may have overreacted.").

Plaintiffs' statements asserting other incidents are bald and conclusory, and fail to provide specific and particular allegations to overcome Abbott's 12(b)(6) motion to dismiss on the grounds of qualified immunity. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief'" and if Plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly,* 550 U.S. at 570; *Iqbal,* 566 U.S. at 678. Put simply, the allegations are not sufficient to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and are "enough to raise a right to relief above the speculative level." *Turner v. Lieutenant Driver,* 848 F.3d 678, 684-85 (5th Cir. 2017). Because Plaintiffs' Amended Complaint alleges excessive corporal punishment or unlawful seizure, and, because Texas provides "adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions," Plaintiffs' claims are subject to dismissal under binding Fifth-Circuit precedent. *See Moore,* 233 F.3d at 875. To the extent that Plaintiffs urge this Court to disregard the Fifth Circuit's approach to school discipline, and not follow *Fee* and its progeny, *Fee* is binding on this Court.

B. Claims under the ADA and Rehabilitation Act

Plaintiffs have also asserted violations of the ADA and Section 504 of the Rehabilitation Act ("RA") by FBISD. Section 504 of the RA provides, in pertinent part, that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Individuals may enforce Title II of the ADA and § 504 of the RA through a private right of action. *Frame v. City of Arlington,* 657 F.3d 215, 223 (5th Cir. 2011). "The remedies, procedures and rights available under the RA are also accessible under the ADA." *Delano-Pyle v. Victoria County,* 302 F.3d 567, 574 (5th Cir. 2002)(internal citations omitted). To establish a cause of action under the either the ADA or § 504 of the RA, a plaintiff must show the following: (1) the person is a qualified individual within the meaning of the ADA; (2) the person is being excluded from participation in, or being denied the benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination is by reason of a disability. *Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 671-72 (5th Cir. 2004). To recover damages, a plaintiff must prove that the discrimination was intentional. *Delano-Pyle v. Victoria*

City, 302 F.3d 567, 574 (5th Cir. 2002). Neither the ADA nor § 504 create "general tort liability for educational malpractice." *D.A. ex rel. Latasha A. V. Houston Indep. Sch. Dist.,* 629 F.3d 450, 454 (5th Cir. 2010). In the school context, a plaintiff must sufficiently plead facts inferring that "a school district has *refused* to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program." *Estate of Lance v. Lewisville Indep. Sch. Dist.,* 743 F.3d 982, 992 (5th Cir. 2014) (emphasis in original); *Campbell v. Lamar Inst. of Tech.,* 842 F.3d 375, 380 (5th Cir. 2016)("When the record is 'devoid of evidence of malice, ill-will, or efforts . . . to impede' a disabled student's progress, summary judgment must be granted in favor of the university."). To substantiate a cause of action for intentional discrimination under § 504, plaintiff must allege "facts creating an inference of professional bad faith or gross misjudgment." *C.C. v. Hurst-Euless-Bedford Indep. Sch. Dist.,* 641 F.App'x 423, 426 (5th Cir. 2016). "Congress did not intend § 504 or ADA claims to create general tort liability for the government." *Estate of A.R. v. Muzyka,* 543 F.App'x 363, 365 (5th Cir. 2013). "So long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals," school officials are not liable under the ADA or § 504. *Reedy. Kerens Indep. School Dist.,* No. 3:16-cv-1228-BH, 2017 WL 2463275, at *13 (N.D. Tex. June 6, 2017).

Defendants move to dismiss Plaintiffs' ADA and RA claims against FBISD because Plaintiffs have failed to state a claim for disability discrimination. Plaintiffs' § 504 and ADA claims are based on allegations that other children besides T.O., including a student with autism and a student in the 6th grade, reported that they had been choked by FBISD teachers or other

staff, but that FBISD did not discipline Abbott and gave her paid time off. They also complain and that the incident was the subject of at least three internal investigations, which "appear designed to exonerate Defendant Abbott and protect FBISD from liability." Defendants point to the absence in the Amended Complaint of any allegations that T.O. was excluded from participating in, or was denied the benefits of, the District's services, programs, or activities based on his disabilities. Defendant FBISD further argues that, while the Amended Complaint alleges that Abbott was "angered by T.O.'s disabilities and that he was being treated in compliance with his Behavior Intervention Plan, there are no facts to support the allegation." In response, Plaintiffs argue that the allegations show that the attack on T.O. was the result of anger and prejudicial animus by Defendant Abbott to seeing T.O.'s disability related behavior and application of a behavior intervention plan, and her "savage behavior" was on account of T.O.'s disabilities. (Document No. 16, p. 9-10).

Plaintiffs have failed to allege sufficient facts that create an inference of professional bad faith or gross misjudgment as required to establish their ADA and § 504 claims claim as a matter of law. At most, the allegations give rise to an educational malpractice claim, which as discussed above, is not actionable under the ADA or § 504 of the RA. Plaintiffs have not alleged that T.O. was removed from the class room and was in the hallway because the school was discriminating against him and disciplining him based on his disability. Rather, Plaintiffs' Amended Complaint alleges his removal to the hallway was consistent with his educational plan. Plaintiffs admit that Abbott had no prior contact with T.O. Plaintiffs have not alleged that FBISD discriminated against T.O. by disciplining

him for his behavior-related disability. Even if T.O.'s disability contributed to his behavior in the hallway on the date of the incident, the allegations fall short of showing discriminatory intent to state a plausible ADA claim or § 504 claim.

IV. Conclusion and Recommendation

Based on the reasons set forth above, the Magistrate Judge RECOMMENDS that Defendants' Motion to Dismiss (Document No. 14) be GRANTED, and that Defendants' Motion for Protective Order (Document No. 23) be DENIED as Moot.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within 14 days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), Fed.R.Civ.P. 72(b), and General Order 80-5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn,* 474 U.S. 140 (1985); *Ware v. King,* 694 F.2d 89 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the fourteen-day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Serv. Auto Assn,* 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Court Clerk, P.O. Box 61010, Houston, Texas 77208.

Signed at Houston, Texas, this 29th day of January, 2020

/s/ Frances H. Stacy
Frances H. Stacy
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed September 15, 2021]

No. 20-20225

T.O., a child; TERRENCE OUTLEY; DARREZETT CRAIG,

Plaintiffs-Appellants,

versus

FORT BEND INDEPENDENT SCHOOL DISTRICT;
ANGELA ABBOTT, a teacher,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-331

ON PETITION FOR REHEARING EN BANC

Before WIENER, COSTA, and WILLETT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. No member of the panel nor judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5th CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

[Filed February 8, 2019]

Civil Action No. 4:19-cv-331

"T.O.," a child, and TERRENCE OUTLEY and DARREZETT CRAIG, parents and next-friends of Plaintiff T.O.,

Plaintiffs,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT, and ANGELA ABBOTT, a teacher,

Defendants.

JURY DEMANDED

AMENDED COMPLAINT

Come now Plaintiffs T.O. ("T.O.," a pseudonym), a minor student with disabilities at all times pertinent to this case, Terrence Outley ("Mr. Outley") and Darrezett Craig ("Ms. Craig"), parents and next friends of Plaintiff T.O., collectively referred to as "Plaintiffs." The Defendants are FORT BEND INDEPENDENT SCHOOL DISTRICT ("FBISD"), and ANGELA ABBOTT ("Ms. Abbott"), a teacher employed at FBISD, collectively referred to as "Defendants". The Plaintiffs file this *Amended Complaint* against the Defendants for the following reasons and to add further clarification to the *Original Complaint:*

I. PRELIMINARY STATEMENT

1. Plaintiffs seek to vindicate Plaintiff T.O.'s rights violated when a math teacher at FBISD subjected him to illegal, discriminatory physical abuse and excessive force because of his disability and/or without substantive due process protections, in violation of Title II of the Americans with Disabilities Act (42 U.S.C. § 12131, et seq., "ADA"), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, "Sec. 504"), and the 4th, 5th and/or the 14th Amendments to the United States Constitution made actionable by 42 U.S.C. § 1983 ("§ 1983").

2. On January 31, 2017, T.O. was a seven-year-old, 55 pound first-grader diagnosed with Attention Deficit and Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder, in the company of his teacher and a behavioral aide, acting in a manner characteristic of his diagnoses. Defendant Abbott, a 47-year-old, 260 pound fourth-grade math teacher happened to be walking by. Due to T.O.'s disability, Ms. Abbott maliciously and without legitimate purpose physically forced T.O. to the floor where she unreasonably restrained him by his neck/throat, choking him even after he was visibly foaming at the mouth. Ms. Abbott caused T.O. lasting physical and emotional damage that continues to interfere with his education and development.

3. Plaintiffs seek compensatory damages to reasonably compensate Plaintiff T.O. for his injuries, declaratory and other equitable relief sufficient to assure that Defendants FBISD and Ms. Abbott do not similarly mistreat T.O. or other students in the future, and punitive damages to punish Defendant Abbott for her mistreatment of T.O. and to deter her and others from committing similar mistreatment in the future.

Plaintiffs also seek reimbursement for costs of suit, including reasonable attorney fees as authorized by statute, including the ADA, Section 504, and/or 42 U.S.C. §1988. Plaintiffs also seek any and all other appropriate relief permitted by law.

II. JURISDICTION

4. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the laws and rules of the United States as noted above.

III. VENUE

5. Under 28 U.S.C. §1391, venue is proper before this Court because the events and omissions giving rise to the Plaintiffs' claims occurred in the Southern District of Texas, Houston Division.

IV. PARTIES

Plaintiffs

6. Plaintiff T.O. was a seven-year-old first grade student living with his parents, Plaintiffs Terrence Outley and Darrezett Craig, at the time of the events giving rise to this case.

7. At all times pertinent to this case, Plaintiff T.O. was and is a qualified individual with a disability as defined by the ADA and Sec. 504, and is entitled to the benefits and protections in the ADA and Sec. 504.

8. At all times pertinent to this case, Plaintiff T.O. was and is a person entitled to bring this lawsuit to vindicate his federal constitutional and statutory rights as provided by 42 U.S.C. §1983.

Defendant

9. Defendant FBISD is a political subdivision of the State of Texas. Defendant FBISD can be served by and through its Superintendent, Dr. Charles E. Dupre, Ed.D. at his place of business, 16431 Lexington Blvd., Sugar Land, TX 77498.

10. Defendant FBISD is a public entity as that term is defined by the ADA, subject to its prohibitions against discrimination against any qualified individual with a disability, including Plaintiff T.O..

11. Defendant FBISD is subject to the remedies provided by the ADA and Sec. 504 to persons alleging discrimination by Defendant FBISD on the basis of disability.

12. Defendant FBISD is a public entity and a recipient of federal funds, making its operations, programs or activities subject to the ADA and Sec. 504.

13. Defendant Angela Abbott was at all times relevant to this case employed as a math teacher at Defendant FBISD's Hunters Glen Elementary School, 695 Independence Blvd., Missouri City, TX 77489, where she can be served with process.

14. Defendant Abbott is and was at all times pertinent to this lawsuit, a person acting under color of state law, as that term is used in applying § 1983. As such, she is liable to Plaintiffs for her violation(s) of Plaintiff T.O.'s rights protected by the United States Constitution.

V. STATEMENT OF FACTS

Plaintiff T.O.'s pertinent background and disabilities:

12. On January 31, 2017 T.O. was a seven-year-old first-grade student in a special education program at FBISD's Hunters Glen Elementary School.

13. At all times pertinent to this lawsuit, T.O. has been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder, recognized disabilities. His disabilities result in behavioral problems that are characteristic of his diagnoses and were the subject of a Behavioral Intervention Plan that included use of verbal redirection, a quiet area for him to calm down in, and positive praise for returning to appropriate behavior. This form of intervention maintains order and an appropriate educational environment, and allows T.O. to resume educational activities with minimal interruption.

Defendant Ms. Abbott:

17. Defendant Ms. Abbott was employed by Defendant FBISD as a 4th grade math teacher at Hunters Glen Elementary. She was 47 years old and weighed approximately 260 lbs. and had no prior contact or experience with Plaintiff T.O. Defendant Abbott claimed to have been trained to properly restrain students. She was prejudiced against, and hostile to, students diagnosed with disabilities like T.O.'s.

Defendant FBISD:

18. Defendant FBISD is the Fort Bend Independent School District, southwest of Houston, Texas. It is the seventh largest school district in Texas, with approximately 76,000 students and over 11,000 employees on about 80 campuses. Since the events giving rise to this lawsuit, the families of other students at FBISD,

including the families of a student with autism and of a student in the 6th grade, have continued to publicly report that their children have been choked by FBISD teachers or other staff.

The January 31, 2017 Incident:

19. Shortly before noon on January 31, 2017 at FBISD's Hunters Glen Elementary School T.O. exhibited behaviors characteristic of his diagnoses. He was in a hallway with his teacher and a behavioral aide who were responding in compliance with his intervention plan by directing him to stay in the hallway (i.e., a quiet place) until he could calm down and return to his classroom. Until this point, the intervention was a typical example of the prescribed response to T.O.'s problem behaviors associated with his disabilities and consistent with his Behavior Intervention Plan.

20. Defendant Abbott, who had been walking down the hallway, was apparently angered by T.O.'s disabilities and that he was being treated in compliance with his Behavior Intervention Plan. She took it upon herself to take charge and "handle the situation."

21. Defendant Abbott then stood in front of the door physically blocking T.O. from returning to the classroom. T.O. began yelling that he wanted to return tothe classroom, and the Defendant Abbott yelled back at him. T. O. pulled at his behavioral aide's arms, to let him back into the classroom, and Ms. Abbott yelled at him to stop. The behavioral aide told Ms. Abbott that the situation was okay, that this was T.O's normal behavior when he tries to calm down. T.O., who weighed about 55 lbs, tried to move the 260 lb. math teacher from the doorway, including ineffectively pushing her leg and hip and, according to

Defendant Abbott, hitting her right leg one time when she would not budge.

22. Defendant Abbott then grabbed T.O., threw him to the floor and seized him by his throat/neck, choking and yelling at him.

23. Defendant Abbott continued holding T.O. down so hard by his neck that it was making the situation harder. Defendant Abbott was choking T.O. by his throat and, while doing so, continued yelling at T.O. that he "had hit the wrong one" and "to keep his hands to himself."

24. Even after it became apparent that Defendant Abbott was choking T.O. and causing him to foam at the mouth, she would not release his throat/neck area until after another witness arrived and the behavioral aide asked her to "release him. . . because he needed air and she was holding him the wrong way." Only then, after several minutes, did Defendant Abbott release her choke hold on T.O.

25. After Defendant Abbott released T.O. he calmed down and walked to the nurse's office.

26. Defendant Ms. Abbotts' actions described above, including choking T.O., were malicious, unreasonable, intentional, knowing and/or reckless, were in reckless disregard of T.O.'s rights, and were contrary to maintaining order and an appropriate educational environment.

27. Defendant Ms. Abbott's actions described above, including her being in the school hallway in the first place, taking charge of the situation (to the exclusion T.O.'s assigned classroom teacher), and using force on T.O., were all abuses of her authority as a school teacher.

28. Defendant Ms. Abbotts' actions described above, including choking T.O., were beyond any legitimate use of discretion and beyond any legitimate scope of her responsibilities as a teacher.

29. Defendant Ms. Abbott knew, or reasonably should have known, that her actions described above, including choking T.O., would be regarded by T.O. as offensive or provocative.

30. Defendant Ms. Abbotts' actions described above, including choking T.O., did not, and could not have reasonably been expected to benefit, advantage, support or defend Hunters Glen Elementary School or FBISD.

31. Defendant Ms. Abbotts' actions described above, including choking T.O., caused him substantial injuries, including physical and mental pain and suffering.

32. Defendant Ms. Abbotts' actions described above, including choking T.O., threatened T.O. with much greater physical injury than the physical injuries that actually resulted. The threat of more serious injuries itself caused additional injury to T.O.

33. Defendant Ms. Abbotts' actions described above, including choking T.O., were motivated by her prejudicial animus to his disabilities.

34. Defendant Ms. Abbotts' actions described above, including choking T.O., served no pedagogical, disciplinary or other legitimate purpose.

35. Defendant Ms. Abbott's actions described above, including choking T.O., shock the conscience. She was an adult (47 years old), he was a child (7 years old); she was a teacher who weighed 260 lbs., he was a first grader who weighed 55 lbs, and; she claims to have

been trained in applying proper restraint techniques but was strangling him. The only disinterested witness to the entire incident reported that the encounter may not have lasted five to ten minutes, but "it felt like forever."

36. Defendant Ms. Abbott's actions described above, including choking T.O., constitute an unreasonable seizure.

37. The nurse and other school personnel observed bruising and redness on T.O.'s neck.

38. FBISD gave Defendant Abbott some paid time off and did not discipline her. Defendant FBISD essentially ratified Defendant Abbott's actions described above, including her choking T.O.

39. At FBISD's direction the events above were the subject of at least three internal investigations, one by its Human Resources office, one by its police department (not an independent outside agency), and one by the campus principal, all of which appear designed to exonerate Defendant Abbott and protect FBISD from liability.

VI. CAUSES OF ACTION

40. The actions and omissions of Defendants described above support causes of action against Defendant FBISD for:

a. violation of the ADA, and;

b. violation of Sec. 504 of the Rehabilitation Act of 1974.

41. The actions and omissions of Defendant Abbott described above support causes of action against Defendant Abbott for:

a. violating Plaintiff T.O.'s 5th and 14th Amendment liberty interests in his bodily integrity in the absence of substantive due process, as made actionable by § 1983;

b. violating Plaintiff T.O.'s 4th Amendment right to be free from unreasonable seizure, as made actionable by § 1983.

VII. JURY REQUEST

42. Plaintiffs request trial by jury on all issues so triable.

VIII. REMEDIES SOUGHT

43. Plaintiffs seek declaratory relief, declaring that Defendants' treatment of T.O. was illegal, unconstitutional, and in violation of the ADA, Sec. 504 and rights guaranteed by the 4th, 5th and/or 14th Amendments to the United States Constitution. This relief is authorized against Defendant FBISD by the ADA and Sec.504, and against Defendant Abbott by § 1983.

44. Plaintiffs seek other equitable relief to prevent Defendant FBISD from similarly mistreating Plaintiff T.O., and others, in the future as authorized by the ADA and Sec.504.

45. Plaintiffs seek other equitable relief to prevent Defendant Ms. Abbott from similarly mistreating Plaintiff T.O. and others in the future, as authorized by § 1983.

46. Plaintiffs seek actual and compensatory damages for the injuries Defendants have illegally caused Plaintiff T.O., including for past and future physical

and mental injuries, as authorized by the ADA and Sec. 504 against Defendant FBISD and as authorized by § 1983 against Defendant Abbott.

47. Plaintiffs seek punitive damages from only Defendant Abbott, as authorized by § 1983 to punish her for her intentional, willful, malicious and/or reckless conduct in violation of rights protected by the United States Constitution, and to deter her, and others, from similarly mistreating other children in the future.

48. Plaintiffs seek costs of suit, including attorneys' fees and other litigation expenses as authorized by the ADA, Sec. 504 and 42 U.S.C. §1988.

49. Plaintiffs seek pre- and post- judgment interest on any monetary recovery, to the fullest extent permitted by law.

50. Plaintiffs seek any and all other relief authorized by law.

Respectfully Submitted,

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PLAINTIFFS' ATTORNEYS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument will be served on all parties with the Original Complaint.

This 8th day of February, 2019.

/s/ Timothy B. Garrigan
Timothy B. Garrigan
Attorney-in-Charge for Plaintiff