APPENDIX

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Appendix A

United States Court of Appeals
for the Fifth Circuit

No. 22-30139

S.B., *on behalf of her minor daughter*, S.B.,

Plaintiff–Appellant,

versus

JEFFERSON PARISH SCHOOL BOARD; CHRISTI ROME; JANINE ROWELL; LESLEY NICK,

Defendants–Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-217

Filed: May 30, 2023

Before JOLLY, HAYNES, and GRAVES, *Circuit Judges.*

Appendix A

PER CURIAM:*

This is a civil rights action in which S.B., an eleven-year-old girl with autism, alleges disability discrimination and violations of her constitutional rights against Jefferson Parish School Board ("JPSB"), Schneckenburger Elementary School, Principal Christi Rome, her teacher Janine Rowell, and paraprofessional Lesley Nick after suffering disciplinary corporal punishment. S.B. appeals the district court's: (A) dismissal of her disparate treatment discrimination claims under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act ("ADA"); (B) dismissal of her claims under 42 U.S.C. § 1983 for violations of her substantive due process and equal protection rights; and (C) conclusion that her failure to properly exhaust her administrative remedies under the Individuals with Disabilities Education Act ("IDEA") barred her reasonable accommodation claims under the Rehabilitation Act and the ADA. For the reasons set forth below, we AFFIRM.

I.

S.B. attended Walter Schneckenburger Elementary School, a public school in Kenner, Louisiana, operated by JPSB. Because of her autism, S.B. occasionally exhibits inappropriate conduct, such as pinching and kicking. She is taught by a special education teacher and is shadowed at school by a "special needs paraprofessional" or "SNP."

S.B.'s lawsuit stems from two incidents. The first

*This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

occurred on February 7, 2020, during a therapy session with a behavioral technician in Janine Rowell's class. During the session, S.B. refused to clean up puzzle pieces and kicked at the technician when she tried to help. Rowell then slapped S.B.'s wrists and scolded her for kicking, stating "No, ma'am! No kicking!"

The behavioral technician reported the incident to the principal, Christi Rome, who later obtained signed statements from two SNPs who were in the classroom.[1] S.B. alleges that Rowell was not formally reprimanded for the incident but instead transferred to another school.

The second incident occurred approximately nine months later. S.B. was working with her behavioral technician on spelling, and SNP Lesley Nick was assisting S.B. At some point during the session, S.B. reached out and pinched Nick's neck. In response, Nick grabbed S.B.'s hand and slapped the top of it, saying, "We do not pinch our friends!" According to S.B., the special education teacher assigned to the classroom that day immediately reported the incident to Rome. JPSB did not reprimand Nick but instead transferred her to another school.

On February 3, 2021, S.B., through her mother,

[1] One said she witnessed Rowell grab S.B.'s wrists but did not witness any slapping. The other SNP said she witnessed Rowell slapping S.B.'s wrists. This SNP also stated that she had witnessed Rowell slapping S.B.'s wrists in this same manner two weeks prior.

sued JPSB, Walter Schneckenburger Elementary School, Rome, Rowell, and Nick (collectively the "Defendants"). S.B. alleges claims under 42 U.S.C. § 1983 against all of the Defendants for violations of her substantive due process and equal protection rights. Additionally, she asserts claims under 42 U.S.C. § 1983 against JPSB and Rome for failure to train. S.B. further alleges disparate treatment discrimination claims under the Rehabilitation Act and Title II of the ADA. Lastly, she alleges state law claims of battery, negligence, and violations of Louisiana's state disability discrimination laws.

Defendants moved to dismiss the Complaint, arguing that S.B. failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted these motions, concluding that the Complaint failed to state a claim under federal law and declined to exercise supplemental jurisdiction over the state-law claims. Relevant here, the district court concluded that S.B. failed to state a substantive due process claim because "Louisiana provides adequate post-punishment remedies for this type of harm."

The district court also dismissed her discrimination claims, finding that S.B. had not pleaded any specific facts that permit an inference that any of the Defendants were motivated by her disability, nor did she plead that another child, either non-disabled or with a different disability, had also misbehaved and that Nick or Rowell did not discipline them.

In an attempt to cure these defects, S.B. moved to amend her complaint. The proposed Second Amended Complaint alleges that "Nick and Rowell have supervised other students without disabilities or with different disabilities who were acting inappropriately or violently" but "did not slap any of those students." Additionally, S.B. has introduced a new argument, contending that the Defendants did not make reasonable accommodations for her disability as required by the Rehabilitation Act and the ADA.

The district court referred the motion to a magistrate judge. The magistrate judge recommended that the district court deny the motion to amend as futile. With respect to S.B.'s reasonable-accommodation claims, the magistrate judge did not consider their plausibility because she concluded that S.B. needed to administratively exhaust them under the IDEA since these claims were a challenge to S.B.'s right to a free and appropriate public education ("FAPE").

S.B. raised objections to the magistrate's recommendation, claiming that the exhaustion defense was not a jurisdictional matter and that JPSB had waived the defense. S.B. did not prevail on any of these arguments, and the district court entered a final judgment. S.B. now appeals.

II.

This court reviews a district court's dismissal of a complaint de novo. *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719,

726 (5th Cir. 2018). It must "accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff." *Richardson v. Axion Logistics, L.L.C.*, 780 F.3d 304, 304–05 (5th Cir. 2015) (quoting *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 146 (5th Cir. 2010)). But it need not accept as true a legal conclusion unsupported by fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, 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." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (citations omitted) (internal quotations omitted).

Generally, we review the denial of a motion to amend for abuse of discretion. *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 347 (5th Cir. 2008). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016) (quoting *Priester v. JP Morgan Chase Bank, N.A.*, 708 F.3d 667, 672 (5th Cir. 2013)). However, when as here, the district court denies leave based solely on futility, this court applies a de novo standard of review "identical, in practice, to the standard used for reviewing a dismissal under Rule 12(b)(6)." *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010).

Appendix A

III.

A.

First, S.B. argues that the district court erred in dismissing her § 504 and ADA claims. We disagree.

The Rehabilitation Act and the ADA both prohibit discrimination against qualified individuals with disabilities; they employ many of the same legal standards and offer the same remedies. *See Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010). While § 504 of the Rehabilitation Act applies to federally funded programs and activities, Title II of the ADA only applies to public entities. *Id.* "The only material difference between the two provisions lies in their respective causation requirements." *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (citation omitted).

Section 504 prohibits discrimination "solely by reason of" a person's disability, whereas Title II of the ADA provides that "discrimination need not be the sole reason" for the adverse action or exclusion but rather "a motivating factor." *Pinkerton v. Spellings*, 529 F.3d 513, 516–19 (5th Cir. 2008). Both the ADA and § 504 require the plaintiff to establish that: (1) she is a qualified individual with a disability within the meaning of § 504 or the ADA; (2) she was excluded from participation in, or was denied benefits of, services, programs, or activities for which the school district is responsible; (3) her exclusion, denial of benefits, or discrimination was by reason of her disability; and (4) the exclusion, denial of benefits, or discrimination

was intentional. *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671–72 (5th Cir. 2004). At this stage, S.B. must plead facts making it "plausible that [s]he was discriminated against 'because of' "—but not necessarily *solely* because of—her disability. *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 601 (5th Cir. 2021) (quoting *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 767 (5th Cir. 2019)).

S.B. argues that the district court erred in dismissing her claims because it improperly applied a summary-judgment standard at the motion to dismiss stage. Specifically, she argues that it's not necessary that she identify in her complaint other students with similar disabilities or different disabilities who were treated more favorably. Instead, she argues that she only needs to show that she was treated less favorably because of her disability.

Not so. To be sure, we have held that a plaintiff need not allege a comparator at the pleading stage in order to advance her discrimination claims under the ADA and § 504. *See Pickett v. Texas Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1019 (5th Cir. 2022). However, the district court's decision did not hinge on this premise. Instead, the district court specifically found that S.B. had not pleaded any specific facts that would suggest any of the Defendants were motivated by her disability. After reviewing the briefs and relevant portions of the record, we agree with the district court that S.B.'s Complaint is insufficient to support a claim of discrimination. It consists of two separate incidents in which S.B. behaved violently toward her

instructors, who in turn resorted to physical discipline. We have dismissed comparable allegations.

In *T.O. v. Fort Bend Indep. Sch. Dist.*, we affirmed the dismissal of the plaintiffs' ADA and § 504 claims after a teacher grabbed a disabled student trying to re-enter a classroom by the neck, threw him to the floor, and held him in a chokehold for several minutes. 2 F.4th 407, 412–18 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2811 (2022), *reh'g denied*, 143 S. Ct. 60 (2022). During the incident, the teacher yelled at the student that he "had hit the wrong one" and "needed to keep his hands to himself." *Id.* at 412. The plaintiffs alleged that the teacher 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." *Id.* at 418 n.44. However, we disagreed, noting that the amended complaint lacked any factual allegations that permit the inference that the defendants' actions were "'by reason of his disability'—an essential element of a discrimination claim." *Id.* at 418.

This case is no different from *T.O.* Although S.B.'s autism was the root cause of her classroom outbursts, it cannot be inferred that Rowell's and Nick's reactions were influenced by her disability. Rather, these claims suggest that S.B. wasn't disciplined due to her disability but to address her disruptive conduct in class. Therefore, punishing S.B. for her disruptive behavior is not the same as treating her differently due to her disability. Consequently, we affirm.

Appendix A

B.

Next, S.B. challenges the dismissal of her claims under 42 U.S.C. § 1983. To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *see Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995). S.B. claims that: (1) the Defendants discriminated against her on account of her disability in violation of the Equal Protection Clause of the Fourteenth Amendment; (2) the Defendants violated her right to be free from state-sanctioned harm to her bodily integrity in violation of the Due Process Clause of the Fourteenth Amendment; and (3) JPSB and Rome failed to train Schneckenburger Elementary staff on how to handle these incidents. We address each in turn.

1. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat all similarly situated people alike. U.S. CONST. AMEND. XIV; *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985) (citations omitted). A plaintiff may bring a cause of action for violation of his right to equal protection under § 1983. *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997). Here, to succeed on a "class of one" theory, S.B. "must establish (1) [she was] intentionally treated differently from others similarly situated and (2) there was

no rational basis for any such difference." *Wilson v. Birnberg*, 667 F.3d 591, 599 (5th Cir. 2012) (internal quotation marks omitted).

S.B.'s equal protection claim fails for similar reasons as her ADA and § 504 claims. The facts that S.B. alleges simply do not support an inference that she was treated differently because of her disability. Therefore, the Complaint fails to state a claim, and we affirm the district court's holding that it fails.

2. SUBSTANTIVE DUE PROCESS

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)). However, we have repeatedly held that "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." *T.O.*, 2 F.4th at 414 (citation omitted); *see also Fee*, 900 F.2d at 808 ("Specifically, states that affirmatively proscribe and remedy mistreatment of students by educators do not, by definition, act 'arbitrarily,' a necessary predicate for substantive due process relief.").

Under this line of cases, our court has "dismissed substantive due process claims (1) when a student was instructed to perform excessive physical exercise

as a punishment for talking to a friend; (2) when a police officer slammed a student to the ground and dragged him along the floor after the student disrupted class; (3) when a teacher threatened a student, threw him against a wall, and choked him after the student questioned the teacher's directive; (4) when an aide grabbed, shoved, and kicked a disabled student for sliding a compact disc across a table; and (5) when a principal hit a student with a wooden paddle for skipping class." *T.O.*, 2 F.4th at 414 (collecting cases).

S.B. attempts to side-step these cases by arguing that Louisiana law explicitly prohibits the use of corporal punishment on children diagnosed with autism.[2] Consequently, she posits that her claim stands apart from the rest, because the State has made it clear that striking children with autism serves no legitimate educational goal. However, this argument is unavailing. Under our precedent, the State is only required to demonstrate that there is a system in place that allows for reasonable disciplinary measures and offers avenues for recourse after punishment has been administered. *Fee*, 900 F.2d at 809 (concluding that the relevant inquiry is whether the State "authorize[s] only reasonable discipline" and "provide[s] post-

[2] Louisiana law provides that "no form of corporal punishment shall be administered to a student with an exceptionality," which includes "slapping." LA. REV. STAT. § 17:416.1(B)(2). Louisiana law further defines autism as an "exceptionality." *See* § 17:1942(B).

punishment relief" from the departures of its laws). Having already found that Louisiana proscribes and remedies mistreatment of students by educators, *see Coleman v. Franklin Parish School Bd.*, 702 F.2d 74, 76 (5th Cir. 1983), we must also find that as a matter of law, the act of slapping S.B. on the hand or wrist did not infringe upon her substantive due process rights.[3]

Other courts have scrutinized these decisions. *See, e.g.*, *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 n.2 (11th Cir. 2000); *P.B. v. Koch*, 96 F.3d 1298, 1302 (9th Cir. 1996). Members of this court have also raised concerns. *See T.O.*, 2 F.4th at 419 (Wiener & Costa, JJ., concurring); *Moore*, 233 F.3d at 877 (Wiener, J., concurring); *Ingraham v. Wright*, 525 F.2d 909, 924 (5th Cir. 1976) (Rives, J., dissenting) (en banc). But despite the criticism, these decisions have yet to be overturned and they remain binding in our circuit. Because we are bound by our precedent, we must affirm.

3. Failure to Train or Supervise

S.B.'s final theory of recovery under § 1983 rests on an allegation that JPSB and Rome failed to train

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[3] S.B. also contends that the Supreme Court has established that a plaintiff can utilize § 1983 without regard to any state-tort remedy that may exist. However, as S.B. acknowledges, this argument is explicitly foreclosed by our caselaw. *See Cunningham v. Beavers*, 858 F.2d 269, 272 (5th Cir. 1988).

or properly supervise Schneckenburger Elementary personnel. To make out this claim, S.B. must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing a violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy. *Valle v. City of Houston*, 613 F.3d 536, 544 (5th Cir. 2010).

Because our precedent operates as a bar to all claims against the Defendants, there is no underlying constitutional violation. Without a constitutional violation, there can be no liability under § 1983 for failure to train. *See Shields v. Twiss*, 389 F.3d 142, 151 (5th Cir. 2004). Therefore, this claim was properly dismissed.

C.

S.B. lastly contends that the district court erred by denying her leave to amend her complaint. She argues that the exhaustion requirement under the IDEA is simply a procedural rule and that any objections related to it were waived. Additionally, S.B. argues that the failure-to-accommodate claims are not FAPE challenges that require exhaustion.

The issue of whether exhaustion under the IDEA constitutes a jurisdictional prerequisite has yet to be conclusively determined by our circuit. *Logan v. Morris Jeff Cmty. Sch.*, No. 21-30258, 2021 WL 4451980, at *2 (5th Cir. Sept. 28, 2021) (per curiam) (explaining that

"we have not yet decided whether a failure to exhaust under IDEA deprives courts of subject matter jurisdiction or is instead a claim-processing requirement which could be forfeited by the party seeking to assert it"); *T. B. ex rel. Bell v. Nw. Indep. Sch. Dist.*, 980 F.3d 1047, 1051 n.2 (5th Cir. 2020) ("This circuit has not yet determined whether exhaustion under the IDEA is a jurisdictional requirement."); *Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 112 (5th Cir. 1992) ("We do not decide whether exhaustion is a jurisdictional requirement.").

Here, however, this issue is inconsequential. Contrary to S.B.'s assertions,[4] JPSB promptly raised its exhaustion argument. The district court evaluated the failure-to-exhaust argument solely as a jurisdictional claim and dismissed it accordingly. Thus, "we need not take sides in this dispute," because the result would be the same whether we consider exhaustion to be a claim-processing rule or a jurisdictional mandate.

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[4] S.B. argues that JPSB waived its exhaustion defense by failing to plead the defense in its first responsive pleading. However, as we have previously held, "an affirmative defense is not waived if the defendant 'raised the issue at a pragmatically sufficient time and [the plaintiff] was not prejudiced in its ability to respond.'" *Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009) (quoting *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 856 (5th Cir. 1983)). That is what we have here. In this case, JPSB raised a timely exhaustion defense in its Motion to Dismiss the First Amended Complaint. Additionally, there is no indication that S.B. has been negatively impacted by JPSB's initial failure to include this affirmative defense in its response. As a result, S.B.'s argument lacks merit.

Pacheco v. Mineta, 448 F.3d 783, 788 n.7 (5th Cir. 2006).

We thus consider whether the district court erred in finding that the failure-to-accommodate claims that S.B. seeks leave to add must be administratively exhausted. It did not.

Under the IDEA, "before the filing of a civil action under [federal law] seeking relief that is also available under [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*). If the gravamen of a complaint brought under federal law is the denial of a FAPE, administrative exhaustion is required. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). To answer this question, we must address two additional questions. *See Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251, 257 (5th Cir. 2017). "First, could the plaintiff have brought the same claim if the alleged conduct had occurred at a public facility that was not a school? Second, could a non-student at the school have brought the same claim?" *Id.* (citing *Fry*, 137 S. Ct. at 747).

Looking at S.B.'s proposed Second Amended Complaint, the answer to both hypothetical questions is "no." The Complaint alleges that S.B. was deprived of unspecified accommodations due to her autism and that Nick and Rowell failed to use common sense tactics to calm S.B. during the two incidents. Thus, as the district court correctly noted: "[T]he gist of

plaintiff's failure-to-accommodate allegations are that JPSB failed to either implement or enforce a protocol for de-escalation, in situations where faculty or staff were dealing with an autistic student who acted out in the course of instruction."

Under these facts, S.B. would not be entitled to a claim for failure to provide reasonable accommodations in a public theater or library, as these establishments are not obligated to provide a trained and supervised aide or teacher to accommodate a learning disability. *See Heston v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 980 (5th Cir. 2020). Similarly, a visitor to a school would not have a claim under the ADA or Rehabilitation Act for the same reason. *Id.* Consequently, the crux of the complaint lies within the purview of the IDEA. So S.B.'s Complaint is subject to the IDEA's exhaustion requirement.

S.B. argues that exhaustion would be futile because hearing officers in Louisiana have no authority over anything other than IDEA assertions, and IDEA proceedings cannot remedy physical injuries or simple discrimination. However, this argument is unpersuasive. Exhaustion under IDEA refers to "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 648 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2803 (2020). The preference is to solve disputes by providing the student with their promised education, not by awarding damages years after the problem arises in the classroom. *See id.* Therefore, S.B. has not

demonstrated that seeking such remedies would have been futile.

As exhaustion was necessary in this case and has not been completed, we affirm the decision of the district court dismissing the action without prejudice.

IV.

For the above reasons, the judgment of the district court is AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

S.B. BY AND THROUGH HER MOTHER, S.B.	**CIVIL ACTION**
VERSUS	**NO: 21-217**
JEFFERSON PARISH PUBLIC SCHOOL SYSTEM, ET AL	**SECTION: "S" (2)**

Filed: October 15, 2021

ORDER AND REASONS

IT IS HEREBY ORDERED that the **Motion to Dismiss First Amended Complaint** (Rec. Doc. 25) filed by Lesly Nick is **GRANTED**, and plaintiff's claims against Lesly Nick are **DISMISSED**;

IT IS FURTHER ORDERED that the **Motion to Dismiss First Amended Complaint** (Rec. Doc. 26) filed by Jefferson Parish School Board and Christi Rome is hereby **GRANTED**, and plaintiff's claims against Jefferson Parish School Board and Christi Rome are **DISMISSED**;

IT IS FURTHER ORDERED that the **Rule 12(b)(6) Motion to Dismiss** (Rec. Doc. 27) filed by Janine Rowell is **GRANTED**, and plaintiff's claims against Janine Rowell are **DISMISSED**.

Appendix B

I. BACKGROUND

This matter arises from the corporal punishment of a disabled Jefferson Parish student. Plaintiff, S.B., is an eleven-year old girl with autism spectrum disorder. S.B. was a student at Schneckenburger Elementary ("Schneckenburger") at all times relevant to the complaint.

The day of the first complained of incident, February 7, 2020, plaintiff was in Janine Rowell's class, receiving Applied Behavioral Analysis ("ABA") therapy from a contractor. That day, plaintiff refused to get up from the floor to clean up puzzle pieces. The ABA therapist moved to help plaintiff off of the floor and plaintiff kicked at her, which plaintiff alleges is a symptom of autism. Rowell slapped plaintiff's wrists and told her "No ma'am, no kicking!"

On February 10, 2020, the ABA therapist's manager emailed Schneckenburger principal Christi Rome, as well as the plaintiff's mother, informing them of incident. Rome collected statements from all adults in the room, and at plaintiff's mother's request, a police report was completed. Rowell was removed from the classroom for the following day, February 11, and eventually transferred to another school.

A second incident occurred at Schneckenberger nine months later on November 18, 2020, involving S.B. and Special Needs Paraprofessional ("SNP") Lesly Nick. The incident occurred during ABA therapy and the special education teacher immediately

reported the incident to Rome. Rome removed Nick from the classroom that day and eventually transferred her to another school.

S.B. has sued the Jefferson Parish School Board ("JPSB"), Walter Schneckenburger Elementary School, Principal Christi Rome, Teacher Janine Rowell, and Paraprofessional Lesly Nick. Plaintiff alleges claims under 42 U.S.C. § 1983 against all of the defendants for violations of her substantive due process and equal protection rights. Plaintiff alleges claims under 42 U.S.C. § 1983 against JPSB and Rome for failure to train. Plaintiff alleges claims against JPSB for violation of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. Plaintiff also alleges violations of Louisiana disability discrimination laws, along with state law battery and negligence.[1] Defendants move to dismiss the complaint, arguing that plaintiff failed to state a claim. Defendant Rowell also seeks to dismiss plaintiff's claims against her as prescribed.

II. DISCUSSION

A. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil

[1] Plaintiff also originally alleged a violation of the Individuals with Disabilities Education Act against JPSB and a 42 U.S.C. § 1983 claim for excessive force as to all defendants, but she has stipulated to the dismissal of those two claims.

Procedure permits a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. "To survive a Rule 12(b)(6) motion to dismiss, 'enough facts to state a claim for relief that is plausible on its face' must be pleaded." In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Bell Atl. v. Twombly, 550 U.S. 544 (2007). A claim is plausible on its face when the plaintiff pleads facts from which the court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. 544, 555 (citations omitted). The court "must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party." In re S. Scrap Material Co., LLC, 541 F.3d 584, 587 (5th Cir. 2008). However, the court need not accept legal conclusions couched as factual allegations as true. Iqbal, 556 U.S. at 678.

B. 42 U.S.C. Section 1983 Claims

Plaintiff has alleged section 1983 claims against all defendants for violation of both the due process and equal protection clauses of the Fourteenth Amendment. Section 1983 provides a remedy against every person, who under color of state law, deprives another of any rights secured by the Constitution and laws of the United States. 42 U.S.C. § 1983. Section 1983 is not itself a source of substantive rights; it

merely provides a method for vindicating federal rights conferred elsewhere. Olabisiomotosho v. City of Hous., 185 F.3d 521, 525 n. 3 (5th Cir. 1999). "To pursue a claim under section 1983, a plaintiff must: (1) allege a violation of rights secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a person acting under color of state law." Sw. Bell Tel., LP v. City of Hous., 529 F.3d 257, 260 (5th Cir. 2008) (internal quotations and citations omitted). Further, the complaint 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). A suit against public officials under § 1983 must include a short and plain statement of plaintiff's complaint that is factual and not conclusory. Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc).

1. Section 1983 Substantive Due Process Claim

Plaintiff alleges that all of the defendants violated her bodily integrity, and thus her substantive due process rights, when she was slapped on her wrists to correct her on two occasions. "The Due Process Clause of the Fourteenth Amendment confers upon an individual the right to be free of state-occasioned damage to [her] bodily integrity…." Randolph v. Cervantes, 130 F.3d 727, 730 (5th Cir. 1997). Further, "[i]t is well-established in this circuit that 'corporal punishment in public schools implicates a constitutionally protected liberty interest' under the Fourteenth Amendment."

T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 413–14 (5th Cir. 2021) (quoting Ingraham v. Wright, 430 U.S. 651, 672 (1977)). However, "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." Id. at 414 (internal quotations and citation omitted). This is because

> 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.

Id. (internal quotations and citations omitted). The Fifth Circuit has held that "the State of Louisiana affords students an adequate remedy [for unlawful corporal punishment] through its tort law and statutory provisions in Title 17." Flores v. Sch. Bd. of DeSoto Par., 116 F. App'x 504, 509 (5th Cir. 2004) (citations omitted).[2]

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[2] Title 17, sections 416 & 416.1 address discipline of students. Section 416.1(B)(2) specifically prohibits the use of corporal

Because the due process violation complained of is corporal punishment in a public school, and Louisiana provides adequate post-punishment remedies for this type of harm, plaintiff cannot establish a violation of her substantive due process rights. Accordingly, plaintiff's substantive due process claims against JPSB, Rome, Rowell, and Nick must be dismissed for failure to state a claim.

2. Section 1983 Equal Protection Claim

Plaintiff alleges a section 1983 claim for violation of her equal protection rights. The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. It requires that all similarly situated persons be treated alike. See id.; City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). While equal protection claims "typically concern governmental classifications that impact groups of citizens in different ways," the Supreme Court has recognized a "class-of-one" equal protection claim. Klinger v. University of So. Miss., 612 Fed. Appx. 222, 232 (5th Cir. 2015) (citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). In order to state a claim for violation of the equal protection clause for such a "'class of one,' the plaintiff must establish (1) [s]he was 'intentionally treated differently from others similarly situated' and (2) there was

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punishment for students with exceptionalities.

no rational basis for any such difference." Wilson v. Birnberg, 667 F.3d 591, 599 (5th Cir. 2012) (quoting Willowbrook, 528 U.S. at 564).

Plaintiff has alleged that the defendants "treat[ed] her less favorably than non-disabled students on the bases of her disability….", and that "there was no rational basis for the Defendants' unequal treatment of Plaintiff."[3] She alleges that "Ms. Rowell slapped Plaintiff because of Plaintiff's disability," "Rome's actions were taken because of, or with deliberate indifference to, Plaintiff's disability," that "Ms. Nick slapped Plaintiff because of Plaintiff's disability."[4] She further alleges that "[n]on-disabled students are not subjected to corporal punishment" and that "Nick and Rowell have not slapped any students who do not have disabilities."[5]

These allegations are insufficient to state an equal protection claim. Though courts take factual allegations as true in ruling on a Federal Rule 12(b) motion, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. While the complaint generally alleges that other similarly situated individuals were treated differently, plaintiff "points to no specific person or persons and provides no specifics as to their violations." Rountree v. Dyson, 892 F.3d 681,

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[3] Rec. Doc. 17, Amd. Cmplt. ¶¶ 143, 144.

[4] Id. at ¶¶ 67, 71, 82.

[5] Id. at ¶¶ 91, 92.

685 (5th Cir. 2018). For example, plaintiff does not plead that another child, either non-disabled or with a different disability, was also misbehaving and that Nick or Rowell did not discipline them. While plaintiff alleges that her mistreatment was intentional and on the basis of her disability, she points to no words or actions of Nick or Rowell that evince this.

Further, the *facts* that plaintiff alleges simply do not support an inference that plaintiff was treated differently because of her disability. Plaintiff alleges that Rowell slapped her wrists when plaintiff, refusing to pick up puzzle pieces, began to kick at her behavioral technician. Rowell then slapped her wrists saying "No ma'am! No kicking!"[6] On a separate occasion nine months later, when plaintiff reached out and pinched her SNP's neck, Nick, the SNP, grabbed and slapped the top of plaintiff's hand saying "We do not pinch our friends."[7] These allegations demonstrate that plaintiff was slapped not based upon her disability, but in an effort to correct inappropriate behavior. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 678. In this case, the court finds that plaintiff has failed to state a plausible

[6] Id. at ¶¶ 35, 36.

[7] Id. at ¶¶ 74, 75.

equal protection claim.[8]

3. Section 1983 Failure to Train Claim

Plaintiff alleges that JPSB and Rome failed to adequately train Nick and Rowell, which caused them to corporally punish plaintiff. To succeed on a failure to train claim, a plaintiff must show that "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." Gates v. Texas Dep't of Protective & Regul. Servs., 537 F.3d 404, 435 (5th Cir. 2008). However, in this case, "[b]ecause there was no constitutional violation, . . . there can be no *Monell* or failure-to-train claims." Albert v. City of Petal, 819 F. App'x 200, 203 (5th Cir. 2020) (citing Hicks-Fields v. Harris Cty., 860 F.3d 803, 808 (5th Cir. 2017)). Accordingly, plaintiff's failure to train claims are dismissed.[9]

C. Federal Disability Discrimination Claims

Plaintiff argues that JPSB violated federal disability discrimination law, specifically Title II of the ADA, codified at 42 U.S.C. § 12132 and Section 504 of the

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[8] Because plaintiff has failed to state a claim, the court does not reach the issue of Rome and Nick's qualified immunity defense.

[9] Because plaintiff has failed to state a federal claim as to Rowell, the court does not reach Rowell's alternative argument that the claims against her are prescribed.

Rehabilitation Act at 29 U.S.C. § 794. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, 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 the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ..." 29 U.S.C. § 794(a).

Similarly, Title II of the ADA provides 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, or activities, of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. A "public entity" includes any State or local government and any department agency, special purpose district, or other instrumentality of a State or States or local government. Id. at § 12131(1)(A)-(B).

To state a claim under Title II of the ADA, a plaintiff must allege: "(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." T.O., 2 F.4th 407, 417 (5th Cir. 2021) (citations omitted). "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." Id. A claim under § 504 of the Rehabilitation

Act is analyzed similarly, except that "[l]iability [under § 504] can only be found when the discrimination was 'solely by reason of her or his disability,' not when it is simply a 'motivating factor.'" Soledad v. U.S. Dep't of Treasury, 304 F.3d 500, 505 (5th Cir. 2002).

Plaintiff's disability discrimination claims fail for the same reason as her equal protection claim. She has not pleaded any specific facts that permit an inference that any of the defendants were motivated by her disability. In a similar case, T.O. v. Fort Bend I.S.D., the Fifth Circuit reached the same conclusion based on similar allegations. 2 F.4th 407, 418. In T.O., plaintiff alleged that the defendant violated his rights under the ADA and section 504 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.'" Id. at n. 44. The Fifth Circuit found that these allegations were insufficient to support a disability discrimination claim, because the complaint "provide[d] no factual allegations to support those allegations and conclusions." Id.

As in T.O., the amended complaint in the instant case contains conclusory allegations of discrimination, but "[t]he trouble is that none of the factual allegations contained in the complaint permit the inference that [plaintiff] was ever discriminated against because of [her] disability." Id. at 417. Rather, as discussed above, the actual facts alleged reflect that plaintiff was slapped in an effort to correct inappropriate behavior, not based upon her disability.

Because plaintiff has not adequately alleged that any complained of behavior was based upon her disability, her ADA and section 504 claims must be dismissed.

D. State Law Claims

In the Fifth Circuit, the "'general rule' is to decline to exercise jurisdiction over pendent state-law claims when all federal claims are dismissed or otherwise eliminated from a case prior to trial" though "this rule is neither mandatory nor absolute." Batiste v. Island Recs. Inc., 179 F.3d 217, 227 (5th Cir. 1999). When deciding whether to retain jurisdiction, a court should "consider both the statutory provisions of 28 U.S.C. § 1367(c) and the balance of the relevant factors of judicial economy, convenience, fairness, and comity . . . ." Id. Under § 1367(c), a district court may decline to exercise supplemental jurisdiction if:

> (1) a claim raises a novel or complex issue of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; and (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c)

Because the court has dismissed all of plaintiff's

federal claims against the moving defendants, under provision (c)(3) above, it declines to exercise supplemental jurisdiction. Additionally, judicial economy favors declining jurisdiction because the case is still new; no defendant has answered, and the complaint was initially filed less than a year ago. Convenience favors declining jurisdiction, as all parties are based in Jefferson Parish and would easily be able to litigate the case in state court there.

III. CONCLUSION

The allegations of the Amended Complaint reflect that plaintiff was slapped on her wrists on two separate occasions nine months apart, for misbehaving in a way that threatened or actually visited violence upon adult caregivers. While not best practice, under the precedent of this circuit, these actions do not rise to the level of a constitutional or federal law violation. No federal claim has been adequately alleged. The court declines to exercise supplemental jurisdiction over plaintiff's state law claims. Accordingly,

IT IS HEREBY ORDERED that the **Motion to Dismiss First Amended Complaint** (Rec. Doc. 25) filed by Lesly Nick is **GRANTED**, and plaintiff's claims against Lesly Nick are **DISMISSED**;

IT IS FURTHER ORDERED that the **Motion to Dismiss First Amended Complaint** (Rec. Doc. 26) filed by Jefferson Parish School Board and Christi Rome is hereby **GRANTED**, and plaintiff's claims

against Jefferson Parish School Board and Christi Rome are **DISMISSED**;

IT IS FURTHER ORDERED that the **Rule 12(b)(6) Motion to Dismiss** (Rec. Doc. 27) filed by Janine Rowell is **GRANTED**, and plaintiff's claims against Janine Rowell are **DISMISSED.**

New Orleans, Louisiana, this 15th day of October, 2021.

s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATS DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

S.B. BY AND THROUGH HER MOTHER, S.B.,	Case No. 2:21-cv-217
	Hon. Mary Ann Vial Lemmon
Plaintiff,	Mag. Judge Donna Phillips Currault
v.	Jury Demanded

JEFFERSON PARISH SCHOOL BOARD, CHRISTI ROME, JANINE ROWELL, and LESLEY NICK,

Defendants.

FINAL JUDGMENT

Consistent with the Court's Order and Reasons entered on October 15, 2021, doc. 38, and its Order and Reasons entered on February 1, 2022, Plaintiff's federal claims are **DISMISSED WITH PREJUDICE**, and Plaintiff's state-law claims are **DISMISSED WITHOUT PREJUDICE**. Accordingly, the complaint is **DISMISSED** in its entirety.

DONE this 17th day of February, 2022.

s/ Mary Ann Vial Lemmon
United States District Judge

Appendix D

United States Court of Appeals
for the Fifth Circuit

No. 22-30139

S.B., *on behalf of her minor daughter*, S.B.,

Plaintiff–Appellant,

versus

JEFFERSON PARISH SCHOOL BOARD; CHRISTI ROME; JANINE ROWELL; LESLEY NICK,

Defendants–Appellees,

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-217

Filed: June 26, 2023

ON PETITION FOR REHEARING EN BANC

Before JOLLY, HAYNES, and GRAVES, *Circuit Judges.*

Appendix D

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. Because no member of the panel or judge in regular active service 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 EASTERN DISTRICT OF LOUISIANA

S.B., BY AND THROUGH HER MOTHER, S.B.,	Case No. 2:21-cv-217
	Hon. Mary Ann Vial Lemmon
Plaintiff,	Mag. Judge Donna Phillips Currault
v.	Jury Demanded

JEFFERSON PARISH SCHOOL BOARD, CHRISTI ROME, JANINE ROWELL, and LESLEY NICK,

Defendants.

FIRST AMENDED COMPLAINT

Plaintiff, by and through undersigned counsel, alleges as follows:

PRELIMINARY STATEMENT

1. This case involves unlawful corporal punishment against a child with a disability. The plaintiff—an eleven-year-old girl with autism—has been slapped by not one, but two different teachers at her school. One of them struck her on multiple occasions.

2. Neither the Jefferson Parish School Board nor

the principal at Plaintiff's school require school officials to undergo any training with regard to their obligations not to use corporal punishment under federal and state disability laws.

3. Neither teacher in this case was fired. Instead, it is the policy of the Jefferson Parish School Board to simply transfer teachers who hit students to another school.

4. This is a civil action for declaratory relief, injunctive relief, monetary damages, and punitive damages to redress disability-based discrimination under the Rehabilitation Act, 29 U.S.C. § 701 *et seq*., Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*, La. Rev. Stat. §§ 46:1953, 46:2254, 51:2247, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*, and La. Const. art. I, § 12. Plaintiff also asserts federal constitutional claims under 42 U.S.C. § 1983, and tort claims under Louisiana law.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 20 U.S.C. § 1400; 29 U.S.C. § 794; 42 U.S.C. §§ 1983, 12132; and 28 U.S.C. § 1367(a).

6. Venue is proper in the Eastern District of Louisiana pursuant to 28 U.S.C. § 1391(b) because the events or omissions giving rise to the Plaintiff's claims occurred there.

Appendix E

PARTIES

7. Plaintiff, a minor child, is a person with a disability and a resident of Louisiana.

8. Plaintiff has a "disability," as defined by 20 U.S.C. § 1401(3), 42 U.S.C. § 12102, 29 U.S.C. § 705(20), and La. Rev. Stat. §§ 46:1952(2), 46:2253(12), 51:2232(3)(a).

9. Plaintiff is a "person aggrieved" under 29 U.S.C. § 794a(a)(2) and La Rev. Stat. § 46:1956(C), a "person alleging discrimination on the basis of disability" under 42 U.S.C. § 12133, a person "subject to unlawful discrimination" under La. Rev. Stat. 46:2256(B), and a "person deeming h[er]self injured" under La. Rev. Stat. § 51:2264.

10. Plaintiff is a person "depriv[ed]" of her rights "secured by the Constitution" under 42 U.S.C. § 1983.

11. Defendant Jefferson Parish School Board is the school board for Jefferson Parish, Louisiana, consistent with La. Rev. Stat. 17:51. Its principal place of business is 501 Manhattan Blvd, Harvey, LA, 70058.

12. Defendant Christi Rome is the Principal of Walter Schneckenburger Elementary School. Plaintiff brings these claims against her in both her official and individual capacities.

13. Defendant Janine Rowell is an employee of Jefferson Parish Public School System, which was created by the Jefferson Parish School Board. She was a special education teacher at Walter Schneckenburger Elementary School. Plaintiff brings these claims against Rowell in her individual capacity.

14. Defendant Lesley Nick is an employee of Jefferson Parish Public School System and was a special needs paraprofessional at Walter Schneckenburger Elementary School. Plaintiff brings these claims against Nick in her individual capacity.

FACTUAL ALLEGATIONS

15. Walter Schneckenburger Elementary School is a public school in Jefferson Parish, operating under the jurisdiction of the Jefferson Parish Public School System. It is located at 26 Earnest Ave, Kenner LA 70065.

16. Christi Rome is the Principal of Schneckenburger Elementary.

17. Plaintiff is an eleven-year-old girl with autism, also known as autism spectrum disorder.

18. Autism is a "disability" under federal and Louisiana antidiscrimination laws, because it substantially limits one or more major life activities.

19. Louisiana law strictly forbids school officials from using corporal punishment against any "student with an exceptionality" or any "student who has been determined to be eligible for services under Section 504 of the Rehabilitation Act of 1973 and has an Individual Accommodation Plan." La. Rev. Stat. § 17:416.1(B)(2).

20. There is never any justification for slapping a child with autism, because there is no state interest in administering corporal punishment against children with disabilities.

21. The Jefferson Parish School Board has no training or policies in place to ensure that school officials refrain from using corporal punishment against students with disabilities.

22. Corporal punishment against a child with a disability is considered "abuse" under the Louisiana Children's Code, Article 603.

23. The Louisiana Children's Code requires that school employees immediately report alleged or suspected child abuse and/or neglect to the Department of Children and Family Services (DCFS) or law enforcement as a mandated reporter. La. Child. Code art. 609–10.

24. Principal Rome is a "mandatory reporter" under the Louisiana Children's Code. La. Child. Code art 609.

25. Principal Rome has a duty to ensure that school

employees at Schneckenburger Elementary receive proper training, including training school officials' obligations to students with disabilities under state and federal law.

26. Principal Rome is also responsible for overseeing school employees and ensuring that they follow all laws, regulations, school policies, and the U.S. Constitution.

27. Plaintiff's autism causes her to occasionally exhibit inappropriate behavior, such as pinching and kicking.

28. Plaintiff is a student at Schneckenburger Elementary.

29. Because of her disability, Plaintiff is shadowed at school by a special needs paraprofessional (SNP), which is a person charged with assisting teachers in making sure a child's education complies with the child's individualized education plan.

30. The Jefferson Parish School Board contracts with a private company called Autism Spectrum Therapies to provide ABA therapy to children during school hours.[1]

[1] ABA stands for "applied behavioral analysis," a form of therapy for people with autism or similar disorders that can

Appendix E

First incident of hitting: Janine Rowell

31. Janine Rowell was a special education teacher at Schneckenburger Elementary, hired in or around the beginning of 2020.

32. Ms. Rowell was assigned to Plaintiff's classroom.

33. From the outset, Ms. Rowell demonstrated little to no patience for Plaintiff and Plaintiff's special needs. Sometimes she would scream at Plaintiff. Other times, she would simply ignore Plaintiff and refuse to help Plaintiff with her schoolwork.

34. At around 1:30 pm on Friday, February 7, 2020, Plaintiff was in her classroom receiving therapy from an ABA behavioral technician.

35. Plaintiff was sitting on floor and refused to stand up to clean up puzzle pieces. Her behavioral technician approached Plaintiff to help her up, but Plaintiff kicked towards her, though without making contact.

36. Ms. Rowell then intervened and began slapping Plaintiff's wrists, saying "No, ma'am! No

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improve social, communication, and learning skills through positive reinforcement.

kicking!"

37. Two SNPs in the room at the time witnessed Ms. Rowell slapping Plaintiff's wrists, including Plaintiff's SNP.

38. Neither of the two SNPs reported the abuse to any school authorities.

39. Later that afternoon, the ABA behavioral technician told her manager at Autism Spectrum Therapies about the incident.

40. Three days later, at 11:00 am on Monday, February 10, 2020, the manager from Autism Spectrum Therapies emailed Christi Rome, the principal at Schneckenburger Elementary. The email recounted the events of the previous Friday as described by the behavioral technician.

41. Upon receiving this email, Principal Rome requested statements from all the adults in the room at the time, including the ABA behavioral technician, the two SNPs in the classroom at the time, and Ms. Rowell herself.

42. Principal Rome did not contact the police or DCFS.

43. Contrary to the Jefferson Parish Public School guidelines and the school handbook, Principal Rome did not remove Ms. Rowell from the

classroom. She remained in the classroom with Plaintiff for the remainder of the school day.

44. At around 1:00 pm that day, Autism Spectrum Therapies sent Principal Rome a formal incident report.

45. Plaintiff's mother did not learn of the incident until around 2:00 pm on Monday, February 10, 2020, after the manager from Autism Spectrum Therapies emailed her about it.

46. After receiving the email from Autism Spectrum Therapies, Plaintiff's mother called the police and drove to the school, where she arrived around 3:00 pm.

47. Around the same time, an officer from the Kenner Police Department arrived at the school.

48. Plaintiff's mother and the Kenner Police officer entered Principal Rome's office together.

49. The responding police officer and Principal Rome knew each other personally.

50. Plaintiff's mother requested a police report. In response, Principal Rome expressed irritation at the request and said, "That's not necessary."

51. Plaintiff's mother replied, "It's my right to have a police report filed."

52. Plaintiff asked Principal Rome why she hadn't

called the police right away after learning of the incident. Principal Rome responded that she had not yet had time to perform an internal investigation into the allegation.

53. The police officer also expressed hesitation about filing a report.

54. Plaintiff's mother told the officer, "If you won't file the police report, I will find another officer who will. My brother is a police officer."

55. The police officer then agreed to write a report.

56. The officer was unable to interview Ms. Rowell.

57. The police report reflects that Plaintiff's mother told the officer that she was not interested, at that time, in pressing charges against Ms. Rowell.

58. Later that day, Principal Rome received signed statements from all the adults in the room at the time, including the two SNPs in the classroom at the time and Ms. Rowell herself.

59. Ms. Rowell denied any wrongdoing or that she slapped Plaintiff's wrists.

60. One of the SNPs said she witnessed Ms. Rowell grab Plaintiff's wrists and use a stern voice, but did not witness any slapping.

61. The other SNP stated that she witnessed Ms.

Rowell grab Plaintiff's wrists, and, after Plaintiff resisted, she witnessed Ms. Rowell slapping Plaintiff's wrists. This SNP also stated in her letter that she had also witnessed Ms. Rowell slapping Plaintiff's wrists in this same manner two weeks prior.

62. The second SNP had not reported the prior incident of slapping to any school authorities.

63. The next day, Ms. Rowell was no longer in the classroom.

64. Principal Rome did not suspend Ms. Rowell. Instead, she referred the matter to Human Resources.

65. Ms. Rowell was not discharged by Jefferson Parish Public School System. Instead, she was transferred to another school within the school system.

66. Ms. Rowell was not reprimanded in any way for her actions.

67. Ms. Rowell slapped Plaintiff because of Plaintiff's disability.

68. Ms. Rowell knew, or reasonably should have known, that federal and state law prohibit slapping children with disabilities.

69. Other parents were not informed of the events that had taken place or the reason for Ms.

Rowell's removal. Rather, over a month after Ms. Rowell's removal, Principal Rome informed the parents that there was a "vacancy" in their children's classroom.

70. For almost two months, there was no teacher in Plaintiff's classroom. As a result, Plaintiff and her classmates were taught only by SNPs, not teachers, denying Plaintiff a free appropriate public education.

71. Principal Rome's actions were taken because of, or with deliberate indifference to, Plaintiff's disability.

Second incident of hitting: Lesley Nick

72. In November 2020, Lesley Nick was an SNP at Schneckenburger Elementary who had recently been assigned to shadow Plaintiff.

73. On the morning of November 18, 2020, Plaintiff was working with her ABA therapist on spelling, and Ms. Nick was assisting Plaintiff in choosing the correct letters.

74. At some point during the session, Plaintiff reached out and pinched Ms. Nick's neck.

75. In response, Ms. Nick grabbed Plaintiff's hand and slapped the top of it, saying "We do not pinch our friends."

76. The special education teacher assigned to

Plaintiff's classroom that day witnessed Ms. Nick slapping Plaintiff's hand and immediately reported the incident to Principal Rome.

77. Principal Rome called Plaintiff's mother right away after the second incident, and immediately removed Ms. Nick from the classroom.

78. Principal Rome did not contact the police or DCFS.

79. Ms. Nick no longer works at Schneckenburger Elementary.

80. Ms. Nick was not fired. Rather, Jefferson Parish Public School System transferred her to another school.

81. Ms. Nick was not reprimanded in any way for her actions.

82. Ms. Nick slapped Plaintiff because of Plaintiff's disability.

83. Ms. Nick knew, or reasonably should have known, that state and federal laws prohibit slapping children with disabilities.

84. Schneckenburger Elementary has no policies or training in place to prevent teachers from using corporal punishment.

85. Principal Rome did not implement, conduct, or oversee any training of teachers at

Schneckenburger Elementary with regard to corporal punishment.

86. Jefferson Parish School Board does not have any policies in place to train its employees on their obligation not to use corporal punishment against students with disabilities.

87. Jefferson Parish School Board has a policy of transferring teachers who hit students to other schools, without notifying the parents of those children that the teacher was transferred because of hitting a student.

88. Jefferson Parish School Board is vicariously liable for the wrongdoing of its employees.

89. Jefferson Parish School Board and Christi Rome acted with deliberate indifference to their duty to train employees not to use corporal punishment against students with exceptionalities.

90. The individual defendants were acting as agents of the Jefferson Parish School Board.

91. Non-disabled students at Schneckenburger Elementary are not subjected to corporal punishment.

92. Defendants Nick and Rowell have not slapped any students who do not have disabilities.

Appendix E

FIRST CLAIM – Disability Discrimination (Section 504 of the Rehabilitation Act)

93. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

94. Defendant violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, because it is a recipient of federal funds, and it discriminated against Plaintiff solely on the basis of her disability.

95. Defendant treated Plaintiff less favorably because of her disability and knowingly allowed a hostile education environment on the basis of her disability.

96. The discriminatory actions of Defendant were intentional and taken with deliberate indifference to Plaintiff's rights.

97. Plaintiff suffered injuries as a result of Defendant's conduct.

98. Plaintiff asserts this claim against Jefferson Parish School Board.

SECOND CLAIM – Disability Discrimination (ADA)

99. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

100. Defendant violated Title II of the Americans

with Disabilities Act, 42 U.S.C. § 12132, because it is a public entity that discriminated against Plaintiff on the basis of her disability.

101. Defendant treated Plaintiff less favorably because of her disability and knowingly allowed a hostile education environment on the basis of her disability.

102. The discriminatory actions of Defendant were intentional and taken with deliberate indifference to Plaintiff's rights.

103. Plaintiff suffered injuries as a result of the Defendant's conduct.

104. Plaintiff asserts this claim against Jefferson Parish School Board.

THIRD CLAIM – Disability Discrimination (La. Rev. Stat. § 46:1953)

105. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

106. Defendant violated La. Rev. Stat. § 46:1953 because it denied a "person with a disability" the same rights "as a person who is able-bodied."

107. Defendant treated Plaintiff less favorably because of her disability and knowingly allowed a hostile education environment on the basis of her disability.

108. The discriminatory actions of Defendants were intentional and taken with deliberate indifference to Plaintiff's rights.

109. Plaintiff suffered injuries as a result of Defendant's conduct.

110. Plaintiff asserts this claim against Jefferson Parish School Board.

FOURTH CLAIM – Disability Discrimination (La. Rev. Stat. § 51:2247)

111. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

112. Defendants violated La. Rev. Stat. § 51:2247 because they "den[ied] an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, … on the grounds of … disability."

113. Defendants treated Plaintiff less favorably because of her disability and knowingly allowed a hostile education environment on the basis of her disability.

114. The discriminatory actions of Defendants were intentional and taken with deliberate indifference to Plaintiff's rights.

115. Plaintiff suffered injuries as a result of Defendants' conduct.

116. Plaintiff asserts this claim against all Defendants.

FIFTH CLAIM – Disability Discrimination (La. Rev. Stat. § 46:2254)

117. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

118. Defendant violated La. Rev. St. § 46:2254 because it "discriminate[d] against … an individual enrolled as a student at the institution on the basis of a disability."

119. Defendant treated Plaintiff less favorably because of her disability and knowingly allowed a hostile education environment on the basis of her disability.

120. The discriminatory actions of Defendant were intentional and taken with deliberate indifference to Plaintiff's rights.

121. Plaintiff suffered injuries as a result of Defendant's conduct.

122. Plaintiff asserts this claim against Jefferson Parish School Board.

SIXTH CLAIM – Failure to Provide a Free and Appropriate Public Education (IDEA)

123. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

124. Defendant violated the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*, because it failed to provide a free and appropriate education.

125. Plaintiff suffered injuries as a result of Defendant's conduct.

126. Plaintiff asserts this claim against Jefferson Parish School Board.

SEVENTH CLAIM –Substantive Due Process (42 U.S.C. § 1983)

127. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

128. The Defendants are "person[s]" acting under color of state law under 42 U.S.C. § 1983.

129. The Defendants violated Plaintiff's right to substantive due process under the Fifth and Fourteenth Amendments to the U.S. Constitution, namely, her right to bodily integrity.

130. The Defendants knew or should have known that their actions were unconstitutional.

131. The actions of Defendants were intentional and taken with deliberate indifference to Plaintiff's rights.

132. The Defendants' actions caused Plaintiff damages.

133. Plaintiff asserts this claim against all Defendants.

EIGHTH CLAIM (42 U.S.C. § 1983 – Excessive Force)

134. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

135. The Defendants are "person[s]" acting under color of state law under 42 U.S.C. § 1983.

136. The Defendants violated Plaintiff's rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution by using unjustified force against her.

137. The Defendants knew or should have known that their actions were unconstitutional.

138. The actions of Defendants were intentional and taken with deliberate indifference to Plaintiff's rights.

139. The Defendants' actions caused Plaintiff damages.

140. Plaintiff asserts this claim against all Defendants.

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NINTH CLAIM (42 U.S.C. § 1983 – Equal Protection)

141. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

142. The Defendants are "person[s]" acting under color of state law under 42 U.S.C. § 1983.

143. The Defendants violated Plaintiff's Equal Protection rights under the Fourteenth Amendment by treating her less favorably than non-disabled students on the basis of her disability and knowingly allowing a hostile education environment on the basis of her disability.

144. There was no rational basis for the Defendants' unequal treatment of Plaintiff.

145. The Defendants knew or should have known that their actions were unconstitutional.

146. The actions of Defendants were intentional and taken with deliberate indifference to Plaintiff's rights.

147. The Defendants' actions caused Plaintiff damages.

148. Plaintiff asserts this claim against all Defendants.

Appendix E

TENTH CLAIM (Louisiana Battery)

149. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

150. The Defendants committed battery against Plaintiff, because they made a harmful or offensive contact with Plaintiff and intended to cause Plaintiff to suffer such a contact. *See Caudle v. Betts*, 512 So. 2d 389, 391 (La. 1987).

151. Plaintiff suffered injuries as a result of Defendants' conduct.

152. Plaintiff asserts this claim against all Defendants.

ELEVENTH CLAIM (Negligence)

153. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

154. The Defendants had a duty to Plaintiff to conform their conduct to a specific standard of care, and their conduct fell below that standard of care.

155. The standard of care is set by statute. Because the Defendants' conduct fell below that standard, their conduct constitutes negligence per se.

156. The Defendants' negligence caused Plaintiff damages.

157. Plaintiff asserts this claim against all Defendants.

TWELFTH CLAIM (Negligence – Failure to Supervise/Train)

158. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

159. The Defendants had a duty to train and supervise their employees to conform their conduct to a specific standard of care, and the Defendants breached that duty.

160. The Defendants' negligence caused Plaintiff damages.

161. Plaintiff asserts this claim against Jefferson Parish School Board and Christi Rome.

THIRTEENTH CLAIM (42 U.S.C. § 1983 – Failure to Train)

162. Plaintiff repeats and realleges all allegations of this Complaint as set forth above.

163. The Defendants' training policies with regard to corporal punishment for special education students are insufficient.

164. The Defendants were deliberately indifferent to this insufficiency in adopting their policies.

165. The insufficiency of the policies was the moving

force behind the violations of Plaintiff's constitutional rights.

166. The Defendants knew or should have known that their failure to adequately train its employees would cause a constitutional violation.

167. The Defendants had actual or constructive notice of a pattern of similar constitutional violations caused by the policies.

168. Plaintiff asserts this claim against Jefferson Parish School Board and Christi Rome.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment:

1. Declaring that Defendants' conduct as set forth above violates 29 U.S.C. § 794; 42 U.S.C. § 12132; 20 U.S.C. § 1414; and La. Rev. Stat. §§ 46:1953, 46:2254, & 51:2247.

2. Declaring that Defendants' conduct violates Plaintiff's constitutional rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

3. Declaring that Defendants are liable for Louisiana battery and negligence;

4. Declaring that defendants Jefferson Parish School Board and Christi Rome are liable for negligence

and failure to train;

5. Entering an injunction directing that Defendants and their officers, directors, agents, employees and successors, and all other persons in active concert or participation with Defendants, take all affirmative steps necessary to remedy the effects of the illegal, discriminatory, and tortious conduct alleged herein and to prevent similar occurrences in the future;

6. Awarding compensatory damages to Plaintiff for injuries caused by Defendants' discriminatory and tortious conduct, pursuant to 29 U.S.C. § 794a, 42 U.S.C. § 12133, La. Rev. Stat. § 46:1956, La. Rev. Stat. § 46:2256, La. Rev. Stat. § 51:2264, and any other applicable provisions.

7. Awarding punitive damages to Plaintiff for injuries caused by Defendants' discriminatory and tortious conduct, pursuant to 29 U.S.C. § 794a, 42 U.S.C. § 12188, La. Rev. Stat. § 46:1956, La. Rev. Stat. § 46:2256, La. Rev. Stat. § 51:2264, and any other applicable provisions.

8. Awarding costs and attorney's fees to Plaintiff, pursuant to 29 U.S.C. § 794a, 42 U.S.C. § 12133, La. Rev. Stat. § 46:1956, La. Rev. Stat. § 46:2256, La. Rev. Stat. § 51:2264, and any other applicable provisions;

9. Requiring that Defendants put into place policies and training to prevent corporal punishment from

occurring in the future;

10. Granting such further relief as this Court may deem just and proper.

JURY DEMAND

Consistent with Federal Rule of Civil Procedure 38(b), Plaintiff hereby requests a trial by jury as to every claim for which she is entitled.

Respectfully submitted,

June 4, 2021

/s/ *Chris Edmunds*

Chris Edmunds,
Counsel for Plaintiff
LBSA: 37670
Chris Edmunds Law Office
4937 Hearst St., Suite 2F
Metairie, LA 70001
(504) 314-0034
chrisedmundslaw@gmail.com