

COPY

D-1-CN-07-002998

CAUSE NO. \_\_\_\_\_

M.P., by and through his next friend,  
A.T., D.M., by and through his next  
friend, N.J., and E.B., by and through  
her next friend, E.R.

Plaintiffs

v.

TEXAS YOUTH COMMISSION and  
DIMITRIA D. POPE, in her official  
capacity as Acting Executive  
Director of Texas Youth Commission,

Defendants

Filed in The District Court  
of Travis County, Texas  
IN THE DISTRICT COURT

SEP 12 2007 *Am*

At \_\_\_\_\_  
Amalia Rodriguez-Mendoza, Clerk

OF TRAVIS COUNTY, TEXAS

*201st* JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

TO THE HONORABLE COURT:

Plaintiffs M.P., by and through his next friend, A.T., D.M., by and through his next friend, N.J., and E.B., by and through her next friend, E.R., file this Petition for Declaratory and Injunctive Relief against Texas Youth Commission ("TYC") and Dimitria D. Pope, in her official capacity as Acting Executive Director of TYC, and in support of this petition show:

**I. DISCOVERY CONTROL PLAN**

1. Plaintiffs intend discovery in this case to be conducted under Level 2 of Rule 190 of the Texas Rules of Civil Procedure.

**II. STATEMENT OF CASE**

2. On August 1, 2007, Defendant Pope issued Executive Directive #2 FY07 that instructed TYC staff to use Oleoresin Capsicum ("OC") spray, also known as pepper spray,<sup>1</sup>

<sup>1</sup>Oleoresin capsicum is referred to herein as "OC pepper spray."

COPY

prior to agency-approved methods of physical restraint whenever practical. This directive substantially amended and revised an existing rule, 37 TEX. ADMIN. CODE § 97.23, which governed the use of force in TYC facilities.

3. Under the existing administrative “use of force” rule, 37 TEX. ADMIN. CODE § 97.23, OC pepper spray is only authorized for use when other less restrictive interventions, including physical restraint, have failed or are determined to be impracticable. 37 TEX. ADMIN. CODE § 97.23(p)(1)(A). By directing the use of OC pepper spray before physical restraint, Defendant Pope effectively and improperly amended this rule by no longer designating OC pepper spray as the intervention of last resort on the TYC’s use of force continuum. Executive Directive #2 FY07 also circumvents the prohibition in the “use of force” rule against using OC pepper spray for youth with mental illness or serious emotional disturbances. 37 Tex. Admin. Code § 97.23(p)(B)(ii). Because these changes in the “use of force” rule were not adopted in accordance with the Administrative Procedure Act’s rulemaking requirements, Executive Directive #2 FY07 is an invalid rule.

4. Plaintiffs M.P, D.M. and E.B. are youth with disabilities who are currently confined in TYC’s facilities. Since the implementation of Executive Directive #2 FY07, they either have been or are at risk of being sprayed with OC pepper spray. As a result of Executive Directive #2 FY07, Plaintiffs have been or will be at risk of being injured by OC pepper spray.

5. Plaintiffs seek an order declaring that (i) Executive Directive #2 FY07 is an invalid rule; (ii) TYC must comply with the existing administrative “use of force” rule, 37 TEX. ADMIN. CODE § 97.23; and (iii) if TYC intends to require the use of OC pepper spray before attempting other less restrictive interventions, TYC must comply with the Administrative Procedure Act’s rulemaking requirements to amend and revise the existing “use of force” rule.

Plaintiffs also seek temporary and permanent injunctive relief enjoining Defendants from relying upon Executive Directive #2 FY07 to spray Plaintiffs and any other youth with OC pepper spray before attempting other less restrictive interventions.

### **III. JURISDICTION AND VENUE**

6. This Court has jurisdiction over this action pursuant to section 2001.038 of the Texas Government Code and section 65.011 of the Texas Civil Practices and Remedies Code.

7. Venue is proper in Travis County, Texas, pursuant to section 2001.038 (b) of the Texas Government Code.

### **IV. PARTIES**

8. Plaintiff M.P. is a 15-year-old male who has been diagnosed as having a major depressive disorder and attention deficit hyperactivity disorder and is currently confined at TYC's Corsicana Residential Treatment Center in Corsicana, Texas. As permitted by Rule 44 of the Texas Rules of Civil Procedure, M.P.'s claim is brought by A.T., his legal guardian and next friend. A.T. resides in Paris, Texas.

9. Plaintiff D.M. is a 15-year-old male with attention deficit hyperactivity disorder who is currently confined at TYC's Gainesville State School in Gainesville, Texas. As permitted by Rule 44 of the Texas Rules of Civil Procedure, D.M.'s claim is brought by N.J., his parent and next friend, N.J. resides in Arlington, Texas.

10. Plaintiff E.B. is a 15-year-old female with a mental illness who is currently confined at TYC's Corsicana Residential Treatment in Corsicana, Texas. As permitted by Rule 44 of the Texas Rules of Civil Procedure, E.B.'s claim is brought by E.R., her grandparent and next friend. E.R. resides in San Antonio, Texas.

11. Defendant TYC is responsible for the administration of the state's juvenile correctional system. For youth committed to its custody, TYC is mandated to "provide a program of constructive training and rehabilitation and reestablishment in society of children adjudicated delinquent by the courts of this state." Tex. Hum. Res. Code § 61.002. Defendant TYC may be served with process by serving its Acting Executive Director Dimitria D. Pope at its central office, 4900 N. Lamar Blvd., Austin, Texas 78751.

12. Defendant Pope is currently the duly appointed Acting Executive Director of TYC and has been delegated the task of administering that agency. Her duties include observing, executing, and enforcing the mandates and regulations established under state and federal law. As Acting Executive Director, Defendant Pope is ultimately responsible for ensuring that TYC is in full compliance with these laws and regulations. Pursuant to section 61.034 (a) of the Texas Human Resources Code, Defendant Pope is responsible for the adoption of all policies and shall make rules appropriate to the proper accomplishment of TYC's functions. Moreover, she is authorized to adopt rules for the governance of its schools, facilities and programs. Defendant Pope is only being sued in her official capacity and may be served at TYC's central office, which is located at 4900 N. Lamar Blvd., Austin, Texas 78751.

## V. FACTUAL ALLEGATIONS

13. OC pepper spray causes a burning sensation of the skin, loss of upper body control, paralysis of the larynx which may render the victim temporarily unable to speak, and inflammation and irritation of the respiratory tract, which results in coughing, gagging, and gasping for breath. It is particularly harmful to youth with chronic lung disease such as asthma, and it may present a risk of nerve damage, risk of loss of protective reflexes, risk of laryngospasm and suffocation, and risk of skin blistering to an exposed youth.

14. Youth who are exposed to OC pepper spray feel severe pain. The effects of OC pepper spray are not limited to the intended targets. Although TYC staff may attempt to spray only one youth, others in the vicinity may be unintentionally exposed to OC pepper spray. Also, OC pepper spray adheres to bedding, walls, and floors, and eventually enters the ventilation system causing discomfort and pain to others.

15. In addition to these physical effects, the use of OC pepper spray on confined youth causes significant detrimental psychological harm. It can produce a heightened sense of anxiety, alienation, and frustration, and encourages rebellion and resistance.

16. Spraying youth with a painful and debilitating chemical agent under color of state law involves constitutionally protected liberty interests to safety and freedom from restraint. *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Morales v. Turman*, 364 F.Supp. 166, 173 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 322 (1977), *remanded on rehearing*, 562 F.2d 993 (5th Cir. 1977). The use of OC pepper spray is recognized as a form of restraint and has been the basis of excessive force litigation filed against law enforcement personnel. *Treats v. Morgan*, 308 F.3d 868, 874 (8th Cir. 2002).

17. On October 12, 2006, TYC adopted the "use of force" rule, 37 TEX. ADMIN. CODE § 97.23. The justification for this rule was the safety and protection of youth and staff from harmful or dangerous conduct. This rule provided greater clarity and consistency as to when physical restraint is to be used and what steps should be taken to prevent the need for it. In accordance with this rule, force is *only* permitted to be used for purposes of restraining youth from harmful or dangerous conduct and only as a last resort. 31 TexReg 7115. The effective date for this rule was November 1, 2006. 31 TexReg 8848.

18. In addition to physical restraint, the “use of force” rule specifically regulates the use of OC pepper spray. In fact, this rule explicitly recognizes OC pepper spray as a higher degree of force than physical restraint. 37 TEX. ADMIN. CODE § 97.23(h). It further authorizes the use of OC pepper spray “only when other less restrictive interventions have failed or are determined to be impracticable.” 37 TEX. ADMIN. CODE § 97.23(p)(1)(A). In other words, the rule *requires* the use of other less restrictive interventions before OC pepper spray.

19. Finally, the “use of force” rule placed restrictions on the use of OC pepper spray with youth with disabilities. Unless it is necessary to prevent loss of life or serious bodily injury, OC pepper spray was not authorized for use when:

- the youth has been identified as having respiratory problems or other health conditions which would make the use of OC pepper spray dangerous; or
- the youth is assigned to a mental health program or identified by a mental health professional as having a psychiatric condition or mental health diagnosis that would contraindicate the use of OC pepper spray until the mental health professional has been given the opportunity to establish control.

37 TEX. ADMIN. CODE § 97.23(p)(B)(i) & (ii).

20. Without complying with any of the rulemaking requirements set forth in sections 2001.023 through 2001.034 of the Texas Government Code or providing any public input, Defendant Pope issued Executive Directive #2 FY07 on August 2, 2007. That is, Defendant Pope did not publish notice of the amendments and revisions to the “use of force” rule in the Texas Register nor provided any opportunity for public comment on the proposed changes as required by sections 2001.023 and 2001.029 of the Texas Government Code, respectively. This directive provided that “staff who are authorized and trained to use OC spray are hereby instructed to use OC spray prior to agency-approved methods of physical restraint whenever practical.” (emphasis added) This directive substantially amended and improperly revised the

existing administrative “use of force” rule by requiring the use of OC pepper spray *before* other less restrictive interventions.

21. Since the implementation of Executive Directive #2 FY07, Plaintiff M.P. has been pepper sprayed on three separate occasions when he was engaging in self-injurious behavior. As a result of having been sprayed with OC pepper spray, M.P. has suffered burns on his skin.

22. Since the implementation of Executive Directive #2 FY07, Plaintiff D.M. has been pepper sprayed. TYC staff have also threatened to pepper spray him. Plaintiff D.M. is again at risk of being sprayed with OC pepper spray.

23. Plaintiff E.B. is at risk of being sprayed with OC pepper spray. After the implementation of Executive Directive #2 FY07, TYC staff threatened to pepper spray her.

24. On information and belief, prior to the adoption of Executive Directive #2 FY07, there were no documented incidents of youth being sprayed with OC pepper spray at the Corsicana Treatment Center. This TYC facility is specifically designated to treat youth with mental illness or serious emotional disturbances. Before Executive Directive #2 FY07, Rule 97.23(p)(B)(ii) did not authorize youth at this facility to be sprayed with OC pepper spray. As evidenced by OC pepper spraying incidents involving Plaintiffs, the prohibition against using OC pepper spray for youth with mental illnesses or emotional disturbances in the existing “use of force” rule has been circumvented by Executive Directive #2 FY07.

25. On information and belief, Executive Directive #2 FY07 has caused a significant increase in the use of OC spray, particularly for youth with mental illness or serious emotional disturbances. Plaintiffs and other youth incarcerated in TYC facilities have been harmed and will continue to be harmed by being sprayed with OC pepper spray instead of being physically

restrained. Each of the above-listed harms currently affects the legal rights of Plaintiffs and other youth in TYC facilities.

## VI. INJUNCTIVE RELIEF

26. As a direct and proximate result of the foregoing, Plaintiffs and other youth incarcerated in TYC facilities have suffered, continue to suffer, and will likely suffer the future grievous, imminent, and irreparable harm as a result of Executive Directive #2 FY07, which instructs TYC staff to use OC pepper spray before using other less restrictive interventions. Such harm stems from, but is not limited to, the fact that, as a result of this invalid rule, they have suffered physical and emotional harm as well as a violation of their constitutionally protected liberty interest to safety and freedom from restraint. Also, without the invalidation of Executive Directive #2 FY07, Plaintiffs and other youth will be injured by the TYC's improper and unlawful use of OC pepper spray.

27. Plaintiffs have no adequate remedy at law, or otherwise, to prevent Defendants from implementing Executive Directive #2 FY07. Plaintiffs have suffered and will continue to suffer imminent and irreparable harm, that is, physical and emotional injury as a direct and proximate result of Defendants' adoption of an invalid rule, unless this Court temporarily and permanently enjoins Defendants from relying upon Executive Directive #2 FY07 to permit the use of OC pepper spray before attempting other less restrictive interventions.

28. In order to preserve the status quo and the rights of the Plaintiffs during the pendency of this action, Defendants should be cited to appear and show cause why Defendants should not be temporarily restrained, during the pendency of this action, from relying upon Executive Directive #2 FY07 to permit TYC staff to use OC pepper spray before other less restrictive interventions with Plaintiffs and other youth confined in TYC facilities.



## **VI. DECLARATORY RELIEF**

29. Pursuant to section 2001.038 of the Texas Government Code, Plaintiffs seek that this Court declare that Executive Directive #2 FY07 is invalid and without force and effect because Defendant Pope amended and revised the “use of force” rule without complying with the rulemaking requirements mandated by sections 2001.023 through 2001.034 of the Texas Government Code. That is, Defendant Pope did not publish notice of the amendments and revisions to the “use of force” rule in the Texas Register nor provided an opportunity for public comment on the proposed changes as required by sections 2001.023 and 2001.029 of the Texas Government Code, respectively. Plaintiffs request that, after notice and hearing, this Court enter a declaratory judgment that Executive Directive #2 FY07 is invalid and without force and effect.

## **VII. EXCLUSION OF FEDERAL CLAIMS**

30. Plaintiffs give notice that it only alleges state claims in this suit, and specifically excludes and does not intend to litigate herein, any federal cause of action. The only causes of action which Plaintiffs intend to litigate in this Court are those concerning rights arising under the laws of the State of Texas.

## **VIII. PRAYER FOR RELIEF**


Therefore, Plaintiffs respectfully pray that this Court enter judgment on their behalf and enter the following relief:

- (A) Temporarily and permanently enjoin Defendants from relying upon Executive Directive #2 FY07 or any other unlawful directives to permit TYC staff the use of

OC pepper spray before attempting other less restrictive interventions with Plaintiffs and other youth confined in TYC facilities.

- (B) Enter a declaratory judgment that Executive Directive #2 FY07 is invalid and without force and effect because Defendant Pope amended and revised the “use of force” rule without complying the rulemaking requirements mandated by sections 2001.023 through 2001.034 of the Texas Government Code.
- (C) Award Plaintiffs their reasonable attorneys’ fees and costs; and
- (D) Grant all such other relief, in law or in equity, to which Plaintiffs may be entitled.

Respectfully submitted,



R. JAMES GEORGE, JR.  
State Bar No. 07810000  
GEORGE & BROTHERS L.L.P.  
114 W. Seventh St., Suite 1100  
Austin, Texas 78701  
(512) 495-1400 (Phone)  
(512) 499-0094 (Fax)

RICHARD LAVALLO  
State Bar No. 11998650  
ADVOCACY, INCORPORATED  
7800 Shoal Creek Boulevard, Suite 171-E  
Austin, Texas 78757  
(512) 454-4816 (Phone)  
(512) 454-3999 (Fax)

DEBORAH J. FITZGERALD-FOWLER  
State Bar No. 24038899  
TEXAS APPLESEED  
1609 Shoal Creek Boulevard, Suite 201  
Austin, Texas 78701  
(512) 473-2800 (Phone)  
(512) 473-2813 (Fax)


ATTORNEYS FOR PLAINTIFFS

VERIFICATION

THE STATE OF TEXAS       §  
  §  
COUNTY OF TRAVIS       §

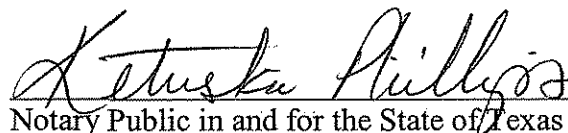
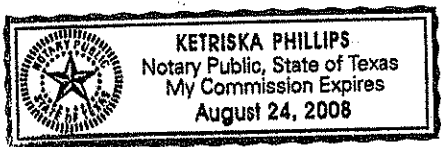
BEFORE ME, the undersigned authority, on this day personally appeared Richard LaVallo, who, known to me, after being by me duly sworn, on oath stated:

“I am an attorney with Advocacy, Incorporated, who is representing Plaintiffs in this action; I have read the foregoing Original Petition, and am familiar with the contents which are true and correct to the best of my information and belief.”



Richard LaVallo

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this 12<sup>th</sup> day of September, 2007.

  
Notary Public in and for the State of Texas

Ketriska Phillips  
(typed or printed name)

My commission expires: August 24, 2008