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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

J.W. et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action Number
	)	**2:10-cv-3314-AKK**
BIRMINGHAM BOARD OF EDUCATION et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This case involves allegations by plaintiffs J.W. et al. (collectively "Plaintiffs") that, among other things, school resource officers ("SROs") assigned to Birmingham city high schools by the Birmingham Police Department ("BPD") used a chemical spray, Freeze+P, on them unnecessarily and in violation of their Constitutional rights. According to Plaintiffs, the SRO Defendants maced them because they committed minor school-based infractions or, in Plaintiff K.B.'s case, because she could not stop crying after a fellow student harassed her with lewd comments because she was pregnant. To make matters worse, Plaintiffs allege that the SROs failed to follow BPD decontamination procedures after each incident and left them instead to continue suffering from the effects of the Freeze+P for hours.

Additionally, as it relates to Carver High School Assistant Principal Anthony Moss ("Moss"), Plaintiff T.A.P. alleges that Moss tripped her (which Moss denies) and then stepped on her back while she was on the ground to restrain her (which Moss, surprisingly, admits) – just because T.A.P. attempted to leave school, purportedly as instructed by Moss, without properly checking out first.

To say that this lawsuit, like most, started with contentious allegations would be a huge understatement. Allegations are, of course, not proven facts. Instead, each defendant will eventually receive an opportunity to tell his or her side of the story. However, when a defendant asks the court to grant summary judgment and dismiss a case, as the defendants here have done, docs. 159 and 162, the court is required to view the disputed facts in the light most favorable to the plaintiffs. Based on the allegations raised here, which the court must accept as true, and for the reasons stated more fully below, the motions of the SROs and Moss for summary judgment are **DENIED**, except for SRO Clark's motion with respect to P.S., count VIII, which is **GRANTED**. BPD Chief A.C. Roper's ("Chief Roper") motion on the claim for injunctive and declaratory relief against him in his official capacity is **DENIED**, but **GRANTED** on all claims against him in his individual

capacity.[1] Plaintiffs' and Defendants' respective motions to strike, docs. 166, 167, 177, are **MOOT** as the court did not rely upon the challenged statements of fact, exhibits and evidentiary submissions in considering the motions for summary judgment.[2]

The court begins its analysis with a review of the relevant standard of review in part I, and will outline the relevant facts for summary judgment purposes in part II. Part III is divided into two parts and addresses separately Defendants' defenses for the federal claims and state law claims. Finally, part IV is the court's overall conclusion.

I. SUMMARY JUDGMENT STANDARD OF REVIEW

Under Rule 56(c)(2) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of

[1] Moss's Motion to Clarify Scope of Previous Order, doc. 195, is rendered **MOOT** by this opinion.

[2] Defendants are, however, reminded that any further submissions to the court should strictly comply with the court's Uniform Initial Order. Doc. 37 at 17.

an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of proving the absence of a genuine issue of material fact. *Id*. at 323. The burden then shifts to the nonmoving party, who is required to "go beyond the pleadings" to establish that there is a "genuine issue for trial." *Id*. at 324 (citation and internal quotation marks omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The court must construe the evidence and all reasonable inferences arising from it in the light most favorable to the non-moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *see also Anderson*, 477 U.S. at 255 (all justifiable inferences must be drawn in the non-moving party's favor). Any factual disputes will be resolved in Plaintiffs' favor when sufficient competent evidence supports Plaintiffs' version of the disputed facts. *See Pace v. Capobianco*, 283 F.3d 1275, 1276, 1278 (11th Cir. 2002) (a court is not required to resolve disputes in the non-moving party's favor when that party's version of events is supported by insufficient evidence). However, "mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v.*

England, 432 F.3d 1321, 1326 (11th Cir. 2005) (per curiam) (citing *Bald Mountain Park, Ltd. v. Oliver*, 863 F.2d 1560, 1563 (11th Cir. 1989)). Moreover, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson*, 477 U.S. at 252)).

II. FACTUAL BACKGROUND

A. Introduction of Chemical Spray in Birmingham City High Schools

In January 1996, the Birmingham Board of Education approved the stationing of SROs at the city's high schools to conduct arrests and to assist in discipline. Doc. 160-9 at 5. These SROs are BPD officers who are part of the Special Victims Division, Youth Services Unit. Doc. 160-1 at 12. SROs are permitted to carry and use chemical spray, if necessary, to address any criminal or breach of the peace violations. Doc. 83-3, at 1; doc. 52, at 16 ¶ 46. SROs stationed at Birmingham high schools generally carry the chemical spray "Freeze+P," a pepper spray product.[3] Over a five-year period beginning in 2006,

[3] The term "chemical spray" is generally used to refer to products including pepper spray and mace. While the chemical compositions of pepper spray and mace may be different in certain products, here a reference to a "macing" or use of "mace" is used to indicate use of the chemical spray used by the BPD SROs.

SROs used chemical spray on approximately 100 students. Doc. 83-4, at 1-2.

The BPD has no specific policy regarding SROs' use of chemical spray. Rather, SROs are subject to the BPD's general policy on Chemical Spray Subject Restraint: Non-Deadly Use of Forces. Plaintiffs contend this policy is constitutionally defective as related to utilizing chemical spray in the school setting and filed this lawsuit, in part, to force Chief Roper to implement a policy specifically for SROs. The parties disagree about whether the current policy allows SROs to subject students to abusive and excessive use of chemical spray and whether the policy gives SROs unfettered discretion to use chemical spray. Doc. 75-1, at 1; doc. 83, at 3.

B. Plaintiff T.L.P.

On November 29, 2009, eleventh grade student T.L.P. heard another student call her a "bitch" while walking past the lunch room at Woodlawn High School. Doc. 164-5 at 9. Unfortunately, the ensuing verbal exchange escalated into a physical altercation. *Id*. Two athletic coaches intervened and successfully separated and restrained both girls. *Id*. at 11-12. Yet, T.L.P. alleges, SRO J. Nevitt sprayed her with mace without warning although she was fully restrained. *Id*. Allegedly, the spray also hit the coach restraining T.L.P. *Id*. at 12. The SRO then handcuffed T.L.P., transported her to Family Court, and placed her in a holding cell

at the G. Ross Bell Youth Detention Center. *Id*. at 14. Although no formal charges were filed, T.L.P. remained in holding, without any decontamination or other medical attention, until her mother arrived to retrieve her. *Id*. Interestingly, this was the second incident involving an SRO spraying T.L.P. with chemical spray while a teacher restrained her. *Id*. at 12. On both occasions, the chemical spray burned T.L.P.'s throat and caused her to cough. *Id*. at 15.

C. Plaintiffs G.S. and P.S.

On December 8, 2009, as seventeen year old G.S. chased another student across the lawn at Huffman High School, an SRO grabbed G.S. from behind. Doc. 164-2 at 7. Before she recognized the individual as an SRO, G.S. tried to free herself. *Id*. at 7, 10. Allegedly, SRO A. Clark immediately sprayed chemical spray directly in G.S.'s eyes and face. *Id*. G.S. contends SRO Clark sprayed her a second time even after she fell to the ground due to the pain caused by the first spray. *Id*.

Around the same time, fifteen year old P.S. saw G.S., her sister, across the lawn and ran toward her. Doc. 164-3 at 6-7. As P.S. approached G.S., she saw SRO Clark spray chemical spray directly in G.S.'s eyes. *Id*. at 7. Another SRO grabbed P.S. from behind to prevent P.S. from reaching G.S. *Id*. Unfortunately, when SRO Clark sprayed G.S. a second time, the blast also hit P.S. in the face. *Id*.

P.S. alleges that SRO Clark was reckless in failing to consider whether other students were in the proximity of the mace blast, and as a result she suffered from a burning sensation in her eyes and had difficulty breathing.

SRO Clark allegedly failed to ascertain the well-being of either P.S. or G.S. after the incident. Instead, G.S. eventually made her way to the office with the assistance of another student, where a school official called 911 at G.S.'s request. Doc. 164-2 at 13. G.S. recalls only that the paramedics asked her questions related to her age and allegedly does not remember much else because of the pain. *Id*. at 13-14. An SRO transported G.S. to Cooper Green Hospital where a nurse told G.S. the pain would eventually subside. *Id*. at 14. G.S. alleges also that a nurse made her sign a medical treatment waiver without disclosing the contents of the document. *Id*. Prior to undertaking any decontamination measures, the SRO transported G.S. from Cooper Green to the Family Court youth detention facility. *Id*. at 14-15. No formal charges were filed and G.S. was eventually released to her mother. *Id*. As a result of the chemical spray, G.S. allegedly sustained multiple injuries, including swollen eyes, burned facial skin, and difficulty breathing. *Id*. at 12-13.

D. Plaintiff K.B.

On or around February 21, 2011, a male student allegedly approached K.B.,

a visibly pregnant tenth grade student at Woodlawn High School, and started making inappropriate sexual comments. Doc. 164-4 at 11-12. Although K.B. attempted to escape, the male student followed K.B. and continued his lewd comments, causing K.B. to cry intensely. *Id*. at 12-13. K.B.'s cries apparently drew SRO S. Smith's attention. Allegedly, SRO Smith grabbed K.B., steered her toward the office, and told her to calm down. *Id*. at 12. When K.B. continued crying, SRO Smith purportedly turned K.B. around and told her in a stern voice, "you really need to calm down." *Id*. at 15. Immediately thereafter, SRO Smith allegedly handcuffed K.B. and sprayed her with chemical spray without warning. *Id*. As SRO Smith escorted K.B. to the gym, K.B. vomited from the effects of the spray. *Id*. Some time later, the school called EMS to treat K.B. and SRO Smith transported K.B. to Cooper Green Hospital, where K.B. signed a medical release form even though K.B. alleges she was partially blind due to the effects of the chemical spray. *Id*. at 15-17. Afterwards, SRO Smith took K.B. to Family Court to await release to her mother. *Id*. at 16-17. No formal charges were filed against K.B. *Id*. K.B. contends the chemical spray made her nauseous, burned her eyes and face, and impacted her breathing. *Id.*

E. Plaintiff B.D.

On February 22, 2011, B.D., then a senior at Woodlawn High School, had a

disagreement with a teacher that caused the teacher to ask the principal to escort B.D. to the office. Doc. 164-6 at 9. While in route to the office, B.D. informed the principal that she wanted to see an assistant principal she felt more comfortable speaking with about the incident. *Id*. Allegedly, this request prompted the principal to page for an SRO, who responded by grabbing B.D. by the arm and pulling her down the hallway. *Id*. at 10. B.D. alleges that SRO D. Henderson grabbed her so tightly that it hurt and that she tried three times to escape from SRO Henderson's grip. *Id*. On the third attempt, SRO Henderson pushed B.D. into a corner and applied chemical spray directly in B.D.'s eyes, causing them to burn and aggravating a preexisting heart condition that causes B.D. to experience symptoms similar to a heart attack. *Id*. at 10-11. Allegedly, the chemical spray also caused SRO Henderson to start coughing and struggling to catch her breath. *Id*. B.D. also alleges that the spray temporarily blinded her and despite her protests that she could not see, SRO Henderson forced her down several sets of stairs - tripping the entire way. *Id*. at 10. Sometime thereafter, SRO Henderson escorted B.D. to Family Court but intake personnel refused to accept B.D. because SRO Henderson had not yet taken her to the hospital for treatment. *Id*. at 11. Henderson then escorted B.D. to Cooper Green Hospital, where a nurse "told" B.D. to sign a form declining medical treatment. B.D. alleges that she signed the form because the

chemical spray affected her ability to see fully. *Id*. Afterwards, SRO Henderson returned B.D. to Family Court, where she remained, without any decontamination procedures, until her mother picked her up. *Id*. No formal charges were ever filed. *Id*. B.D. contends her face and eyes burned and that bumps formed on her neck and chin.

G. Plaintiff J.W.

In April 2010, J.W., a Woodlawn High School tenth-grader, saw two students fighting. Doc. 164-1 at 7-8. J.W., and other students, gathered nearby to watch. *Id*. Around that same time, two SROs responded and one allegedly dispersed chemical spray into the crowd before the spectators could walk away. *Id*. at 8. J.W. alleges that the student onlookers started coughing and screaming from the pain, that J.W.'s eyes and nose started stinging and burning, and that he had difficulty breathing. *Id*. at 8-9. Neither J.W. nor any of the other students in the crowd received any medical attention or decontamination procedures. *Id*.

H. Plaintiff T.A.P.

In August of 2009, a substitute teacher at Carver High School told T.A.P. that she smelled like cigarette smoke and sent her to the office. Doc. 162-2 at 9, 13. On her way to the office, T.A.P. saw Moss in the hallway and the teacher told Moss her suspicions regarding T.A.P. smoking. *Id*. at 14. T.A.P. asserts that Moss

told her to call her mother to come pick her up, but Moss says he simply asked for the number. *Id*. at 15. T.A.P. took out her cell phone and began dialing her mother, which prompted Moss to ask for the phone. *Id*. When T.A.P. refused to turn over the phone, she and Moss engaged in a verbal dispute. *Id*. at 14-15. SRO R. Tarrant claims he heard the commotion and walked over to warn T.A.P. to calm down. T.A.P. instead asserts that Moss told her to leave the school and that when she made it to the door, Moss tripped her and placed his foot on her back until another student commented on his actions. *Id*. at 16, 19. When T.A.P. got up, she swung her backpack and accidently hit SRO Tarrant in the chest - she claims this is the first time she realized he was present. *Id*. at 22. When Tarrant reached for his gun belt to retrieve his handcuffs, T.A.P. panicked and ran away because she thought SRO Tarrant was reaching instead for his gun. *Id*. SRO Tarrant contends he chased T.A.P. alone, that he and T.A.P. both fell to the ground in some bushes, and that T.A.P. continued to resist him. Doc.160-2 at 60. T.A.P. asserts that Moss, SRO Tarrant and two other adult males held her down, that Tarrant stated he would "see how hard you is when you get this," sprayed her in the eyes and face with mace, and then flipped her onto her stomach to handcuff her. *Id*. at 23, 25-26. Moss denies ever making physical contact with T.A.P., besides "placing" his foot on her back, and further denies being present outside or helping to restrain T.A.P.

Doc. 162-6 at 12, 14-15. SRO Tarrant eventually escorted T.A.P. to Cooper Green, but no medical treatment was administered. *Id*. at 27. Afterwards, SRO Tarrant transported T.A.P. to Family Court where T.A.P. remained until she was released to her mother. *Id*. at 28. T.A.P. asserts that she suffered swelling in her face and eyes, temporary blindness, difficulty breathing, and peeling of the skin around her eyes. *Id*. at 26-27.

I. Plaintiff B.J.

On or around September 27, 2010, a substitute teacher reported B.J., a student at Jackson-Olin High School, to the assistant principal for using profanity. Doc. 164-7 at 6-7. B.J. alleges that another student made the comment, and that the teacher incorrectly identified him as the speaker because she had just instructed B.J. to tuck in his shirt. *Id*. Once in the hallway, an assistant principal searched B.J. *Id*. at 7. B.J. alleges that two male assistant principals restrained him against the lockers with his arms spread and called SRO M. Benson to the scene. *Id*. SRO Benson purportedly maced B.J. in the face, at close proximity, while the assistant principals restrained B.J., without first taking any other action or even speaking to B.J. *Id*. at 8. B.J. claims he experienced immediate temporary blindness, a severe burning sensation on his face and in his eyes, felt as if he could not breathe, and later vomited. *Id*. Following the incident, B.J. fell to the ground crying and SRO

Benson planted her knee in B.J.'s back and handcuffed him, threatening to spray B.J. again if he attempted to stand. *Id*. at 8-9.

B.J. alleges that no one sought any immediate medical attention on his behalf. *Id*. at 10. Instead, he sat handcuffed in the school office for an extended period of time, without any decontamination procedures, until SRO Benson eventually escorted him to Cooper Green Hospital. *Id*. Allegedly, a nurse told B.J. she could do nothing for him. *Id*. Although he still could not see and alleges that no one explained the contents of the form, B.J. signed a medical release waiver. *Id*. SRO Benson then escorted B.J. to the G. Ross Bell Youth Detention Facility where he remained in custody, still wearing his contaminated clothing, until his grandmother received notice and secured his release at 7p.m. *Id*. at 10-11. No formal charges were ever actually filed against B.J. *Id*.

III. ANALYSIS

The Corrected Third Amended Complaint contains 54 counts.[4] Doc. 188. Specifically, Count I seeks declaratory and injunctive relief against Chief Roper in his official capacity and alleges that Chief Roper is responsible for the "Chemical Spray Subject to Restraint: Non-Deadly Use of Force" policy that is purportedly

[4] The court dismissed J.W.'s claim against SRO Nevitt, count IV of the Third Amended Complaint, doc. 52, on August 30, 2012. *See* doc. 185.

unconstitutional both on its face and as applied to the individual Plaintiffs and the certified class. *Id.* at 56. In Counts III - XIX, the individual Plaintiffs allege use of excessive force in violation of the Fourth and Fourteenth Amendments against all Defendants in their individual capacities - including allegations that Chief Roper is responsible for each individual instance of alleged excessive force for "sanctioning, enforcing, and implementing" the challenged policy. *Id*. at 60-75. Count XX alleges excessive corporal punishment in violation of the Fourteenth Amendment against Defendant Moss for his alleged conduct with respect to Plaintiff T.A.P. *Id*. at 75. In Counts XXIX through XLI, each individual Plaintiff asserts an Alabama state law assault and battery claim against each defendant in their individual capacities, including allegations that Chief Roper is again responsible for "sanctioning, enforcing, and implementing" the policy that purportedly led to each plaintiff's injuries. *Id*. at 85-93. Finally, Counts XLII through LIV assert claims under Alabama law for the tort of outrage against each defendant individually. *Id*. at 93-102.[5] Defendants have moved for summary judgment on all claims. Docs. 159, 162.

[5] The court granted the Defendant Birmingham Board of Education's motion to dismiss, *see* docs. 48, 49, and therefore declines to address Counts II and XXI-XXVIII asserted against it.

A. Federal Claims

Each defendant asserts a qualified immunity defense to the federal claims. Additionally, Moss also asserts an immunity claim under the No Child Left Behind Act. Both defenses are discussed more fully below, beginning with qualified immunity.

[1] Qualified Immunity

The doctrine of qualified immunity "shields public officials from suits against them in their *individual* capacities for torts committed while performing discretionary duties unless the tortious act violates a clearly established statutory or constitutional right." *Mahone v. Ben Hill County School System*, 377 Fed. Appx. 913, 915 (11th Cir. 2010) (emphasis added) (quoting *Zivojinovich v. Barner*, 525 F.3d 1059, 1071 (11th Cir. 2008) (*per curiam*). To properly raise a qualified immunity defense, officials must demonstrate initially that they were engaged in a discretionary function at the time of the allegedly unlawful act. *Id*. The burden then shifts to the plaintiff to establish that the officials are otherwise unentitled to qualified immunity. *Id*. (citing *Brant v. Jones*, 575 F.3d 1281, 1295 (11th Cir. 2009)). A plaintiff may satisfy this burden by demonstrating that the officials violated a clearly established constitutional right. *Id*.

(a) Chief Roper

As a preliminary matter, Chief Roper is not entitled to qualified immunity for Count I because it is pled against him in his official capacity. *See* doc. 188. "A suit against a state official in his or her official capacity is not a suit against the individual but rather a suit against the official's office." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Here, the official-capacity count against Chief Roper is better characterized as a suit against the BPD, a municipality, which cannot assert qualified immunity as a defense to liability under § 1983. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980). Therefore, Chief Roper's motion on the official capacity claim against him in Count I is **DENIED**.

On the other hand, "an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses [.]" *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Put differently, Chief Roper may assert qualified immunity with respect to the counts against him in his individual capacity.

i. Discretionary Authority

Plaintiffs do not challenge Chief Roper's contentions that he acted within his discretionary authority with respect to the claims against him in his individual capacity. As such, no disagreement exists as to this element of Chief Roper's

qualified immunity defense. Therefore, the only issue in dispute is whether Chief Roper violated a clearly established constitutional right.

ii. Constitutional Violation

Each Plaintiff alleges that Chief Roper is liable for "sanctioning, enforcing, and implementing a policy, practice and/or custom that unreasonably and unconstitutionally subjects [them] to excessive force in violation of the Fourth and Fourteenth Amendments..." *See* doc. 188. In other words, Chief Roper's liability is based on the individual SROs' alleged constitutional violations and the BPD policy they followed.

Since individual capacity suits under §1983 seek to impose liability upon an official for actions he takes under color of law, to succeed on the merits Plaintiffs need only show that Chief Roper, "acting under color of...law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). To meet this burden, Plaintiffs argue that Chief Roper deprived them of their federal rights by promulgating and enforcing a constitutionally deficient mace policy that "permits unfettered use of [chemical spray] against Birmingham students" by failing to place actual limits on the SROs' discretion to deploy mace. Doc. 167 at 27. As discussed in section (b), *infra*, the facts, viewed in the light most favorable to Plaintiffs, establishes that Plaintiffs suffered a deprivation of the

right to be free from use of excessive force. The primary question under the second prong of the immunity analysis, then, is whether this right was "clearly established" with respect to Chief Roper, as viewed under Plaintiffs' theory that Chief Roper failed to implement a non-deadly force policy and training procedures specifically for the school setting.

iii. Clearly Established Right

"For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *See also Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The Eleventh Circuit uses two separate methods in determining whether a defendant should have known that her conduct was unconstitutional. *Fils v. City of Aventura*, 647 F.3d 1272, 1292 (11th Cir. 2011). "The first method looks at the relevant case law at the time of the violation; the right is clearly established if a concrete factual context exists so as to make it obvious to a reasonable government actor that his actions violate federal law." *Id.* (internal quotations omitted) (citing *Hadley v. Gutierrez*, 526 F.3d 1324, 1333 (11th Cir. 2008)). "This method does not require that the case law be 'materially similar' to the [defendant's] conduct; officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* The

second method looks directly at the conduct of the defendant and "inquires whether that conduct lies so obviously at the very core of what the 4th Amendment prohibits that the unlawfulness of the conduct was readily apparent to [him], notwithstanding the lack of fact-specific case law." *Id*.; (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002)). This second method is often referred to as the "obvious clarity" exception to the normal test requiring case law and specific factual scenarios. *Id*. It is meant to recognize that in some instances, certain conduct is so outrageous that qualified immunity will not protect the offender, even in the absence of case law. *Id*.

Again, Plaintiffs contend that Chief Roper violated their constitutional rights by failing either to adopt a use of force policy specific to the school setting or to train the SROs properly on use of chemical spray in schools. To defeat Chief Roper's immunity defense, Plaintiffs must show that he should have had notice that these alleged failures violated their rights. In other words, Plaintiffs must show that their rights were clearly established. In this instance, there is no case law establishing the necessity of a specific policy or special training for use of non-deadly force, like Freeze+P, in a school setting. Indeed, Plaintiffs are asking this court to determine whether, in fact, the BPD and Chief Roper should implement such a policy for SROs. Furthermore, under the second test, it is not so clear that it

is unreasonable for Chief Roper to fail to implement such a policy or training, when general use of force policies and training are already in place. In addition to the general policies, Chief Roper also has in place an agreement with the Board of Education that outlines graduated procedures SROs must follow before using any force, which Plaintiffs allege the SROs violated when they deployed mace on them. Under Plaintiffs' theory, presumably if the SROs had followed Chief Roper's policies, the SROs may not have had to use mace on them. In short, Chief Roper did not violate a "clearly established" constitutional right and is, therefore, entitled to qualified immunity. Accordingly, Chief Roper's motion, with respect to Plaintiffs' excessive force claims against him in his individual capacity, is **GRANTED**.[6]

(b) SRO Defendants

i. Discretionary Authority

The court begins its qualified immunity inquiry for the SROs by first asking whether each was "acting within the scope of [his or her] discretionary authority when the allegedly wrongful acts occurred." *Grider v. City of Auburn, Ala.*, 618

[6] Separately, Chief Roper is also due summary judgment on J.W.'s claim for excessive force under the 4th and 14th Amendments, count III. J.W. voluntarily dismissed his allegation of excessive force against SRO Nevitt. *See* doc. 185. Therefore, J.W. cannot assert liability for excessive force against Chief Roper based on a ratification theory when he acknowledges the SRO under Chief Roper's supervision did not subject him to an unconstitutional action. Thus, summary judgment as to count III is **GRANTED** for Chief Roper.

F.3d 1240, 1254 n.19 (11th Cir. 2010) (citations and internal quotations omitted). "Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265-1266 (11th Cir. 2004). To make this determination, the court must review whether the Defendants were "performing a legitimate job-related function (that is, pursuing a job-related goal)," and whether they performed this goal "through means that were within [their] power to utilize." *Id*. During this review, the court must "look to the general nature of the [SROs'] action[s] [and] temporarily put[] aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Id*.

Plaintiffs allege that SROs Smith, Henderson and Benson acted outside their discretionary authority by violating the Collaborative Agreement ("Agreement") between the BPD and the Birmingham Board of Education. Doc. 167-5. According to Plaintiffs, the Agreement provides that SROs will follow a graduated sanctions procedure prior to arresting a student for a school-based offense:

> The parties agree that the response to the commission of a minor school-based offense by a student should be determined using a system of graduated sanctions, disciplinary methods, and/or educational

> programming before a complaint is filed with the Court. The parties agree that a student who commits a minor school-based offense must receive a Warning Notice and a subsequent referral to the School Conflict Workshop before a complaint may be filed in the Juvenile Court.

Id. Since the SROs arrested Plaintiffs K.B., B.D. and B.J. and charged them with an offense covered by the Agreement, *see* doc. 160-21, Plaintiffs allege that by effectuating those arrests without observing the graduated procedure, and using mace during those arrests, these officers thus acted outside their authority. Finally, Plaintiffs allege that SRO Tarrant acted outside his authority in violation of BPD policy by brandishing mace, using it to intimidate T.A.P. without a threat of further escalation of force, or using mace punitively. *See* Doc. 160-23. According to T.A.P., SRO Tarrant pushed her to the ground, said he was going to "see how hard you is when you get this," and maced her while he and three adult males held her down. Doc. 162-2 at 23, 25.[7]

Defendants challenge Plaintiffs' reliance on the Agreement and dispute that it is official BPD or city policy. Doc. 160-10 at 6-7. Further, Defendants claim that the Agreement does not prohibit SROs from arresting students, or for that

[7] The court notes that Plaintiffs failed to raise any argument asserting that SRO Nevitt acted outside his discretionary authority when he maced T.L.P. *See generally* doc. 167. Additionally, while Plaintiffs argue that SRO Clark acted outside his discretionary authority by macing P.S. without justification, they failed to raise a similar argument with respect to G.S. *See id.* As such, the court assumes Plaintiffs concede that SROs Nevitt and Clark were, in fact, acting within such authority.

matter, using chemical spray, prior to observing the graduated three-step procedure. *Id*. Obviously, if the graduated procedure delineated by the Agreement is not an official or binding policy, Plaintiffs' reliance on it to claim the SROs acted outside their discretionary authority would ring hollow. This fundamental dispute between the parties as to the effect and nature of the Agreement is clearly a material factual dispute that this court cannot resolve without additional evidence and testimony.

Moreover, even if the court assumes the SROs are correct about the Agreement and finds that the SROs acted within their discretionary authority, the court can only grant summary judgment if the court also finds the SROs did not violate a clearly established constitutional right. Although establishing the existence of a constitutional right and determining if it was clearly established is an analysis the court need not undertake sequentially, the court will do so nonetheless for the sake of clarity. *See Pearson v. Callahan*, 555 U.S. 223 (2009). Thus, the court's initial inquiry is whether the allegations, when viewed in the light most favorable to Plaintiffs, establish a constitutional violation. *Saucier*, 533 U.S. at 200-02 (2001).

ii. Constitutional Violation

The Plaintiffs' excessive force claims arise from the 4th Amendment's prohibition against unreasonable seizures, as made applicable to the states through

the 14th Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989). An officer's use of force is excessive under the 4th Amendment if it was "objectively [un]reasonable in light of the facts and circumstances confronting" the officer. *Id.* at 397. Reasonableness is "judged from the perspective of the reasonable officer on the scene" without the benefit of hindsight. *Id*. This standard "allow[s] for the fact that police officers are often forced to make split-decision judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." *Id.* at 396-97. In its analysis, "a court must carefully balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1305 (11th Cir. 2009). In determining whether the officers used only the force that was "necessary in the situation at hand," *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir. 2002), the court evaluates "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Brown v. City of Huntsville, Ala.*, 609 F.3d 724, 738 (11th Cir. 2010) (quoting *Vinyard*, 311 F.3d at 1347). However, the court must determine whether the SROs' use of force was excessive under the circumstances as reconstructed in a light most

favorable to Plaintiffs, rather than accepting the officers' version of events. *See Vinyard*, 311 F.3d at 1347-48.

The SROs justify each instance of use of Freeze+P as necessary "to protect the officer from injury, to effectuate a lawful arrest and to protect the subjects from injuring themselves" because the "Plaintiffs were conducting themselves in a violent, disruptive, aggressive, threatening, or unlawful" manner. Doc. 160 at 17. To no surprise, Plaintiffs paint a different picture that alleges the use of chemical spray even when Plaintiffs purportedly offered no resistance. For example, T.L.P. claims SRO Nevitt maced her even though she was completely secured by an adult male and offered no struggle. Doc.164-5 at 11-12. G.S. contends that she ran after a young man who pushed her, that she only pushed SRO Clark because she had no idea who grabbed her from behind, that SRO Clark never identified himself, and that SRO Clark maced her even though she never caught up with the young man. Doc. 164-2 at 7, 10. K.B. contends that SRO Smith maced her, despite being pregnant and restrained in handcuffs, simply because she could not stop crying after another student insulted her. Doc. 164-4 at 12-15. B.D. admits to pulling her arm away from SRO Henderson three times because his grip was too tight, and alleges that on the third time SRO Henderson pushed her into a corner and maced her without warning. Doc. 164-6 at 10-11. T.A.P. asserts that SRO Tarrant maced

her while he and three men held her down and after mocking her about his intent to mace her. Doc.160-2 at 15-16. Finally, B.J. alleges that SRO Benson maced him after two adult males had already secured him against a locker and even though he had not committed a crime. Doc. 164-7 at 6-7. All Plaintiffs contend they received injuries from the chemical spray.

In light of the officers' contentions that they acted justifiably, the court must first determine the severity of the alleged "crimes" involved in each incident. In viewing the facts in a light most favorable to Plaintiffs, it appears that, at best, the most severe crime any Plaintiff engaged in was disorderly conduct or resisting arrest. Disorderly conduct is, of course, not a serious offense warranting use of force, including the use of non-deadly force like mace. *Vinyard*, 311 F.3d at 1347. Similarly, resisting arrest without force does not rise to a level of dangerousness that justifies the type of force used here. *Fils v. City of Aventura*, 647 F.3d 1272, 1288 (11th Cir. 2011). To make matters worse, the SROs intentionally subjected some of the Plaintiffs to mace even though the Plaintiffs purportedly were not accused of any crime – a fact that the SROs may not be able to refute since the SROs never filed charges against the majority of Plaintiffs – and had only committed minor school infractions. Given these alleged facts, the court cannot agree with Defendants that the severity of Plaintiffs' alleged "crimes" warranted

the use of force.[8]

Next, the court must ascertain whether the Plaintiffs posed an immediate threat to the safety of themselves or others. Among other things, the court must discern whether the SROs used force even though the plaintiffs made no attempt to attack the officer or persons nearby. *See id*. Likewise, while an officer may assert that a person posed a safety threat by disobeying a direct order from the officer, to make this assertion the officer must first identify herself and issue directives or warnings to the individual. This is not the case here because the Plaintiffs allege that for some of the incidents, the SRO never announced his or her presence, and that in other instances the SRO maced them without issuing any warnings. Further, there is a dispute about whether the Plaintiffs posed a threat to the safety of others at the time they were maced - in fact the Plaintiffs allege they were already restrained either by handcuffs or by other adults. Based on these allegations, the court simply cannot say that the use of force was warranted under these

[8] This rationale is inapplicable to the incident between SRO Clark and P.S., who was unintentionally subjected to mace when she ran into the affected area. *See* Doc. 164-3 at 7. Even further, as P.S. admits, another SRO attempted to keep her from entering the contaminated area by grabbing her. *Id*. Given these facts, the court cannot say that SRO Clark violated P.S.'s right to be free from unreasonable seizure and summary judgment is **GRANTED** for him as to P.S.'s excessive force claim. While she cannot survive SRO Clark's qualified immunity claim, P.S., nonetheless, maintains her status as a member of the certified class to challenge Chief Roper's purported failure to implement a specific policy for and/or training procedures for use of force in the school setting.

circumstances.

Finally, the court must determine whether there was active resistance or an attempt to evade arrest. Again, viewing the facts in Plaintiffs' favor, T.A.P. was the only plaintiff who attempted to flee. Even then, T.A.P. contends she fled because she saw SRO Tarrant reach for his gun belt. While SRO Tarrant had every right to chase and apprehend T.A.P. – although it is debatable whether T.A.P. posed a threat since she ran out of the school and SRO Tarrant could have waited and arrested her at home because the school presumably had T.A.P.'s home address – the facts are in dispute as to whether T.A.P. continued to resist after SRO Tarrant restrained her outside. According to T.A.P., she posed no threat at that point, was subdued by SRO Tarrant and three other adults, and was purportedly taunted by SRO Tarrant before he maced her.

Although the court agrees with Defendants that the use of non-lethal weapons such as Freeze+P does not violate the 4th Amendment *per se*, the law is clear that "unprovoked force against a non-hostile and non-violent suspect who has not disobeyed instructions violates that suspect's rights under the 4th Amendment." *Fils*, 647 F.3d at 1289. When the alleged facts here are viewed in the light most favorable to Plaintiffs, the court cannot find at this juncture that the "Plaintiffs were conducting themselves in a violent, disruptive, aggressive, threatening, or

unlawful" manner, as Defendants contend. Doc. 160 at 70. Ultimately, Defendants may well succeed in establishing that the Plaintiffs posed a threat. However, that determination is one for a jury to make at the appropriate juncture. At this stage in the litigation, based on these alleged facts, the court simply cannot conclude that, as a matter of law, the SROs used the Freeze+P justifiably.

iii. Clearly Established Right

As the final step in the qualified immunity analysis, the court must also determine whether Plaintiffs' rights were "clearly established." Summary judgment is inappropriate here because, ultimately, whether the Plaintiffs' rights were "clearly established" hinges on which version of the facts a jury finds most credible. Again, as discussed in section (a), the Eleventh Circuit relies on two separate tests in making this determination. Under either method, the facts viewed in a light most favorable to Plaintiffs show that a reasonable jury could find that the SROs should have known their conduct violated the 4th Amendment. For example, under the first method for determining whether a right is clearly established, just as in *Fils v. City of Aventura*, the SROs subjected the Plaintiffs to non-deadly force even though they committed, at most, minor offenses, did not resist arrest, were not a continuing threat to anyone, and were not disobeying any of the SROs' instructions. *See generally*, 647 F.3d 1272; *See also Vinyard*, 311 F.3d at 1347-48

(defendant-officer violated a clearly established right when he sprayed pepper spray into the eyes of a non-violent plaintiff, who was handcuffed and in the back seat of the police car, even though he had threatened no one). These cases "clearly establish that such force is excessive where the suspect is non-violent and has not resisted arrest. While these cases are not identical to [Defendants'], they need not be 'materially similar'; the precedent need only provide the Defendants with 'fair warning.'" *Fils*, 647 F.3d at 1292. Even under the second test, viewing the evidence in the light most favorable to the Plaintiffs, they displayed little to no hostility toward the officers, were not disobeying orders, did not resist arrest, and, for some, were accused of no wrongdoing. As such, Plaintiffs' rights were clearly established and it was unreasonable for the SROs to believe using mace was appropriate. For all these reasons, except as to P.S.'s claim against SRO Clark, the SROs motion for summary judgment on qualified immunity grounds is **DENIED**.

(c) Moss

i. Discretionary Authority

T.A.P. asserts that Moss acted outside his discretionary authority when he purportedly tripped her and planted his foot on her back because this conduct amounted to prohibited corporal punishment. *See* doc. 168-3 (Birmingham Board of Education policy prohibiting corporal punishment). Moss disagrees and

contends that the Board's policy is limited to paddling and "necessarily still allows physical contact between school officials and students, including the use of physical force as may be necessary to maintain order and discipline." Doc. 176 at 5. In other words, at a minimum, Moss is contending that restraining T.A.P. by stepping on her back while she was on the floor was "necessary to maintain order and discipline." Whether Moss is correct that he acted within his discretionary authority when he purportedly tripped T.A.P. and then restrained her by stepping on her back is contingent on a resolution of the factual dispute between Moss and T.A.P. regarding the incident in question. The resolution will require, in part, the presentation of evidence on the Board's policies and procedures. The court can only side with Moss on this issue if it ignores established case law and finds that Moss's version of the incident is more credible than T.A.P.'s, which the court declines to do. *Hardin v. Pitney-Bowes Inc.*, 451 U.S. 1008, 1008 ("It has long been established that it is inappropriate to resolve issues of credibility. . . on motions for summary judgment").

ii. Constitutional Violation

Even if Moss prevails on the discretionary authority prong, he still must show that he did not violate T.A.P.'s clearly established constitutional right. The analysis for T.A.P.'s 4th Amendment excessive force claim against Moss is

identical that for the SROs because Moss was in a position to sanction, enforce, and/or implement generally any policy of police use of force or the use of pepper spray specifically. Again, T.A.P. asserts that Moss tripped her as she left the school premises pursuant to his instructions, then placed his foot on her back to hold her down, and subsequently assisted in restraining her while SRO Tarrant maced her. Doc. 162-2 at 15-16, 19. Moss asserts that he had to use force to prevent T.A.P. from violating the school's prohibition against leaving school without checking out first. Doc. 162-3 at 12, 14-15. Although Moss admits to putting his foot on T.A.P.'s back – after all, that was the only way, apparently, to ensure that T.A.P. followed the check out policy – Moss denies tripping T.A.P. or restraining her while SRO Tarrant maced her. *Id*. at 14-15. While ensuring that students follow school policies is an important objective, leaving school without checking out is not an offense that warrants the use of force – even under Moss's version of the facts. Furthermore, purportedly tripping T.A.P., stepping on her back, or allegedly helping to restrain her so that SRO Tarrant could spray her with mace is conduct that Moss can only justify if there is a finding that T.A.P. posed a safety threat or continued to resist. In light of T.A.P.'s contentions, a factual dispute clearly exists regarding the extent of Moss's behavior and whether T.A.P. disobeyed a directive supplied by Moss and/or SRO Tarrant that, at a minimum,

would justify an administrator stepping on a student's back. Thus, with respect to the 4th Amendment claim, the court disagrees with Moss's assertion that T.A.P. has failed to demonstrate a constitutional violation.

Turning now to T.A.P.'s 14th Amendment excessive corporal punishment claim, the Eleventh Circuit has recognized that "excessive corporal punishment . . . may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior." *Neal ex rel. Neal v. Fulton Cnty Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000). The plaintiff bears the burden of demonstrating the "school official intentionally used an amount of force that was obviously excessive under the circumstances, and [that]... the force used presented a reasonably foreseeable risk of serious bodily injury." *Id*. Whether the use of force was "obviously excessive" under the circumstances can be determined by looking to "the need for the application of corporal punishment, . . . the relationship between the need and amount of punishment administered, and . . . the extent of the injury inflicted." *Id*. As a threshold matter, the court must first analyze whether Moss's actions constitute corporal punishment. The key inquiry here is "whether the use of force is related to the student's misconduct at school and ... for the purpose of discipline." *T.W. ex rel. Wilson v. School Bd. of Seminole Cnty., Fla.*, 610 F.3d 588, 599 (11th Cir. 2010).

The parties disagree on whether Moss's conduct constituted prohibited corporal punishment under the Birmingham Board of Education's policies. Moss asserts that "corporal punishment" is limited to paddling and thus his actions neither violated the Board's policy nor are actionable under the 14th Amendment. Unfortunately for Moss, corporal punishment, as defined for 14th amendment purposes, is not limited to paddling. *T.W.*, 610 F.3d at 598-99 ("Not all corporal punishment cases arise under circumstances where school officials ... mete out spankings or paddlings to a disruptive student.") (internal quotation marks omitted). Thus, Moss's alleged conduct may, in fact, qualify as corporal punishment under the 14th Amendment. However, whether Moss is correct that the Board does not prohibit his alleged conduct is a disputed fact and probably a claim that the Board wants an opportunity to address. After all, if Moss is correct, then, presumably, the Board allows the use of physical force, such as stepping on students, to ensure compliance with the check-out procedures. Likewise, whether Moss's alleged use of corporal punishment was excessive and whether T.A.P. has sufficiently established a constitutional violation are disputed issues for a jury to resolve.

iii. Clearly Established

The last step of the immunity analysis requires the court to determine

whether T.A.P.'s constitutional rights were "clearly established." Again, T.A.P.'s excessive force claim against Moss arises from the 4th Amendment's prohibition against unreasonable seizures, as made applicable to the states through the 14th Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Therefore, the analysis is identical to that for the SROs, i.e., a jury question exists on this prong. *See* section III(A)(b)(iii), *supra*.

To the extent that T.A.P.'s 14th Amendment claim against Moss requires a separate analysis, the facts viewed in the light most favorable to T.A.P. likewise preclude summary judgment. The cases cited by Moss in an attempt to demonstrate that the case law was not clearly established are inapposite, in that the injuries complained of were primarily caused inadvertently by the teacher's conduct. For example, in *Ex Parte Turner*, 840 So. 2d 132 (Ala. 2002), the teacher grabbed a student to keep her from passing by and inadvertently injured the student when they both fell. *Id*. at 134. Even further, in cases such as *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000), where a teacher hit a student after the student assaulted another student, the court found that "[e]ven assuming that it would not have been improper per se for [the defendant] to have administered some amount of corporal punishment to the Plaintiff due to the Plaintiff's misconduct, [the defendant] allegedly went much further, intentionally

using an obviously excessive amount of force that presented a reasonably foreseeable risk of serious bodily injury." *Id*. at 1076. This is precisely the case here. Again, T.A.P. alleges that Moss used physical force against her even though she was not engaged in any misconduct. Specifically, T.A.P. alleges that Moss tripped her and stepped on her back while she was on the ground to restrain her, which "presented a reasonably foreseeable risk of serious bodily injury." In light of these facts, a constitutional violation is clearly established because the alleged conduct creates a foreseeable risk of injury. Further, a jury could find, under the second method discussed above, that Moss's behavior was so outrageous that the unlawfulness of it should have been readily apparent, even in the absence of established case law. Ultimately, whether T.A.P.'s 14th Amendment right was "clearly established" rests on a jury's determination of the underlying facts. Therefore, summary judgment for Moss on qualified immunity grounds is **DENIED**.

[2] Paul D. Coverdell Protection Act of 2001

Moss asserts also that he is entitled to immunity under the *No Child Left Behind Act, Paul D. Coverdale Teacher Protection Act of 2001*, 20 U.S.C. § 6731, et seq., doc. 162 at 3 ¶ 13, which provides that

> no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if --
>
> (1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;
>
> (2) the actions of the teacher *were carried out in conformity with Federal, state, and local laws (including rules and regulations)* in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;
>
> . . .
>
> (4) the harm was *not* caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher[.]

20 U.S.C. § 6736(1), (2) and (4) (emphasis added). Although T.A.P. does not explicitly challenge Moss's contention that he was acting within the scope of his employment with respect to his assertion of immunity under the Act, the argument T.A.P. raised in challenging Moss's qualified immunity defense is equally applicable here. Specifically, T.A.P. contends that Moss had no authority, discretionary or otherwise, to use force of any kind on her because of the Board's corporal punishment policy. Moss, instead, contends that the policy does allow for some physical force "to maintain order and discipline." Just as for the discretionary authority analysis under the qualified immunity section, the court cannot settle this factual dispute at this juncture.

The parties' primary dispute centers on whether Moss's actions violate §

6736(2) and (4), which state that there is no immunity if Moss acted willfully, recklessly or if he violated the Board's policy. Interestingly, perhaps because he believes the Act gives a teacher the power to use any form of "control, discipline . . . [or] order" to keep students in school, Moss contends that his admitted conduct, i.e., stepping on T.A.P.'s back to restrain her because she wanted to leave school without "checking out," conformed with all applicable laws, "as well as the policies of the Birmingham Board of Education." Doc 162-1 at 30; *see also* doc. 162-3 at 14-15. Again, T.A.P. alleges that Moss tripped her, planted his foot on her back, and helped restrain her so that SRO Tarrant could mace her. Doc. 162-2 at 15-16. Whether a school official can engage in such conduct as part of his efforts to comply with the Act and leave no child behind is a question for a jury to resolve. However, construing the evidence in the light most favorable to T.A.P., as the court must do at this juncture, a genuine issue of material fact exists as to whether Moss can satisfy the elements required for immunity under § 6736. Accordingly, Moss' motion for immunity under the *No Child Left Behind Act* is **DENIED**.

B. State Law Claims

The Defendants challenge also the Plaintiffs' state law claims on immunity grounds – state agent immunity for all Defendants and school master's immunity

for Moss. Finally, Moss and the SROs challenge the Plaintiffs' outrage claims on the merits. For the reasons stated more fully below, with the exception of Chief Roper, the court again finds that summary judgment based on these defenses is inappropriate at this juncture.

[1] State Agent Immunity

Moss asserts state agent immunity, under Article I, § 14 of the Alabama Constitution[9] and *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000). Doc. 162 at 2 ¶ 10. Likewise, the Police Defendants assert the defense of discretionary function immunity, which is also called state agent immunity, as provided in § 6-5-338 of the Code of Alabama (1975)[10] and *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000). Doc. 159 at 2-3 ¶ 9-10. In explaining this immunity, the Alabama Supreme Court stated that

> [a] state agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's . . . exercising. . . their judgment in the administration of a department or agency of the government, including . . . making administrative adjudications[,]. . . hiring, firing, transferring, assigning, or supervising personnel;. . . exercising judgment in the enforcement of the criminal laws of the State, including. . .attempting to arrest persons; or . . .exercising judgment in the discharge of duties

[9] Section 14 states simply that the state "shall never be made a defendant in any court of law or equity." ALA. CONST. Art. I § 14 (1901).

[10] Section 6-5-338 provides that "[e]very peace officer, [...] who is employed or appointed pursuant to the Constitution or statutes of this state, [. . .] shall have immunity from tort liability arising out of his or her conduct in performance of any discretionary function within the line and scope of his or her law enforcement duties."

> imposed by statute, rule or regulation in. . . educating students.

Ex parte Cranman, 792 So. 2d at 405. Under the burden-shifting process used when a party raises this defense, the movant must demonstrate initially that the plaintiff's claims arise from a function that would entitle the movant to immunity. *Giambrone v. Douglas*, 874 So. 2d 1046, 1052 (Ala. 2003). The burden then shifts to the plaintiff to establish that the movant "act[ed] willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law." *Id*. (quoting *Cranman* at 405). Further, a state agent acts beyond his or her authority, and thus is not immune from suit, if he or she "fail[s] to discharge duties pursuant to detailed rules or regulations." *Id*.

a. Chief Roper

Chief Roper claims he is entitled to immunity because the claims against him are based on his tasks in "hiring, training, disciplining, supervising, and retaining police officers," doc. 160 at 26, which fall within the category of "exercising judgment in the administration of a department." Plaintiffs disagree and assert that Chief Roper has no immunity because he purportedly allowed his officers to arrest students in violation of the Collaborative Agreement. *See* doc. 167-5. This appears to be an allegation that Chief Roper acted beyond his authority. Further, Plaintiffs allege that Chief Roper acted willfully, maliciously, in bad faith or under

a mistaken interpretation of the law because the use of mace under these circumstances violates the Constitution. As such, Plaintiffs claim Chief Roper "either . . . misinterpreted the law on the use of force in response to minor misconduct or . . . knew this was wrong and [allowed his SROs to proceed] anyway." Doc. 167 at 33. Plaintiffs arguments, however, are unpersuasive. Despite their allegation that Chief Roper allowed the SROs to violate the Collaborative Agreement, they failed to present sufficient evidence to establish that Chief Roper acted beyond his authority as police chief. Plaintiffs, likewise, presented no evidence suggesting that Chief Roper acted willfully, maliciously, fraudulently or in bad faith, in violation of the *Cranman* standard for immunity.

Alternatively, even if Chief Roper is not entitled to state agent immunity, Plaintiffs have failed to sufficiently establish the basis for the state law claims against Chief Roper. While the tort of outrage is discussed more fully below in section [3], an allegation of assault and battery requires a plaintiff to show "(1) that the defendant touched the plaintiff; (2) that the defendant intended to touch the plaintiff; and (3) that the touching was conducted in a harmful or offensive manner." *Walker v. City of Huntsville*, 62 So. 3d 474, 494 (Ala. 2010). Plaintiffs obviously do not allege that Chief Roper personally assaulted them and instead seek to hold him liable in his individual capacity for the torts of his subordinates.

Although an *employer* can be held directly liable for the alleged tortious conduct of his employees if he "authorize[d] or participate[d] in the employee's acts or ratifie[d] the employee's conduct after [he] learns of the action," *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995), the claims here are against Chief Roper in his *individual* capacity. Plaintiffs failed to explain how a supervisor can be held individually liable for the torts of his employees. Alternatively, they fail to explain how Chief Roper, in his individual capacity, authorized or ratified the SROs' alleged conduct or "enforc[ed], sanction[ed], and/or implement[ed] a policy/custom that subjects [Birmingham City Schools] students to bodily harm in violation of state law" as they allege in their amended complaint. Therefore, their state law claims against Chief Roper fail as a matter of law.

Moreover, Plaintiffs cannot establish that Chief Roper authorized or ratified the alleged torts. To establish ratification, Plaintiffs must show that Chief Roper expressly adopted the SROs' alleged tortious conduct or implicitly approved of it because he "(1) had *actual* knowledge of the tortious conduct of the offending employee and that the tortious conduct was directed at and visited upon the complaining [student]; (2) that based upon this knowledge, [Chief Roper] knew, or should have known, that such conduct constituted . . . a *continuing* tort; and (3) that [Chief Roper] failed to take 'adequate' steps to remedy the situation." *Id.*

(emphasis added). There is no allegation that Chief Roper expressly approved the SRO's alleged conduct, and thus Plaintiff's must satisfy the remaining steps of the ratification analysis. Although Chief Roper may have constructive notice of each incident involving an SRO and use of Freeze+P through the use of incident reports and use of force forms, there is no indication that Chief Roper had *actual* knowledge of each individual incident complained of prior to the filing of this lawsuit. Additionally, even if Chief Roper did have such knowledge, information about the use of chemical spray in response to alleged misconduct by a student would not reasonably lead Chief Roper to conclude that a prohibited tort had occurred. Even further, these were not instances of *continuing* torts – each alleged assault and battery involves only a single macing incident. In other words, Chief Roper would not have had an opportunity to take adequate steps to remedy the tortious conduct, especially since Plaintiffs failed to allege that they complained directly to the BPD about the conduct of the SROs in each of these particular incidents. Therefore, Plaintiffs have failed to establish that Chief Roper ratified the alleged wrongful conduct of each SRO and his motion for summary judgment on the assault and battery and, because this analysis applies also to Plaintiffs' outrage claims, the outrage claims is **GRANTED**.

b. SRO Defendants

The SRO Defendants assert they are entitled to state agent immunity because the challenged incidents involved their "exercise of judgment in enforcing the criminal laws." Plaintiffs disagree and assert that they violated no criminal laws and only committed mere school infractions. Although Plaintiffs may be correct that the officers were not addressing *per se* criminal infractions, the SROs were nonetheless acting within their discretionary authority. Therefore, the SRO Defendants have met their initial burden under the state agent immunity test.

The court must now ascertain whether Plaintiffs have demonstrated that the SROs are otherwise not immune from suit. In that regard, Plaintiffs allege that SROs Smith, Benson and Henderson acted beyond their authority by arresting Plaintiffs B.J., K.B., and B.D. in violation of the Collaborative Agreement which requires that SROs effectuate arrests only in "exceptional circumstances" and after using a graduated set of responses for school based offenses. *See id.*; doc. 160-5 at 50; doc. 160-3 at 85-86; doc. 160-4 at 49. Further, Plaintiffs allege that the SRO Defendants acted willfully, maliciously, in bad faith or under a mistaken interpretation of law by "either. . . misinterpret[ing] the law on the use of force in response to minor misconduct or [knowing] this was wrong and [going] ahead

anyway." Doc. 167 at 33. Essentially, Plaintiffs allege that the SROs lost their right to state agent immunity due to their purported failure to discharge their duties pursuant to applicable rules and regulations.

As discussed in Section III.A[1](b) regarding qualified immunity, several factual disputes exist regarding whether the SRO Defendants used excessive force or violated the Collaborative Agreement. Likewise, there are factual disputes regarding whether the SROs lose their immunity for "act[ing] willfully [or] maliciously" under *Cranman*. 792 So. 2d at 405. The court finds that these factual disputes preclude a finding that the SRO Defendants are entitled state agent immunity. Therefore, the SRO Defendants' motion on this issue is also **DENIED**.

c. Defendant Moss

Moss asserts that he is entitled to state agent immunity because he was "exercising his judgment in discharging his duty to educate students" during the incident with T.A.P. Several genuine factual disputes exist regarding whether Moss used excessive force, corporal punishment, *see* section III.A[1](c)-[2], *supra*, or is otherwise not immune because he "act[ed] willfully, maliciously [or] beyond his . . . authority" in violation of *Cranman*, 792 So. 2d at 405, when he purportedly tripped T.A.P., stepped on her back, and restrained her so she could be maced.

Thus, Moss's motion on this issue is **DENIED**.

[2] Schoolmaster's Immunity

Moss asserts also that he is entitled to "schoolmaster's immunity," as construed by the Alabama Supreme Court in *Suits v. Glover*, 71 So. 2d 49 (Ala. 1954). Doc. 162 at 3 ¶ 14. Further, Moss asserts that the heightened evidentiary standard of "clear and convincing evidence" applies because of the applicability of this defense.[11] According to *Suits*,

> A schoolmaster is regarded as standing *in loco parentis* and has the authority to administer *moderate correction* to pupils under his care. To be guilty of an assault and battery, the teacher must not only inflict on the child immoderate chastisement, but he must do so with legal malice or wicked motives or he must inflict some permanent injury. In determining the reasonableness of the punishment or the extent of malice, proper matters for consideration are the instrument used and the nature of the offense committed by the child, the age and physical condition of the child, and the other attendant circumstances.

Suits, 71 So. 2d at 50 (emphasis added). T.A.P. alleges that Moss is not entitled to this immunity because she was following his instructions, and thus no correction, moderate or otherwise, was warranted in the situation. Doc. 162-2 at 20-21. T.A.P.

[11] The heightened pleading standard of clear and convincing evidence established in *Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989), clearly does not apply in this case because, as the court made clear, this "exception to the parental immunity doctrine" is narrow and only to be used in "cases involving sexual abuse." *Id*. at 266.

asserts also that Moss admits his actions "fit[] within the 11th Circuit's broad definition of corporal punishment[,]" doc. 162-1 at 11, and thus his conduct, which is purportedly prohibited by the Board of Education, does not qualify as "moderate" under *Suits*. Doc 168-3 at 2.

The court does not even have to consider the facts in the light most favorable to T.A.P. to find against Moss on this issue. By Moss's own admission, he is simply not entitled to schoolmaster's immunity. According to Moss, "the nature of the offense [T.A.P.]committed," *Suits*, 71 So. 2d at 50, is leaving school without checking out. Doc. 162-3 at 14-15. Under even an extreme tough love form of *in loco parentis*, placing one's foot on the back of a child to restrain them from leaving school without checking out, as Moss admits, is simply not a reasonable form of punishment or "moderate correction" as outlined in *Suits*. *See id.* Frankly, when coupled with T.A.P.'s allegation that Moss also tripped her, Moss's admitted conduct borders on child abuse and is precisely the type of behavior that creates a strong inference of "legal malice or wicked motives," under *Suits*. *Id*. Therefore, Moss's motion on the basis of school-master immunity is **DENIED**.

[3] The Tort of Outrage

Finally, Moss alleges that Plaintiff T.A.P. cannot establish an outrage claim.

Doc. 162 at 3 ¶ 15. Further, while outrage is not specifically mentioned in their motion, the Police Defendants also seem to allege that Plaintiffs cannot adequately establish an outrage claim because "there is no proof [the Police Defendants] acted in a personal or vindictive nature[.]" Doc 160 at 29.

Moss is correct that "[t]he tort of outrage is a very limited cause of action that is available only in the most egregious circumstances." *Thomas v. BSE Indus. Contractors, Inc.*, 624 So. 2d 1041,1044 (Ala. 1993). Despite this limited nature, the Alabama Supreme Court has explained that outrage claims are not restricted to the three specific circumstances articulated in *Potts v. Hayes*, 771 So. 2d 462 (Ala. 2000). *Little v. Robinson*, — So.3d —, No. 1090428, 2011 WL 1334416, at *4 (Ala. April 8, 2011). Nonetheless, it is clear that the tort is only appropriate when the alleged conduct is so "outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." *Tinker v. Beasley*, 429 F.3d 1324, 1329-30 (11th Cir. 2005) (citing *American Rd. Svc. Co. v. Inmon*, 394 So. 2d 361, 365 (Ala. 1980)).

Here, all Plaintiffs allege that the SRO Defendants and/or Moss subjected them to excessive force or punishment. Furthermore, they allege that they were

unnecessarily subjected to the use of mace, while restrained, handcuffed, pregnant, engaged in no wrongdoing, and deprived of proper decontamination procedures afterwards. *See* docs. 164-4 at 45-46, 53-54; 164-2 at 25-26, 40-41; 164-5 at 45; 164-6 at 36-38; 164-7 at 26-33; 164-3 at 25, 54; and 160-2 at 52, 77-78, 82. Even if the SRO Defendants are correct that they used mace justifiably, they face a difficult time arguing credibly that their purported failure to subsequently follow the decontamination procedures does not rise to the level of "extreme and outrageous" conduct necessary for an outrage claim. *See Perkins v. Dean*, 570 So. 2d 1217, 1219 (Ala. 1990) (stating that the tort of outrage requires proof that "(1) the actor intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from his conduct; (2) the conduct was extreme and outrageous; and (3) the distress was severe") (citations omitted).

According to Chief Roper, SROs must follow the use of force and chemical spray policies, which include decontamination procedures following use of Freeze+P. Doc. 160-1 at 17, 20, 35. The policy on chemical spray subject restraint states that "[f]ollowing the use of chemical spray the officer will ensure that the subject receives adequate decontamination as soon as practical. The officer should supply immediate medical attention if requested by the subject." Doc. 160-21 at 3. Yet, Plaintiffs allege that the SROs held them for hours without decontamination,

and that they continued to feel the lingering effects of the chemical spray as a result. Indeed, the alleged behavior is so outrageous that even the Family Court personnel purportedly refused to accept Plaintiff B.D. because SRO Henderson had yet to decontaminate her and seek medical treatment. Our society has set certain rules that all citizens must follow. Amongst these rules is the requirement that even purported criminals have basic human rights. Where, as here, the SRO Defendants purportedly violated the BPD's Agreement with the Board of Education and maced the Plaintiffs for engaging in minor non-criminal infractions, and then also failed to follow the BPD policy on decontamination, this court is simply not prepared to say that this conduct can never rise to the level necessary for it "to be regarded as atrocious and utterly intolerable in a civilized society." Whether Plaintiffs ultimately can prevail on this or any of their claims are matters not before this court at this juncture. Ultimately, the parties will have the opportunity to tell their respective stories to a jury, and that jury may well find against the Plaintiffs. However, based on these allegations, Plaintiffs have earned the right to present their outrage claims to a jury. Accordingly, the SRO Defendants' motion is **DENIED**.

Likewise, Moss's motion is also **DENIED**. An assistant principal simply cannot contend credibly that T.A.P.'s allegations against him, which the court must

accept as true, do not cross the bounds of decency and rise to the level of acts regarded as atrocious and intolerable for a civilized society.

With respect to Chief Roper, however, Plaintiffs have failed to show that his conduct in sanctioning, enforcing, and implementing the policies SROs follow was sufficiently extreme and outrageous. Chief Roper's conduct is distinct from that of the individual SROs, as he was a non-actor in each incident leading to Plaintiffs' alleged injuries. Failing to promulgate specific policies with respect to use of non-lethal force by police officers assigned to a school is not outrageous conduct when there is a general policy in place and a collaborative agreement that outlines practices for the SROs to follow. As such, Chief Roper's motion on the outrage claim is **GRANTED**.

IV. CONCLUSION

In sum, except for P.S.'s claim against SRO Clark and Plaintiffs' claims against Chief Roper in his individual capacity, summary judgment is **DENIED** as to all counts alleged against the police defendants and Assistant Principal Moss.

DONE and ordered this 3rd day of October, 2012.

ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE