FILED
2012 Aug-31 PM 02:20
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-03314-AKK**
BIRMINGHAM BOARD OF EDUCATION, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The court has for consideration J.W., G.S., P.S., T.L.P., T.A.P., B.J., B.D., and K.B.'s ("Plaintiffs") Motion for Class Certification, doc. 75, which is fully briefed, docs. 83, 84, and 86.[1] In its discretion, and, after considering the parties' written submissions and arguments at the December 6, 2011, hearing, doc. 105, the court **GRANTS** Plaintiffs' motion to certify a class of all current and future high school students of Birmingham City Schools. The issues for class resolution

---

[1] Plaintiffs ask the court to disregard Defendant Anthony Moss's ("Moss") Opposition to Motion for Class Certification, doc. 84, because only Plaintiff T.A.P. has a claim remaining against Moss and T.A.P.'s claims are not asserted on behalf of the proposed class. Doc. 86, at 2-3. Plaintiffs assert that Moss he cannot respond to their motion since Moss is not a party to the class claim. *Id.* In its discretion, the court will consider Moss's arguments because they aid the court in resolving the class issues. Also, Defendants' Motion to Strike Exhibit #1 and Exhibit #5 and Legal Arguments Associated Therein to Plaintiffs' Motion for Class Certification, doc. 82, and Motion to Strike Exhibit #4 and Legal Arguments Associated Therein to Plaintiffs' Reply Brief, doc. 90, are **MOOT** because the court did not rely on the exhibits in question.

are whether the Birmingham Police Department Policy for the use of chemical spray in school settings and the training provided to School Resource Officers ("SROs") are constitutionally defective.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, who are current and former students enrolled in Birmingham City high schools (the "schools"), allege a number of claims arising from the use of chemical spray by SROs, who are Birmingham police officers assigned to the high schools. Doc. 52. Plaintiffs, on behalf of the proposed class, seek declaratory and injunctive relief against Defendant A.C. Roper ("Chief Roper"), in his capacity as Chief of the Birmingham Police Department ("BPD"), to limit the use of chemical spray against high school students ("students") through training of the SROs and a revision of policy. Doc. 75-1; doc. 105, at 20-21. The proposed class includes all current and future students who "are at risk of injury as a result of Defendant Chief Roper's unconstitutional policy and practices that permit [SROs] . . . to use mace against Birmingham high school students . . . ." Doc. 75-1, at 2. According to Plaintiffs, Chief Roper's implementation of alleged unconstitutional policies and practices relating to the use of chemical spray in the schools violates all students' Fourth and Fourteenth Amendment rights against excessive force. Doc. 52, at 1-2 ¶ 1; doc. 75, at 2.

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 high schools to conduct arrests and to assist in discipline. *Id*., at 12 ¶¶ 35-36. 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. Over a five-year period beginning in 2006, SROs used chemical spray on approximately 100 students.[2] Doc. 83-4, at 1-2.

The BPD has no specific policy regarding SROs' use of chemical spray. Rather, SROs are subject to BPD's general policy on Chemical Spray Subject Restraint: Non-Deadly Use of Forces, which provides:

> C. The chemical spray may be used in an arrest situation where the weapon's use offers the possibility of lessening the likelihood of physical injury to the arresting officer, citizens on the scene and/or the suspect.
>
> D. The use of chemical spray is intended solely as a control device to enable the officer to carry out his or her duties in the safest, most efficient and most professional manner with the least chance of injury to either the officer or suspect.
>
> 1. At no time will an officer unnecessarily brandish, or use chemical spray as an intimidation device unless the

[2]Allegedly, over the same period, similar officers stationed at high schools run by the Jefferson County Board of Education have only used chemical spray once on students. Doc. 105, at 31.

officer is attempting to prevent further escalation of force.

2. Chemical spray is not[,] under any circumstances, to be used as punishment or as a coercive tool once an individual is under control and in custody.

3. The chemical spray is not to be used by officers unless they 3.

with the contacted area until he can wash that area with warm soapy water.

III. AFTER USE PROCEDURE

A. Following the use of chemical spray the officer will ensure that the subject receives adequate de

Plaintiffs[3] and are in two distinct groups. The first group is comprised of students intentionally chemically sprayed (T.L.P., G.S., K.B., and B.D.), and the second is comprised of the innocent bystanders accidently exposed to the effects of chemical spray (P.S. and J.W.). Doc. 75-1, at 14-15; doc. 75-1, at 3-28. The court outlines the specific incidents involving both groups below.

i. **Group On**

restrained her. *Id.*, at ¶ 6. On both occasions, the chemical spray burned T.L.P.'s throat and caused her to cough. *Id.,* at 19 ¶ 9.

2. G.S.

On December 8, 2009, as seventeen-year-old G.S. jogged across the lawn at Huffman High School, a SRO grabbed her from behind. Doc. 75-5, at 12 ¶ 4. Naturally, before she recognized the individual as a SRO, G.S. tried to free herself from her attacker. *Id.,* at ¶ 5. Allegedly, the SRO immediately sprayed chemical spray directly in G.S.'s eyes and face. *Id.* G.S. contends the SRO sprayed her a second time even after she fell to the ground due to the pain caused by the first spray. *Id.*, at ¶ 6.

Although the school(Ö†P

3. **K.B.**

On or around February 21, 2011, a male student allegedly approached K.B., then a tenth grader at Woodlawn and four months pregnant, and started maknaawn

informed the principal that she wanted to talk to an assistant principal B.D. knew well. *Id.*, at ¶ 6. Allegedly, this request prompted the principal to page a SRO to assist her with an "outrageous student on the second floor." *Id.* Shortly thereafter, a SRO responding to the page grabbed B.D. by the arm and pulled her down the hallway. Because of the pain, B.D. tried three times to escape from the SRO's grip. On the third attempt, the SRO pushed B.D. against the wall and applied chemical spray directly in B.D.'s eyes, *id.*, at ¶ 8, causing them to burn and aggravating a preexisting health condition that causes B.D.'s heart to beat abnormally fast, *id.*, at 20 ¶ 3. Allegedly, the chemical spray also caused the SRO to start coughing and struggling to catch his breath. *Id.*, at 22 ¶ 9. Sometime thereafter, the SRO escorted B.D. to Family Court and then to Cooper Green Hospital, where a nurse "told" B.D. to sign a form declining medical treatment. *Id.*, at ¶ 11. B.D. alleges that she signed the form because the chemical spray affected her ability to see fully. *Id.* Finally, B.D. contends her face and eyes burned and that bumps formed on her neck and chin. *Id.*, at 23 ¶¶ 13-15.

ii. Group Two – Class Representatives Accidently Exposed to Chemical Spray

1. **P.S.**

P.S. is the sister of Group One class representative G.S. and was exposed

heard arguments only since neither side requested an evidentiary hearing. Doc. 105. During the arguments, in response to the court's questions, counsel for Plaintiffs clarified that Plaintiffs are not asking this court to issue an outright ban on the use of chemical spray:

> THE COURT: The plaintiff is not asking the Court in this case to bar the SROs from ever using mace in school settings.
>
> MS. HOWARD: Right. Your Honor, we're just asking that the Court bar the unlawful use of mace in school settings.

See id., at 21-22. In fact, it is clear Plaintiffs recognize and embrace the school system's legitimate interests in preserving order and protecting students and teachers from harm while on school property. Plaintiffs challenge instead the specific uses of chemical spray here which Plaintiffs claim constitute excessive force. As it relates to the class question currently before this court, Plaintiffs claim that the use of chemical spray is constitutionally flawed because Chief Roper allegedly failed to adequately train SROs and to implement a policy specifically for the utilization of chemical spray by SROs. Essentially, Plaintiffs contend that the school setting is unique and requires police procedures tailored specifically to such an environment. In other words, Chief Roper's general policy on the use of chemical spray and the training he provides to officers is purportedly geared towards the adult population and, consequently, applying it in the school setting

without any modifications is tantamount to excessive force. Plaintiffs seek to challenge these alleged constitutional deficiencies on behalf of themselves and a class of similarly situated students, and ask this court to certify a class and appoint them as representatives of the class.

II. CLASS CERTIFICATION ANALYSIS

A. Class Certification Standard

Rule 23 of the Federal Rules of Civil Procedure outlines the requirements for class certification. Initially, Plaintiffs must satisfy the four Rule 23(a) prerequisites:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). Courts often refer to these prerequisites as the numerosity, commonality, typicality, and adequacy requirements. They are "designed to limit class claims to those fairly encompassed by the named plaintiffs' individual

claims." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003) (citing *Prado-Steiman v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000)). "These four requirements serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) (quotations and citations omitted).

If Plaintiffs succeed in establishing the Rule 23(a) prerequisites, the analysis then shifts to Rule 23(b), which states in pertinent part that:

A class action may be maintained if Rule 23(a) is satisfied and if:

necessary to determine whether the requirements of Rule 23 will be satisfied." *Valley Drug Co.*, 350 F.3d at 1188 n.15. Signficantly, "[i]t is inescapable that in some cases there will be overlap between the demands of Rule 23(a) and (b) and the question of whether plaintiff can succeed on the merits." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1234 (11th Cir. 2000). Finally, the movant bears the burden of proving that she satisfies one of the Rule 23(b) requirements. *Valley Drug Co.*, 350 F.3d at 1187.

B. Rule 23(a) Analysis

Consistent with the established procedures for analyzing motions for class certification, the court will begin its analysis with an assessment of whether this matter is appropriate for class certification by examur

joinder is practicable depends on many factors, including "the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (finding that class of at least 31 individual class members from a wide geographic area met the numerosity requirement). "While there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (quotations omitted). If the court can draw reasonable inferences from the facts before it as to the approximate size of the class and the infeasibility of joinder, the numerosity requirement is satisfied. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983) ("Although mere allegations of numerosity are insufficient to meet this prerequisite, a plaintiff need not show the precise number of members in the class"); *Dujanovic*, 185 F.R.D. at 666 ("This court may 'make common sense assumptions' to support a finding of numerosity.").

Here, Plaintiffs maintain that all students are at risk of either direct or indirect exposure to chemical spray and, accordingly, seek declaratory and injunctive relief on behalf of all current and future high school students. Doc. 75-

1, at 4. Moreover, because approximately 8,000 students attended Birmingham city high schools during the 2009-2010 school year, doc. 77-1, at 7-8, doc. 83, at 11, Plaintiffs allege the 8,000 current student

misbehaving and compliant students. As such, any student in the vicinity can suffer from the effects of the chemical spray. Indeed, this is the subset of students the second group of class representatives seeks to represent. While the precise number for this group is speculative, it is safe to assume nonetheless that the innocent bystander group is fairly significant given that SROs directly sprayed 100 students, including while in close proximity to other students. *See Dujanovic*, 185 F.R.D. at 666 ("This court may 'make common sense assumptions' to support a finding of numerosity."). Therefore, the court rejects Defendants' contention that the chemical spray only impacted 100 students.

Moreover, even if the court ignores the innocent bystander subset and focuses only on the group of 100, Plaintiffs still satisfy the numerosity requirement because generally more than forty is sufficient. *Cox*, 784 F.2d at 1553. Thus, under Rule 23(a)(1), it is insignificant whether the class is comprised of 8,000 as Plaintiffs contend or 100 students as Defendants contend because either amount is so "numerous that joinder of all class members is impracticable." *Dujanovic*, 185 F.R.D. at 666.

ii. <u>Commonality and Typicality</u>[5]

"Traditionally, commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Prado-Steiman,* 221 F.3d at 1266. Commonality under Rule 23(a)(2) requires that the named plaintiff and the class members' grievances share common questions of law or fact, while typicality under Rule 23(a)(3) requires that "the claims or defenses of the representative parties [are] typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(2), (a)(3). Commonality is satisfied whenever "[t]he claims actually litigated in the suit [are] fairly represented by the named plaintiffs." *Cox,* 784 F.2d at 1567. Indeed, commonality requires "'that there be at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1355 (11th Cir. 2009) (quoting *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982)). Likewise, typicality exists when the named plaintiffs' claim arises "from the same event or pattern or practice and are based on the same legal theory" as the claims of the class. *Kornberg v. Carnival Cruise Lines, Inc.*,

---

[5]The court addresses these two prerequisites together because they involve similar considerations and "tend to merge." *See e.g.*, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13 (1982).

741 F.2d 1332, 1337 (11th Cir. 1984). "Typicality also encompasses the question of the named plaintiff's standing, for '[w]ithout individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.'" *Piazza,* 273 F.3d at 1346. Significantly, commonality and typicality do not require that the named plaintiffs' claims are identical to each class member's claims, but they must share "the same essential characteristics." *Prado-Steiman*, 221 F.3d at 1279 n.14 (citations and quotation marks omitted).

a. *Commonality*

Plaintiffs allege they satisfy the commonality requirement because "this

iwjsF€

- Whether Defendant Roper's uniform training and supervision SROs in the use of mace provides insufficient guidance on application of the chemical in school settings and against children . . . .

- Whether Defendant Roper's decontamination procedures for students who have been exposed to mace are inadequate to reduce the risk of prolonged pain, injury, or other serious harm to exposed students.

- Whether SROs' use of mace on students constitutes an unreasonable seizure in violation of the Fourth Amendment.

- Whether Defendant Roper is liable under 42 U.S.C. § 1983 for failing to adequately train and supervise SROs who are authorized to use mace on children.

Doc. 75-1, at 10-11.

Defendants disagree and contend the "primary issue is whether the use of mace by Defendants against teenagers engaging in criminal activity in the Birmingham High School is excessive on its' face." Doc. 83, at 14. Moreover, Defendants allege that this matter is inappropriate for class certification because excessive force cases involve numerous factual disputes that require an individual fact intensive reviesvien

- Whether the Plaintiffs were violating the law
- Different criminal charges that resulted from each incident
- Different criminal and disciplinary history of the Plaintiffs
- Different students as witnesses to each incident
- Different actions by the Plaintiffs for each incident
- Different locations (schools) and physical makeup of the area of each incident
- Numerous other different witnesses, including principles, teachers and faculty to the events

Doc. 83, at 14.

Although Defendants are correct about factual differences in Plaintiffs' individual claims, they overlook that Rule 23(a)(2) "demands only that there be questions of law or fact common to the class. This part of the rule does not require that all the questions of law and fact raised by the dispute be common." *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1268 (11th Cir. 2009) (citations and quotation marks omitted). Indeed, here, all of Plaintiffs' claims, including the Plaintiffs accidently subjected to chemical spray, stem from whether Chief Roper's implementation of policies and practices and the alleged failure to train SROs specifically relating to the use of chemical spray in a school setting violate students' Fourth and Fourteenth Amendment rights. *See* doc. 75, at 3-28c8õ6P

premised on the same legal theories ” of whether the policy and practices

governin&esp”or of wheth

and the common questions of fact or law which unite the class." *Kornberg,* 741 F.2d at 1337. "A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Id.*; *see also Prado-Steiman*, 221 F.3d at 1279 n.14. ("[A] strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences.").

As previously stated, the proposed class and Plaintiffs' claims arise from the same allegedly unconstitutional practices. Doc. 75-1, at 16. Because the class representatives consist of four students who were sprayed with chemical spray and two students accidently affected by the effects of chemical spray, their claims are consistent with the proposed class's injury or risk of injury from the use of chemical spray by SROs. Thus, the court finds the typicality requirement is satisfied because the class representatives and members' claims are premised around the same injury or threat of injury and the same legal theory of the unconstitutionality of Chief Roper's policies, practices and training.

iii. **<u>Adequate Representation</u>**

Rule 23(a) also requires the named plai sd tb on rep

between the named plaintiffs and the class members. *Griffin v. Carlin*, 755 F.2d 1516, 1532-33 (11th Cir. 1985). Thus, "adequacy of representation means that the class representative has co

if Ms. Howard is lead counsel for the class. However, Ms. Howard is assisting Ms. Bauer whom Defendants acknowledge is competent to adequately represent the proposed class. Indeed, Ms. Bauer has prior experience serving as class counsel in at least four cases. Doc. 75-8, at 3. Moreover, The Southern Poverty Law Center, where Ms. Bauer and Ms. Howard work, has extensive experience as class counsel in at least twenty cases and has sufficient funds to finance this litigation. *Id.* at 3-4. In other words, because Ms. Howard will have the assistance of Ms. Bauer and The Southern Poverty Law Center, Ms. Howard's participation will not handicap the class adversely. Furthermore, Ms. Howard has almost five years of litigation experience which, although not class action related, will be a benefit to the class nonetheless. Finally, the court adds that Ms. Howard can only gain experience by working on a class case under the guidance and tutelage of an experienced counselor like Ms. Bauer, and it might as well be this one especially since Ms. Howard has proved to be an effective advocate thus far in this case. Therefore, the court finds that counsel are adequate to represent the proposed class.

b. ***Adequacy of Class Representatives***

The Eleventh Circuit has held that "[t]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a

'fundamental' one going to the specific issues in controversy." *Valley,* 350 F.3d at 1189. "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.*

Plaintiffs contend no conflict exists between them and the proposed class because they want to make all students safer by ensuring that Chief Roper implements adequate policies and training for the SROs. Doc. 75-1, at 17; 75-5, at 3-28. Defendants disagree and contend that Plaintiffs may have "interests antagonist to those of the class" because some Plaintiffs are no longer students,

excessive force cases." Doc. 83, at 15. Indeed, the Eleventh Circuit stated in *Kerr*:

> As we have already discussed, when presented with allegations that a police officer used excessive force in the apprehension of a suspect, the federal courts must assess the reasonableness of the office's actions in light of the essentially unique factual circumstances accompanying the arrest

generalized proof predominate over those subject to individualized proofs." *Murray*, 244 F.3d at 811; *see also Rutstein v. Avis Rent-A Car Sys., Inc.,* 211 F.3d 1228, 1233 (11th Cir.2000); *Barnes v. American Tobacco Co.,* 161 F.3d 127, 143 (3rd Cir.1998) ("While 23(b)(2) class actions have no predominance . . . requirements, it is well established that the class claims must be cohesive.").

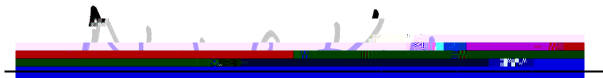
To satisfy the first requirement of 23(b)(2), Plaintiffs allege Chief "Roper has acted or refused to act on grounds applicable to the proposed class by subjecting Birmingham high school students to an unconstitutional policy and deficient police training program on mace." Doc. 19, at 21. As previously stated, Plaintiffs only need to show general questions of law or fact are common to the members of the class, which Plaintiffs have done. Plaintiffs and the proposed class's claims are based on the same legal theory that Chief Roper allegedly failed to perform his constitutional legal duty to implement a policy for the use of chemical spray by SROs and to train and adequately supervise SROs. Doc. 75-1, at 19. Therefore, although there may be some factual disputes about the circumstances surrounding each specific incident, Chief Roper's legal duty to Plaintiffs is generally applicable and cohesive to the class members. Furthermore, the exclusive relief sought in the Complaint under class action is injunctive and declaratory relief; thus, the second requirement of Rule 23 (b)(2) is satisfied. *See*

Doc. 52.

V. CONCLUSION

For the reasons stated above, the court finds that Plaintiffs satisfy the Rule 23(a) and (b)(2) requirements. Accordingly, the court **GRANTS** Plaintiffs' motion for class certification.

DONE this the 31st day of August, 2012.



ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE