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 matterssvodtsm svloa3 svÖfg0

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. cause

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 pro

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,

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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 constitutional

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, th

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. 2ed

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 abou l t

chemical spray affected her ability to see fully. *Id*

told her to call her m

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 breo FG • ry bli

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. Finallr Öæp

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 m Ö–Đ

(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 immunitxÖ—@

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

> 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 [illegible]

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 agai

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 restra×f •

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 disput

identical that for the SROs because

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 asse

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 unrti

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 §

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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, [illegible]

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

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 g cla aintiffr.

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.*

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

anyway." Doc. 167 at 33. Essentially, Plaintiffs allege that the SROs lost their right

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.* Fran

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 decont

and that they continued t