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

J.W. et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action Number
v.	)	**2:10-cv-03314-AKK**
	)	
BIRMINGHAM BOARD OF EDUCATION., et al.,	)	
	)	
Defendants.	)	
	)	

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perfectly justifiable, even in the school setting. What no one can disagree on, however, is that once law enforcement officers have secured the affected individual, they have a legal obligation to decontaminate the individual. Unfortunately, despite established case law requiring effective decontamination and clear instructions from Freeze +P's manufacturer, the officers here failed to decontaminate the students, and instead left them to suffer the effects of the chemicals until they dissipated over time. That the officers chose to do so when each of the high schools has science labs with eye wash stations, showers in the lockers, and bathroom sinks with showers and soap is simply confounding to this court when, as here, the officers testified that the students posed no further threat after the officers sprayed them with Freeze +P.

The plaintiffs in this case are eight former Birmingham City School students who Birmingham Police Department School Resource Officers ("S.R.O.s") sprayed with Freeze +P while they attended various Birmingham high schools. The plaintiffs seek damages from the officers who sprayed them. Six of the plaintiffs, J.W., G.S., P.S., T.L.P., B.D., and K.B,[1] are also the named representatives of a class of all current and future Birmingham City Schools high school students. They seek injunctive relief from Birmingham Police Chief A.C. Roper. The court presided over a twelve-day bench trial on the matter between January 20, 2015 and February 9,

[1] The plaintiffs' motion requesting that the court continue to refer to them by their initials, doc. 264, is **GRANTED**.

2015.

At the outset, let the court be clear regarding what is not at issue in this case. This case is not about whether the S.R.O.s assigned to Birmingham City Schools can spray students who are actively engaged in a physical fight or other violent behavior with Freeze +P. They can. The plaintiffs have long since conceded that point and agree that S.R.O.s can use Freeze +P in schools. *See* doc. 105 at 5. Indeed, the law affords law enforcement a great deal of discretion when a person poses a risk of harm to others or to the officers. Instead, this case boils down to four issues. The first is whether the defendant S.R.O.s inflicted excessive force on the plaintiffs when they sprayed the plaintiffs with Freeze +P. The second is whether the defendant S.R.O.s adequately decontaminated the plaintiffs after spraying them with Freeze +P, and if not, whether their failure to do so constituted excessive force. The third is whether, if they inflicted excessive force on the plaintiffs, the defendant S.R.O.s' behavior was pursuant to a Birmingham Police Department ("B.P.D.") policy or custom. The fourth is whether the plaintiffs have demonstrated that they are entitled to injunctive relief.

The court was profoundly disturbed by some of the testimony it heard at trial. The defendant S.R.O.s uniformly displayed a cavalier attitude toward the use of Freeze +P—in a display of both poor taste and judgment, one defendant joked that Freeze +P is a potent nasal decongestant for individuals with sinus problems. Equally disturbing, the trial revealed that the defendant S.R.O.s believe that deploying Freeze

+P is the standard response even for the non-threatening infraction that is universal to all teenagers—i.e. backtalking and challenging authority. Frankly, the d

The six plaintiffs who the defendant S.R.O.s directly sprayed with Freeze +P[2] succeed on the merits of their excessive force claim against the defendant S.R.O.s for failing to adequately decontaminate them. By and large, the defendant S.R.O.s did nothing to decontaminate the plaintiffs, and their efforts certainly do not rise to the level suggested by Freeze +P's manufacturer and, most tellingly, the defendants' own expert.

These two constitutional violations occurred pursuant to B.P.D. policy or custom.

injunctive relief.

Findings of Fact[3]

I. Findings of Fact Related to the Plaintiffs' Claims against Individual Officers

A. G.S. and P.S.

1. On the afternoon of December 8, 2009, at about 4:00 p.m. G.S.,[4] a seventeen-year-old student enrolled in Huffman High School, was standing in front of the school waiting for her mother to pick her up. 1/20/15 at 130–32.[5] While G.S. talked to a friend, a boy known as "Snake" approached the two girls and insulted G.S.'s friend. *Id*. at 133–34. G.S. and Snake exchanged words, and Snake pushed G.S. twice in the chest. *Id*. at 134–35. At this point, other students intervened; G.S.'s friend grabbed

as she struggled, and did not realize it was Officer Anthony Clark who had grabbed her until she opened her eyes and saw that he was holding a can of Freeze +P directly in front of her face. *Id*. at 137–39. Without telling G.S. to calm down, that she was under arrest, or that he was about to spray her with Freeze +P, Officer Clark sprayed G.S. in the face, and G.S. fell to the ground. *Id*. at 138, 140–41.

2. At trial, Officer Clark presented a different version of the facts. Relevant here, Officer Clark testified that he spoke to G.S. prior to spraying her with Freeze + P, that G.S. told him that Snake had hit her, 2/3/15 at 209, that

trying to get to a male student who previously hit her, presumably Snake, and does not describe her trying to punch anyone, although it does state that she pushed Officer Clark twice. Pl. Ex. 14 at 3. Finally, P.S., G.S.'s younger sister, who was nearby, testified that she did not hear Officer Clark say anything to G.S. prior to spraying her with Freeze +P. 1/21/15 at 63.

4. After Officer Clark sprayed G.S., a teacher helped G.S. off the ground and walked her into the school building to the office, where a school official asked if she needed an ambulance. *Id*. at 142–44. G.S. said yes because her face burned badly and she was having trouble breathing. *Id*. at 144.

5. Birmingham Fire and Rescue Service personnel responded and spoke with G.S. *Id*. at 145. They asked her for basic information, including her name and other identifying information. *Id*. G.S. asked the paramedics if she could wipe or put water on her face, but they told her doing so would make the burning worse. *Id*. at 146.

6. At some point, Officer Clark arrested G.S. and charged her with physical harassment. Pl. Ex. 14 at 1. Eventually, Officer Clark drove G.S. to Cooper Green Hospital, where G.S. told a nurse she was feeling better and signed a release form (albeit purportedly without knowing it was a release form). 1/20/14 at 147–49.

7. Officer Clark then transported G.S. to the Jefferson County Family Court, where court officials strip-searched G.S. *Id*. at 149–52. Eventually, G.S. was released to her mother. *Id*. at 150. She did not face any criminal proceedings in connection

with her arrest. *Id*. at 154.

8. At trial, the court heard no testimony indicating that Officer Clark attempted to decontaminate G.S. in any way. Specifically, the court heard no testimony indicating that Officer Clark placed G.S. in front of a fan or arranged for her to access any airflow. The court heard no testimony indicating he provided her with an opportunity to wash her face or shower. He also failed to provide G.S. with a change of clothes or give her the opportunity to access clothing that was not soaked in Freeze +P. *Id*. at 152.

9. G.S.'s younger sister, P.S., then a ninth grade student at Huffman High School, was standing nearby when Officer Clark sprayed G.S. with Freeze +P. 1/21/15 at 55, 64. Because of the windy conditions, P.S. and other students nearby experienced the effects of Freeze +P, which P.S. described as feeling like "needles stabbing my face. . . . [I]t hurt." *Id*. at 64.

B. T.L.P.

10. On October 29, 2009, a fight erupted between T.L.P.,[6] a fifteen-year-old student enrolled in Woodlawn High School, and another female student, E.H., in the school's cafeteria. 1/21/15 at 137. Two members of

grabbed T.L.P., and Coach Howard grabbed E.H., who had fallen to the ground.[7] *Id*. at 163. Officer Jeremiah Nevitt was already in the cafeteria and reached the girls a few seconds after Coach Johnson and Coach Howard. 2/2/15 at 150. He attempted to join the coaches in separating the girls but was unable to do so because T.L.P. had a tight grip on E.H.'s hair. *Id*. at 151.

11. Officer Nevitt told T.L.P. to let go of E.H.'s hair several times. *Id*. By this time, the many other students in the lunch room were growing rowdy and beginning to throw things. *Id*. at 230–31. When T.L.P. failed to comply with his instructions, Officer Nevitt attempted to spray her with Freeze +P. *Id*. Although some of the spray hit T.L.P. in the mouth, 1/21/15 at 142, Coach Johnson "took the bulk of the spray." 2/2/15 at 151. The spray made the inside of T.L.P.'s mouth burn and itch and caused her to cough. 1/21/15 at 142. T.L.P. released E.H.'s hair, ending the fight, and Coach Johnson dropped T.L.P. 2/2/15 at 151–52.

12. Subsequently, in an assistant principal

at 156, 1/21/15 at 131, 235. T.L.P. was not formally charged with any criminal conduct in connection with this incident.

13. At trial, the court heard no testimony indicating that Officer Nevitt made any effort to decontaminate T.L.P. Specifically, the court heard no testimony indicating Officer Nevitt placed T.L.P. in front of a fan or arranged for her to access any airflow.[8] *Id*. at 234. The court heard no evidence indicating Officer Nevitt provided T.L.P. with a change of clothes or gave her the opportunity to access clothing uncontaminated by Freeze +P. The court also heard no evidence indicating that Officer Nevitt provided T.L.P. with water to wash her face or arranged for her to go to the restroom to wash. *Id*. at 235.The day after the incident, T.L.P. saw her pediatrician because she continued to cough as a result of the exposure to Freeze +P. 1/21/15 at 187.

14. At trial, T.L.P.'s version of these events differed somewhat from Officer Nevitt's. Most critically, she denied holding onto E.H.'s hair, 1/21/15 at 139, and testified that she and E.H. had stopped struggling with the coaches when Officer Nevitt sprayed her and Coach Johnson, *id*. at 141. Unfortunately for T.L.P., she undermined her own credibility by attempting to minimize the seriousness of and her culpability in the fight with E.H. *Compare id*. at 139 (testifying on direct that she

[8] Officer Nevitt did note during cross examination that the air conditioning was on in the assistant principal's office and that there "was plenty of air."2/2/15 at 234.

could not remember whether E.H. fell during the fight), *with id*. at 163 (admitting on cross-examination that E.H. was on the ground by the end of the fight). There is nothing in the record that undermines Officer Nevitt's testimony, and based on his demeanor at trial, the court chooses to credit his version of events to the extent they are inconsistent with T.L.P.'s.

C. B.D.

15. On February 22, 2011, B.D.,[9] a seventeen-year-old student

16. Officer Douglas Henderson and Assistant Principal John LyonsÔÇ •

Court, 1/21/15 at 22. During the drive, the windows in Officer Henderson's squad car were up and the air conditioning was off. *Id*. at 23. The Family Court refused to accept B.D. in light of her distress and her lack of medical treatment.[11] *Id*. at 22–23. Officer Henderson transported B.D. to Cooper Green Hospital, where, although she wanted medical attention, B.D. signed a form refusing treatment, purportedly because she did not understand the document. *Id*. at 23. After leaving Cooper Green, Officer Henderson transported B.D. back to Family Court, where court officers strip-searched her. *Id*. at 24. B.D. remained there for a few hours until her mother picked her up. *Id*. at 25.

19. B.D.'s eyes remained swollen for three or four days, and the spray caused welts on her face that lasted for a week and a half. *Id*.

20. At trial, the court heard testimony indicating that Officer Henderson undertook only minimal measures to decontaminate B.D. Although Officer Henderson took B.D. outside to provide her with access to fresh air, 2/2/15 at 30, the court heard no testimony indicating that he provided her with water to wash her face or arranged for her to go to the restroom to wash. The court also heard no testimony indicating that Officer Henderson provided B.D. with a change of clothes or gave her the opportunity to access clothing uncontaminated by Freeze +P.

[11] Officer Henderson testified that he could not recall whether he took B.D. to Family Court before taking her to Cooper Green Hospital. 2/2/15 at 69–72.

D. K.B.

21. During a class change on the afternoon of February 21, 2011, K.B.,[12] a fifteen-year-old female student enrolled in Woodlawn High School, and a boy named L.M. became engaged in a verbal altercation. 1/20/15 at 96. The dispute apparently stemmed from K.B.'s family's decision to ask L.M., who had previously lived with them, to move out after K.B. caught him stealing from her family. *Id* at 98. During

down. *Id*. K.B. insisted that she was calm, *id*., even though, by her own account, she was still upset and continued to cry hysterically, *id*. at 103.

23. K.B. did not struggle with Officer Smith, try to pull away from Officer Smith, or call him any names. *Id*. at 104. When Officer Smith asked K.B. about the dispute with L.M., K.B. started to tell him, and added that she did not understand why she was the only person in handcuffs. *Id*. Officer Smith told her to calm down twice more, and when she failed to do so, with no warning,[14] he sprayed her with Freeze +P. *Id*. The spray made K.B.'s eyes burn and her face felt like someone had cut it and poured hot sauce on it. *Id*. at 105.

24. While K.B. waited for the paramedics to arrive, she vomited. *Id*. at 106. Birmingham Fire and Rescue responded and talked to K.B., but did not provide any treatment. *Id*. Instead, they asked her a few questions and told her to keep her eyes open and not to put water on her face. *Id*. At the time of this incident, K.B. was five months pregnant. *Id*. at 124.

25. After Birmingham Fire and Rescue left, Officer Smith drove K.B. to Cooper Green Hospital. *Id*. at 108. The car windows were up. *Id*. At the hospital, K.B. signed a form declining treatment because Officer Smith told her there was nothing

[14] Officer Smith admitted he failed to warn K.B. before spraying her. 2/3/14 at 67.

the medical personnel could do to help her and that they would sit at the hospital all day if K.B. requested treatment. *Id.* at 109–10.

26. After leaving Cooper Green, Officer Smith transported K.B. to the Family Court, where the staff strip searched her. *Id.* at 111. K.B. was not formally charged with any criminal conduct in connection with this incident.

27. At trial, the court heard no testimony indicating that Officer Smith made any effort to decontaminate K.B. Specifically, the court heard no testimony indicating that Officer Smith placed K.B. in front of a fan or arranged for her to access any airflow. Officer Smith did not provide K.B. with a change of clothes or give her the opportunity to access clothing uncontaminated by Freeze +P. *Id*. at 109.,t

29. Based on K.B. and Officer Smith's demeanor on the stand, the court finds K.B.'s testimony to be more credible. Unlike some of the plaintiffs, K.B. did not try to minimize the disturbance her yelling and crying created. She also testified with great detail about her and L.M.'s movements around the campus prior to her encounter with Officer Smith, an aspect absent from Officer Smith's own testimony. In contrast, Officer Smith was evasive and combative on cross examination. And, importantly, a number of significant contradictions emerged in his testimony. On direct examination, Officer Smith testified that he sprayed K.B., in part, because a crowd of students was nearby, and he was worried that additional fights would begin. *Id*. at 56. But on cross examination, he stat`rri ation, Officer Sm

Officer Smith undermined his

that ensued was not clear from either B.J. or Officer Benson's testimony, but they culminated in the two men holding B.J. against a locker. 1/23/15 at 26–27. Although B.J. had stopped resisting at this point, *id*., he heard a woman's voice say "Stay still, don't move." *Id*. at 9. Then, Officer Benson sprayed him in the face with Freeze +P, threw him to the ground, where he hit his head, kneeled on his back, and handcuffed him. *Id.* at 10–11.

32. Officer Benson picked B.J. by the handcuffs and took him to Gates' office. 2/3/15 at 149, 160. The Freeze +P made B.J. feel like his skin was steaming. 1/23/15 at 10. In the office, B.J. vomited, *id*. at 11, and Gates gave him a paper towel so that he could blow his nose, 2/3/15 at 149. Officer Benson charged B.J. with harassment. Pl. Ex 14 at 16. She then drove him to Cooper Green Hospital. 1/23/15 at 12. The windows in Officer Benson's car were rolled up. *Id*. at 13. At Cooper Green, B.J. signed a form declining treatment, although he purportedly did not understand what it meant. *Id*. at 12. Officer Benson then took B.J. to Family Court, *id*. at 13, where B.J. stayed until his father picked him up, *id*. at 16. He continued to cough until he fell asleep that night. *Id*. at 18. B.J. was not formally charged with any criminal conduct in connection with this incident.

33. Officer Benson failed to engage in any efforts to decontaminate B.J. after she sprayed him with Freeze +P. Specifically, she failed to place B.J. in front of a fan

or arrange for his access to any airflow.[18] 2/3/15 at 162. She failed to provide B.J. with a change of clothes or give him the opportunity to access clothing uncontaminated by Freeze +P. *Id*. at 163. She also did not provide him with water to wash his face or arrange for him to wash. *Id*. at 162.

34. B.J. and Officer Benson's versions of these events are largely consistent, although by Officer Benson's account, B.J.'s resistance to Principals Gadson and

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would not help and some of her discomfort had been alleviated when the teacher washed her face. *Id.* at 175, 190. After leaving Cooper Green, Officer Tarrant drove T.A.P. to Family Court, where T.A.P. stayed until her mother picked her up. *Id*. at 175. The Freeze +P caused T.A.P.'s face to hurt for a couple of days. *Id*. at 177. T.A.P. was not formally charged with any criminal conduct in connection with this incident.

38. At trial, the court heard testimony indicating that Officer Tarrant undertook only minimal measures to decontaminate T.A.P. Although Officer Tarrant rolled down his car windows while driving T.A.P. to Cooper Green and Family Court, the court heard no testimony indicating he placed T.A.P. in front of a fan or arranged for her to access any airflow during the hour and a half she sat in the distance learning center after he sprayed her with Freeze +P.

39. In April 2010,[23]

S.R.O.s stationed in the high schools. 2/3/15 at 174. Huffman High School, Wenonah High School, Jackson-Olin High School and Kennedy Alternative School each has one full-time and two part-time S.R.O.s. Woodlawn High School, Carver High School, and Parker High School each has one full-time and one part-time S.R.O. Ramsay High School has one part-time S.R.O.

B. B.P.D. Rules and Regulations on the Use of Force and Chemical Spray

3. B.P.D. has rules and regulations governing officer conduct. Each officer is trained on the rules and regulations at the police academy and receives periodic retraining in various forms. *See e.g.*, 2/2/15 at 35, 161.

4. At the time the incidents giving rise to this matter occurred, B.P.D. Use of Force Policy, Procedure No. 113-3, Revision 9[24] ("Revision 9") governed the use of force.[25] It provides that B.P.D. officers may use physical control methods under four circumstances: "to stop potentially dangerous and unlawful behavior; to protect the officer or another from injury or death; to protect subjects from injuring themselves;

[24] In post-trial briefing, the defendants attempt to exclude Procedure No. 113-3 from the court's analysis. Doc. 279 at 3 n. 3. However, the defendants failed to object to the admission of either Procedure 113-3 Revision 9 or 10 at trial. 2/3/15 at 125, 130.

[25] Revision 9 became effective on December 10, 2009. Pl. Ex. 1 at 5647. Consequently, it was not in effect when S.R.O.s sprayed T.A.P., T.L.P., and G.S. with Freeze +P. The parties did not present any evidence regarding the use of force police in effect prior to the implementation of Revision 9. At any rate, this omission is immaterial in light of the court's findings that T.A.P., T.L.P., and G.S.'s excessive force claims fail on the merits.

and in the process of effecting lawful arrest or detention when the subject offers resistance." Pl. Ex. 1 at 1.

5. Revision 9 provides that an "officer's actions to resistance will be based upon his perception of the level of resistance." *Id*. at 3. The following table displays the B.P.D.'s classification of resistance and control:

Level:	I	II	III	IV	V	VI
Levels of Resistance:	Psychological Intimidation	Verbal Non-Compliance	Passive Resistance	Defensive Resistance	Active Aggression	Lethal Force Assaults
Examples of Resistance	Blank stares, clenching of fists, tightening of jaws	Any verbal response of unwillingness to obey	Dead weight	Pulling away, pushing away	Challenging, punching, kicking, grabbing	Dangerous instruments, firearms, knives; any force which the officer believes could cause serious bodily injury or death
Levels of Control:	Officer presence	Verbal Direction	Soft Empty Hand Control	Hard Empty Hand Control	Intermediate Weapon	Lethal Force
Examples of Control	Badge, uniform	Officer's commands, advice persuasion	Handcuffing, pressure points, wrist locks	Kicks, punches, strikes, **CS/OC spray**		

are permitted to respond with a level of control one to two levels higher than the level of resistance displayed by an individual.[26] 1/23/15 at 150. Similarly, several of the defendant S.R.O.s testified that their training included instruction that they were allowed to use control one to two levels higher than a subject's level of resistance.[27] 2/2/15 at 166; 2/3/15 at 54. With regard to the resistance and force at issue in this case, Chief Roper specifically testified that chemical spray can be an appropriate control level in response to verbal noncompliance. 1/23/15 at 128.

7. Revision 9 requires an officer to notify his supervisor after using chemical spray. Pl. Ex. 1 at 14. It also requires the officer to prepare a Use of Force Information and Statement Report. *Id*. The officer's sergeant, lieutenant, captain, the deputy chief and ultimately Chief Roper must review and approve the report. *Id*. at 15; *see also* 1/23/15 at 86 (Chief Roper's testimony that he is ultimately responsible for reviewing and approving every incident report involving the use of chemical spray). Each Use of Force Information and Statement also is reviewed independently by the B.P.D.'s Internal Affairs Division. *Id*.

8. The Use of Force Rules and Regulations, Procedure No. 113-3, Revision 10 ("Revision 10"), an updated version of Revision 9, became effective on March 27,

[26] The plaintiff's expert, Dr. Aaron Kupckik, testified that permitting this upward deviation was standard law enforcement practice. 1/22/15 at 141.

[27] By point of contrast, Officer Henderson denied he received training instructing him that he could deviate upward by one to two levels. 2/2/15 at 49.

2012. Pl. Ex. 2 at 1. Unlike Revision 9, Revision 10 requires that officers evaluate a number of specific factors when determining the appropriate level of control required for a situation. *Id*. at 11. For example, Revision 10 requires that an officer evaluate the seriousness of the crime committed by the subject, the subject's size, age and weight, the apparent physical ability of the subject, the number of subjects present, the weapons possessed or available to the subject, whether the subject has a known history of violence, whether innocents or potential victims are present in the area, and whether evidence is likely to be destroyed. *Id*. Revision 10 also requires that officers consider their own size, physical ability and defensive tactics expertise, the number of officers present or available, the weapons or restraint devices available to the officer, legal requirements, agency policy, and the environment. *Id*. However, several of the defendant S.R.O.s testified that they failed to consider some of these factors when determining what level of force to employ in a given situation, even after Revision 10 went into effect. 2/2/15 at 54 (Officer Henderson's testimony that he failed to consider the size and age of an individual when deciding whether to use Freeze +P); 2/3/15 at 186 (Officer Benson's testimony that she failed to consider the size and age of an individual when deciding whether to use Freeze +P). Others were unaware of the difference between Revision 9 and Revision 10. 2/4/15 at 73 (Officer Tarrant's testimony that the two policies were basically the same).

9. B.P.D. Chemical Spray Subject Restraint: Non-Deadly Use of Force Rules and Regulations, Procedure No. 113-5 Revision 5[28] (the "Chemical Policy") specifically governs B.P.D. officers' use of chemical spray. Consistent with Revision 9, the Chemical Policy classifies chemical spray as a Level IV Control "Use of Force." Pl. Ex. 3 at 2. According to the Chemical Policy, "chemical spray may be used ibb

including S.R.O.s, attend required semiannual in-service training. *Id.* at 63. As part

Ex. 9. Between 2006 and 2014, S.R.O.s sprayed 199[30] Birmingham City School students with Freeze +P in 110 incidents. Pl. Exs. 14, 15. With one exception, none of these incidents involved any students who had weapons in their possession.

15. Incapacitating agents, such as Freeze +P, are designed to temporarily incapacitate an individual by causing pain and intense tissue irritation. 1/28/15 at 177. Freeze +P consists of one percent Oleoresin Capsicum ("OC") and one percent Orthochlorobenzalmalonitrile ("CS") in a nonflammable solvent. *Id*. at 37. The expected effects of Freeze +P are burning of the eyes, skin, mouth, and airway, tearing, reflexive closing of the eyes, coughing, gagging, and difficulty breathing. 1/21/15 at 188. In the words of the defendants' expert Dr. David Tanen, it works by causing "severe pain." 1/28/15 at 25.

16. The plaintiffs' experiences were consistent with this description. G.S. testified that her face burned badly and she had trouble breathing. 1/20/15 at 144. P.S. testified that exposure to Freeze +P felt like "needles stabbing [her] face." 1/21/15 at 52. T.L.P. testified that her mouth burned and itched and that the spray made her cough. *Id*. at 142. B.D. testified that she felt like her face was on fire and that she had trouble breathing. *Id*. at 20. K.B. testified that her eyes burned and that her face felt like someone had cut it and poured hot sauce on it. 1/20/15 at 105. B.J. testified that

[30] The plaintiffs derive this number from the 110 arrest reports at issue. The defendants do not challenge the 195.

his skin felt like it was steaming, and that he coughed and vomited. 1/23/15 at 10, 11, and 18. Finally, J.W. testified that his eyes and nose burned and that the spray made him cough. 1/21/15 at 92.

17. Testimony at trial varied somewhat as to the duration of the effects of Freeze +P. The defendants' position, generally, was that they persist for less than an hour. B.P.D.'s Chemical Policy states that "[t]he effects of chemical spray will begin to lessen in 10–15 minutes with all effects disappearing in approximately 45 minutes with no treatment being administered." Pl. Ex. 3 at 3. B.P.D. training materials state that "[e]ffects are temporary," that after treatment with "[c]ool air or water," "eyes can open in 10–20 minutes," that "[r]espiratory effects [] dimishing in 10–30 minutes," and that "[e]ffects on skin [] may take 45–60 minutes" and may last "up to hours" for "some sensitive subjects." Pl. Ex. 12 at 000068. Dr. Tanen, one of the defendants' experts, testified that "severe pain" lasts for less than a minute, 1/28/15 at 25, and that an individual might cough for half an hour and experience eye irritation for about an hour after exposure to Freeze +P, *id*. at 31.

18. The plaintiffs' testimony placed more emphasis on the extreme pain they experienced immediately after exposure, but some of them testified about lingering discomfort. B.J. coughed for the rest of the day after Officer Benson sprayed him, T.L.P. sought medical attention the day after Officer Nevitt sprayed her because she

continued to cough, T.A.P.'s skin hurt for a few days after Officer Tarrant sprayed her, and B.D.'s eyes were swollen for three or four days after Officer Henderson

[illegible]

The plaintiffs presented a great deal of evidence in an attempt to establish that exposure to Freeze +P may potentially lead to serious and/or long-term medical ramifications. In particular, the plaintiffs' expert, Dr. Michael Cohen testified that

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chemical spray could lead to

[illegible]

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patients who suffered from corneal abrasions after being sprayed, that corneal abrasions are "a known side effect of being sprayed," *id*. at 69, but that "ninety-eight to ninety-nine percent of corneal abrasions heal spontaneously," *id*. at 73, and that they can also be caused by rubbing one's eyes, *id*. at 30. The court finds Dr. Tannen's testimony regarding the relatively safety of chemical spray, based on his own experience, more convincing than Dr. Cohen's testimony based on hypotheticals and isolated incidents. More to the point, none of the plaintiffs contend that they suffered from serious or long-term medical ramifications because of exposure to Freeze +P. The plaintiffs seemed to be moving in that direction when B.D. testified that doctors diagnosed her with pulmonary tachycardia as an infant, 1/21/15 at 35, but none of her testimony suggested exposure to Freeze +P exacerbated her underlying condition. In light of Dr. Cohen and Dr. Tanen's testimony, but primarily because the matter is simply not at issue in this lawsuit, the court declines to issue findings regarding the risks of serious or long term medical consequences posed by exposure to Freeze +P.

20. Similarly, the plaintiffs presented evidence and elicited testimony seemingly for the purpose of establishing that teenagers who take prescription psychotropic medication are at risk of increased harm if exposed to Freeze +P. The plaintiffs' expert, Dr. Daphne Glindmeyer, testified that the use of Freeze +P on an individual taking psychotropic medication could cause cardiovascular side effects. 1/26/15 at 12. Specifically, Dr. Glindmeyer testified that exposure to Freeze +P could

cause such an individual to experience "[i]ncreased blood pressure, increased heart rate, [and/or] cardiac arrhythmia, which could lead to death." *Id*. at 36. However, Dr. Glindmeyer admitted that she knew of no such fatal incidents, *id.*, and, indeed, failed to give any examples regarding actual individuals who suffered an adverse reaction as a result of exposure to Freeze +P while taking psychotropic medication. More to the point, while two of the plaintiffs, B.D. and T.A.P.,[31] testified that they were taking medication for psychiatric disorders at the time Officers Henderson and Tarrant sprayed them with Freeze +P, 1/21/15 at 21, 1/22/15 at 188, neither testified that she experienced any cardiac symptoms in association with the events. Consequently, sufficiency of Dr. Glindmeyer's testimony aside, because the matter is not at issue in this case, the court declines to make findings regarding the interaction between Freeze +P and psychotropic medication.

21. Turning to the final issue in this vein, Dr. Glindmeyer testified that all of the plaintiffs experienced some "peritraumatic symptomatology" as a result of their exposure to FkeezeÁÁRTÁFm

Dr. Glindmeyer repeatedly testified that trauma is "additive." *Id*. at 20, 23, 30, and 35. Over the course of the trial, the court heard testimony revealing that exposure to Freeze +P was not the only potentrev

determination, the court will outline the parties' respective positions on the matter here, and address the constitutional question in its Conclusions of Law.

23. The parties are in agreement that the Material Safety Data Sheet for Freeze +P describes Emergency and First Aid procedures for exposure to Freeze +P:

> EYES: Flush eyes with large quantities of water to speed recovery. Face subject into wind or forced air source such as fans or air conditioning outlet. Wash face with mild soap
>
> SKIN CONTACT: Remove contaminated clothing. Wash affected area with soap and water to avoid transfer to more sensitive areas. Burning sensation with skin contact in most areas. Use no creams or salves. Persons with preexisting skin disorders may be more susceptible to the effects of this agent.
>
> INHALATION: Irritant, stimu

> When running water is available, a softly flowing stream from a hose should be applied to the face and eyes. Copious amount[s] of cool water will give some relief.
>
> After initial treatment with water or wash, the subject should be moved to fresh air and faced into the wind. The time to recovery is directly proportionate to the speed of the air stream. Fans or air conditioning outlets provide an excellent source of relief. In the event running water or the [s]odium [b]isulfate solution is not available[,] excellent field treatment results may be obtained by placing the subject in the front section of a vehicle and directing the air conditioning vent into his face.

Pl. Ex. 10 at 64. Based on this material, the plaintiffs' position is that adequate decontamination involves removing contaminated clothes, washing with copious amounts of water, and exposure to moving air.

24. Turning to the defendants' position, the Chemical Policy notes that "[t]he effects of chemical spray will begin to lessen in 10–15 minutes, with no treatment being administered," but that "[f]ollowing the use of chemical spray the officer will ensure that the subject receives adequate decontamination as soon as practical." Pl. Ex. 3 at 3. At trial, Chief Roper explained that:

> [t]he policy requires officers to take adequate decontamination efforts. And so under decontamination, that can be water. That can be time. That can be air. Our policies also requires the officers to notify the Birmingham Fire and Rescue[35]. . . . [I]f you're asking me does the policy specifically say large qualities of water, then the policy does not say that.

1/23/15 at 68.

[35] It was undisputed at trial that Birmingham Fire Rescue Services personnel did nothing to decontaminate the plaintiffs. Moreover, the defendant S.R.O.s conceded that this was generally the case. *See e.g.*, 2/3/15 at 97.

25. Interestingly, the defendants' expert, Dr. Tanen, who was exposed to chemical spray for training purposes on an annual basis during his twenty-year career in the Navy, had a different assessment of adequate decontamination. 1/28/15 at 14–15. He testified that if he were sprayed, his first choice method of decontamination would be to wash with copious amounts of water and soap, and if neither were available, he would want access to a fan. *Id.* at 98.

26. Dr. Tanen also testified that ideal decontamination after exposure to Freeze +P includes the passage of time, exposure to wind or a fan, and washing with copious amounts of water and soap. *Id*. at 34. He noted, though, that ideal decontamination is possible in a controlled environment, such as a police training scenario, where spraying is anticipated, the necessary materials are on hand, and decontamination can be accomplished without jeopardizing officer safety, and that such conditions are less likely in many situations when police deploy Freeze +P in the field. *Id*. Dr. Tanen acknowledged, however, that in terms of the practicality of ideal decontamination, a school environment where officers are permitted to deploy Freeze +P and consequently can anticipate its use has much in common with a police academy. *Id*. As a result, he believes that officers should provide studaps ed

27. The court heard testimony that there are multiple facilities in each high school where students could wash after being sprayed with Freeze +P including gym sho

III. Conclusions of Law Related to the Plaintiffs' Individual Claims

A. The Plaintiffs' Constitutional Claims

The plaintiffs contend that the S.R.O.s violated their constitutional rights and that the S.R.O.s are consequently at the

violated the plaintiffs' Fourth Amendment rights by failing to properly decontaminate them. The answer to that question is unequivocally yes.

1. The Initial Sprayings

The plaintiffs can only succeed in their claims against the defendant S.R.O.s if the officers are not entitled to qualified immunity.[36] "'Qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mercado v. City of Orlando*, 407 F.3d 1152, 1156 (11th Cir. 2005) (quoting *Ferraro*, 284 F.3d at 1193–94). "Qualified immunity allows government employees to carry out their discretionary duties without fear of litigation, 'protecting from suit all but the plainly incompetent or

"'Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Case v. Eslinger*, 555 F.3d 1317, 1325 (11th Cir. 2009) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

For the defendant S.R.O.s to invoke qualified immunity, they "must first establish that [they were] acting within the scope of [their] discretionary authority." *Id.* at 1325. This point is not in dispute. "The burden then shifts to the plaintiff[s] to overcome the defense of qualified immunity." *Id.* (citing *Bates v. Harvey*, 518 F.3d 1233, 1239 (11th Cir. 2008)). Once the burden shifts, a plaintiff must show that (1) the defendants violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. at 236.

As explained above, the Fourth Amendment guarantees that citizens be "secure in their persons . . . against unreasonable . . . seizures." *Graham*, 490 U.S. at 394. "At the core of the Fourth Amendment is the understanding that officers cannot unnecessarily harm suspects in the course of arresting or otherwise seizing them." *M.D. ex rel. Daniels v. Smith*, 504 F. Supp. 2d 1238, 1251 (M.D. Ala. 2007) (citing *Ferraro*, 284 F.3d at 1200; *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926–27 (11th Cir. 2000); *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)).

Claims alleging that an officer used excessive force during the course of an arrest or other "seizure" are analyzed under an objective reasonableness standard. *Graham*, 490 U.S. at 388; *see also Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008). If "'the nature and quality of the intrusion on the [plaintiffs'] Fourth Amendment interests'" outweigh "the countervailing government interests at stake," the seizures violated the plaintiffs' constitutional rights. *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1981`×P

This circuit first considered whether an officer's use of chemical spray during the course of an arrest constituted excessive force in *Vinyard v. Wilson*, in which the court concluded that a deputy sheriff inflicted excessive force when he sprayed the plaintiff with pepper spray while the plaintiff was sitting, handcuffed, albeit screaming and cursing loudly, in the back seat of his patrol car. 311 F.3d at 1348. In evaluating the plaintiff's claim, the court noted that the charges against her, disorderly conduct and obstruction, "were of minor severity," *id.* at 1347, she "was a nuisance[,] but not a threat to [the deputy], herself or others," *id*. at 1347–48, she neither resisted the initial arrest nor attempted to flee, and "at the time of the force . . . [the plaintiff] was under arrest and secured with handcuffs and in the back seat of the patrol car," *id*. at 1348.

In addition to its analysis of the specific facts before it, the *Vinyard* court noted that in the context of an arrest,

> [c]ourts have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else.[37] Courts have consistently concluded that using pepper spray is reasonable, however, where the plaintiff was either resisting arrest or refusing police requests, such as requests to enter a patrol car or go to the hospital.[38]

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[37] Citing *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1129–30 (9th Cir. 2002); *Park v. Shiflett*, 250 F.3d 843, 852–53 (4th Cir. 2001); *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994).

[38] Citing *Jackson v. City of Bremerton*, 268 F.3d 646, 652–53 (9th Cir. 2001); *Wagner v. Bay City*, 227 F.3d 316, 324 (5th Cir. 2000); *Monday v. Oullette*, 118 F.3d 1099, 1104–05 (6th

Id. (footnotes omitted). These principles have guided this circuit's jurisprudence as it evaluates the constitutionality of officers' use of chemical spray and similar weapons during the course of an arrest. To be clear, "this [circuit] has noted that the use of pepper spray is not excessive force in situations where the arrestee poses a threat to law enforcement officers or others, uses force against officers, physically resists arrest, or attempts to flee, ..." *Brown*, 608 F.3d at 739. However, in situations where the suspect faces only minor charges, does not pose a risk to anyone's safety, and is not resisting arrest or attempting to flee, an officer's use of chemical spray is generally excessive. *See Hawkins v. Carmean*, 562 F. App'x 740, 743 (11th Cir. 2014) (officer used excessive force when she sprayed motorist stopped on suspicion of a tag light violation who neither threatened anyone's safety nor attempted to flee); *Fils v. City of Aventura*, 647 F.3d 1272, 1288–89 (11th Cir. 2011) (officer used excessive force when he shot a bystander to an arrest with a taser[39] after the bystander remarked "'they're overreacting, these motherfuckers are overreacting'—'they' presumably meaning the police"; the charges the bystander

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Cir. 1997); *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995); *Fernandez v. City of Cooper City*, 207 F. Supp. 2d 1371, 1380 (S.D. Fla. 2002); *Gainor v. Douglas Cnty.*, 59 F. Supp. 2d 1259, 1287–88 (N.D. Ga. 1998); *Griffin v. City of Clanton*, 932 F. Supp. 1359, 1369 (M.D. Ala. 1996).

[39] Although *Fils* involved a taser, not chemical spray, the court found "no meaningful distinction between the two under the [present] circumstan` ò • Filso

ultimately faced, disorderly conduct and resisting arrest without force, were not serious,[40] the bystander did not pose a threat to anyone's safety, and he did not resist arrest[41] or attempt to escape); *Brown*, 608 F.3d at 739–40 (officer used excessive force when he pepper sprayed the plaintiff who was suspected of playing music too loudly and slammed her to the pavement when plaintiff posed no threat and was attempting to exit her vehicle so the officer could arrest her); *Howell v. Sheriff of Palm Beach Cnty.*, 349 F. App'x 399, 405 (11th Cir. 2009) (officer used Árst@Pa

[chemical spray] was a wholly disproportionate response to the situation."). There is a final consideration in the present matter that potentially distinguishes it from the previous cases: the defendant S.R.O.s inflicted the alleged excessive force at issue here on students in schools. It is well-established that "the constitutional rights of students in public school are not automatically coextensive with the rights of adu`ÖR&& •

objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). The Eleventh Circuit has extended this rule to seizures by school-based police officers. *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1305 (11th Cir. 2006).

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of students' Fourth Amendment expectations regarding searches and seizures, none of them involve allegations of excessive force pursuant to the Fourth Amendment.[45] Absent a clear directive from binding authority,[46] the court declines to adopt the position that children in public schools have a reduced expectation of being free from

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the classroom did not conduct an illegal seizure per the Fourth Amendment); *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989) (seizure of student for questioning about a bomb threat was reasonable).

[45] The only case that comes close, *Wallace by Wallace v. Batavia Sch. Dist. 101*, is distinguishable from the present matter both factually and legally. In *Wallace*, the defendant, a teacher, briefly grasped the plaintiff by the wrist and elbow and guided her toward the classroom exit. 68 F.3d at 1011. The plaintiff halted and told the defendant to let go. *Id*. The defendant complied. *Id*. The plaintiff subsequently brought a claim against the defendant for wrongful seizure, pursuant to the Fourth Amendment, and unlawful excessive corporal punishment, pursuant to the Fourteenth Amendment. Although the court applied *T.L.O.*'s reasonableness standard to the plaintiff's Fourth Amendment claim, its inquiry was limited to the reasonableness of the seizure itself, not of the degree of force. *Id*. at 1015. To the extent that Wallace raised a claim of excessive force, she did so in the context of excessive corporal punishment in violation of the Fourteenth Amendment, which is not a legal issue in this case. *Id*. at 1016.

The court also notes the following language in *Wallace*:

> Because a student is at least as much seized when a school official administers corporal punishment as Wallace was here, corporal punishment may be evaluated pÀ· €% Ö6÷'÷&ÂVæ–

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the infliction of excessive force by law enforcement officers. At any rate, the court's position is largely academic because the outcome of the plaintiffs' individual claims against the defendant S.R.O.s is the same whether the court applies *T.L.O.*'s reasonable-under-the-circumstances test or the factors described in *Graham*[47]—which, the court notes, are fairly similar analyses.

With this legal framework in mind, and based on the findings in this case, the court makes the following conclusions of law:

a. K.B.

1. Officer Smith inflicted excessive force on K.B. when he sprayed her with Freeze +P. The crime - esesaw:

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testified at his deposition that the crowd that concerned him had dispersed by the time he sprayed K.B.

3. For these reasons, the court concludes there was simply no reason for Officer Smith to spray K.B. with Freeze +P, and when he did so, he caused her to experience a great deal of physical pain. Consequently, the court concludes that when Officer Smith sprayed K.B. with Freeze +P, he violated her right to be free of excessive force, pursuant to the Fourth Amendment.

4. Finally, while all of the facts in this case are disturbing, the court is especially taken aback that a police officer charged with protecting the community's children considered it appropriate and necessary to spray a girl with Freeze +P simply because she was crying about her mistreatment at the hands of one of her male peers.

b. B.J.

1. No justifiable basis existed for Officer Benson to spray B.J. with Freeze +P.

2. Physical harassment, the crime with which Officer Benson charged B.J., is a minor offense.

3. B.J. did not pose a threat to Officer Benson. Officer Benson stood idly by while B.J. struggled with school officials Gadson and Gates, and by the time she sprayed B.J., he had stopped struggling. More to the point, B.J. was a 135-pound boy

who two adult men had pinned against a set of lockers, and he posed no risk to Gadson or Gates. In fact, Officer Benson never testified that Gadson and Gates asked for her assistance. Moreover, B.J. was not trying to flee.

4. To the extent B.J. struggled with Gadson and Gates, he did so to resist a search by school officials, not an arrest by a law enforcement officer. There were no non-school-specific concerns associated with this incident, and the incident, which took place in a hallway, away from other students, cannot be characterized as a disturbance to the school environment. By Officer Benson's own admission, her role as an S.R.O. did not involve enforcing school disciplinary policies. 2/3/15 at 142. In fact, Officer Benson also testified that it would be inappropriate for an S.R.O. to spray a student with Freeze +P for refusing to consent to a search by a school official, 2/3/15 at 181, although that is essentially what she did.

5. As with K.B., there was no reason for Officer Benson to spray B.J. with Freeze +P, much less throw him on the ground and kneel on his back, and when she did so, she caused B.J. to experience a great deal of physical pain. Consequently, the court concludes that when Officer Benson sprayed B.J. with Freeze +P, she violated his right to be free of excessive force, pursuant to the Fourth Amendment.

c. G.S.

1. As the court has previously stated, physical harassment, G.S.'s purported offense, is not a serious crime, and the court views G.S.'s resistance as de minimis. Nonetheless, although G.S. engaged in de minimis resistance, her claim fails because of the law of the case. In particular, this court's opinion regarding the defendants' motion for summary judgment, doc. 196, which, among other things, denied Officer Clark's claim that he was entitled to qualified immunity, contained the following description of G.S.'s encounter with Officer Clark:

> On December 8, 2009, as seventeen year old G.S. chased another student across the lawn at Huffman High School, an S.R.O. grabbed G.S. from behind. Before she recognized the individual as an S.R.O., G.S. tried to free herself. Allegedly, S.R.O. A. Clark immöbr@Ö •

2. At trial, G.S. did not testify that Officer Clark sprayed her a second time; she only testified that he sprayed her after she tried to pull away from him. 1/20/15 at 140–42. Because the Eleventh Circuit has explicitly ruled that Officer Clark's actions were reasonable, the court finds that Officer Clark did not inflict excessive force on G.S. when he sprayed her with Freeze +P.

d. B.D.

1. Based on testimony at trial, it seems likely to the court that Officer Henderson, who was 6'1" and weighed 240 pounds at the time, had complete control over B.D., who was 5'4" and weighed only 110 pounds, and consequently that it was unlikely she actually posed a risk to Principal Burrell.

2. Nonetheless, B.D. resisted Officer Henderson by pulling away from him and actively attempted to charge at Principal Burrell who, albeit, was out of harm's way. However, B.D.'s conduct is an act that in this circuit justifies the use of chemical spray. *See Brown*, 608 F.3d at 739. Consequently, the court finds that Officer Henderson did not inflict excessive force on B.D. when he sprayed her with Freeze +P.

e. T.A.P.

1. Based on the trial testimony that T.A.P. swung her bookbag intentionally at Officer Tarrant and then fled, and in light of this circuit's general principal that fleeing from law enforcement justifies the use of chemical spray, *id.*, the court finds that Officer Tarrant did not inflict excessive force on T.A.P. when he sprayed her with Freeze +P.

f. T.L.P.

1. Officer Nevitt acted justifiably in spraying T.L.P. The incident occurred in a charged setting, and after T.L.P. had beaten E.H. to the ground and was still holding on to E.H.'s hair. Moreover, two, large, adult men were unable to separate T.L.P. and E.H., and T.L.P. ignored Officer Nevitt's repeated instructions to let go of E.H. The volatility of the situation was highlighted by the fact that although Officer Nevitt tried to spray T.L.P., he mainly sprayed Coach Johnson. In short, T.L.P. was actively harming another person and had ignored officer instructions.

2. Additionally, the court notes that the fight took place in a crowded cafeteria, and by the time Officer Nevitt sprayed T.L.P., other students were growing rowdy and throwing things.

3. In this circuit, T.L.P.'s actions were sufficient to justify the use of chemical spray. *See id*; *Vinyard*, 311 F.3d at 1348. Consequently, the court concludes that Officer Nevitt did not infldidcal

because although he identified the S.R.O. who sprayed the crowd as Officer Nevitt in the plaintiffs' most recent pleadings, *see* doc. 188 at 60, at trial, J.W. was unable to identify the officer who sprayed him, *see* 1/21/15 at 88–91. Therefore, the court finds that J.W. failed to prove his claims.

To summarize, as to the plaintiffs' individual excessive force claims stemming from being sprayed with Freeze +P, the court finds only in favor of K.B. and B.J. Therefore, because the court concludes that Officers Smith and Benson violated K.B. and B.J.'s Fourth Amendment rights by spraying them with Freeze + P, the court turns next to the second prong of its qualified immunity inquiry: were those rights clearly established at the time the violation occurred. In this circuit, courts use "two methods to determine whether a reasonable officer would know that his conduct is unconstitutional." *Fils*, 647 F.3d at 1291. "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*. (quoting *Hadley*, 526 F.3d at 1333. "This method does not require that the case law be 'materially similar' to the officer's conduct; 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'" *Id*. (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "But, where the law is stated in broad propositions, 'a very high degree of

prior factual particularity may be necessary.'" *Id*. (quoting *Hope*, 536 U.S. at 740–41).

"The second method looks not at case law, but at the officer's conduct, and inquires whether that conduct 'lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law.'" *Id*. (quoting *Vinyard*, 311 F.3d at 1355) (alteration in the original). "This method—termed 'obvious clarity,'—is a 'narrow exception' to the normal rule that only case law and specific factual scenarios can clearly establish a violation." *Id*. (citations omitted) (citing *Lee*, 284 F.3d at 1198–99). "Concrete facts are generally necessary to provide an officer with notice of the 'hazy border between excessive and acceptable force.'" *Id*. at 1291 (citing *Lee*, 284 F.3d at 1198–99). "But, where the officer's conduct is so outrageous that it clearly goes 'so far beyond' these borders, qualified immunity will not protect him even in the absence of case law." *Id*. at 1291–92 (quoting *Reese*, 527 F.3d at 1274.

Therefore, as to tht rl wH

force on the plaintiff when he sprayed her with pepper spray, even though she was screaming and cursing at him, because the plaintiff was under arrest for a crime of minor severity, was restrained, and posed no danger to the officer, herself, or anyone else, 311 F.3d at 1349, K.B. and B.J. were arrested for minor offenses (disorderly conduct and physical harassment), restrained (K.B. was handcuffed and B.J. was held

3. Additionally, in both *Vinyard* and *Fils*, the Eleventh Circuit noted that the behavior of the defendant officers "clearly [went] so far beyond" the "hazy border between excessive and acceptable force" that it met the "obvious clarity" standard described above. *Fils*, 647 F.3d at 1291, 1292 (internal quotation marks omitted); *Vinyard*, 311 F.3d at 1355. Because Officers Smith and Benson violated clearly established law, the court need not rely on this standard, but it notes that their actions were so factually similar to those at issue in *Vinyard* and *Fils* that they meet the obvious clarity standard as well. In other words, their behavior was "so far beyond the hazy border between excessive and acceptable force that every objectively reasonable officer had to know he was violating the Constitution even without caselaw on point." *Id*. (citing *Priester*, 208 F.3d at 926; *Smith*, 127 F.3d at 1419).

2. Adequate Decontamination

The plaintiffs contend that by failing to adequately

Amendment] and, after placing the suspect in the vehicle, under Fourteenth Amendment substantive due process").[50] Consequently, the defendants contend the court should not consider the plaintiffs' decontamination claims because they were improperly pleaded,[51] *id.* at 41, or, in the alternative, that the court should analyze whether the decontamination measures taken by the defendant S.R.O.s "shock the conscience" under the Fourteenth Amendment rather than whether they run afoul of

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[50] The court's reading of *Cottrell* is not so clear-cut. *Cottrell* involved an arrestee who died from positional asphyxia while officers transported him in the back of a police car following his arrest. 85 F.3d at 1488. The administrator of the arrestee's estate filed a mistreatment in custody claim and an excessive force claim. *Id*. at 1489, 1492. As to the mistreatment in custody claim, the court noted that "[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners." *Id.* at 1490. However, as to the excessive force claim, the court noted that, unlike the mistreatment in custody claim, "the proper standard for judging Fourth Amendment excessive force claims . . . is one of objective reasonableness." *Id*. at 1492. The court did not, however, indicate that the mistreatment in custody claim was the plaintiff's sole claim regarding his post-arrest treatment; put differently, the court did not limit the plaintiff's excessive force claim to his pre-arrest treatment, and applied the Fourth Amendment reasonableness standard to the entire claim. Discussing *Cottrell*, Judge Myron Thompson noted that:

> [i]n reversing the district court's denial of summary judgment on both claims, the appellate court did not specifically address whether the Fourth Amendment 'reasonableness' test was the appropriate standard for all post-arrest, pre-detention excessive-force claims. However, by analyzing and rejecting the plaintif's excessive-force claim without further commenting on the relevant standard, it at least implicitly acknowledged that the Fourth Amendment provided the appropriate constitutional framework in that particular post-arrest case.

Calhoun v. Thomas, 360 F. Supp. 2d 1264, 1273 (M.D. Ala. 2005).

[51] The court notes that while the plaintiffs pleaded their individual claims against the defendant S.R.O.s under the Fourth *and* Fourteenth Amendment, *see, e.g.*, doc. 188 at 62–63, the pretrial order clearly indicates that the plaintiffs' decontamination claims are pursuant to the Fourth Amendment. *See e.g.*, Doc. 270-1 at 12 ("Defendant Clark further subjected Plaintiff G.S. to an illegal seizure in violation of the Fourth Amendment when he failed to commence adequate decontamination procedures after he sprayed her.").

the Fourth Amendment's prohibition on unreasonable seizures, *id*. at 41–42; *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992)) ("[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking . . . .'").

Based on the evidence and the case law, the court makes the following conclusions of law with respect to the decontamination claim:

1. "'[T]he precise point at which a seizure ends (for purposes of Fourth Amendment coverage) and at which pretrial detention begins (governed until a conviction by the Fourteenth Amendment) is not settled in this Circuit.'" *Nasseri v. City of Athens*, 373 F. App'x 15, 17 n. 2 (11th Cir. 2010) (quoting *Hicks v. Moore*, 422 F.3d 1246, 1253 n. 7 (11th Cir. 2005)).

2. In *Hicks*, the Eleventh Circuit faced facts regarding timing similar to those currently before the court. The *Hicks* plaintiff alleged that, following her arrest, a police officer touched her in a sexual manner while fingerprinting her at the jail during the booking process. *Hicks*, 422 F.3d at 1253 n. 7. Noting that the plaintiffC•`t

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plaintiffs commenced immediately after they subdued the plaintiffs with Freeze +P, at the schools where the defendants sprayed the plaintiffs, and was directly related to the plaintiffs' exposure to Freeze +P. In contrast, the *Hicks* plaintiff objected to alleged behavior that took place hours after her initial seizure, at a different location than her initial seizure, and was wholly unrelated to her initial seizure.

4. Consequently, the court concludes that there is no impropriety in considering the defendants' failure to decontaminate the plaintiffs as part of an ongoing seizure that it should evaluate pursuant to the Fourth, rather than the Fourteenth Amendment.[54]

5. The Fourteenth Amendment is relevant to the court's inquiry, however, because the EltFi at i ry,i l

court, i.e. failing to decontaminate a subject whom law enforcement has exposed to chemical spray, in the Fourteenth Amendment context. In *Danley v. Allen*, the plaintiff alleged that after spraying him with chemical spray, jail guards confined him in a small, poorly ventilated cell for twenty minutes, then allowed him to take a two-minute shower, which was

punishment, depends on whether the jailer's act 'shocks the conscience,'" *id*. at 1307, rather than the reasonableness standard the court will apply in this case.

7. Evaluating the merits of Danley's claim, the Eleventh Circuit noted that "[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force is excessive." *Id*. at 1309 (citing *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir. 2005)). In Danley's case, the court determined that the guards' initial use of chemical spray was permissible because Danley failed to follow instructions and was creating a disturbance. *Id*. at 1308. The court went on, however, to find that the guards' failure to decontaminate Danley violated his right to be free from excessive force. *Id*. at 1309. More specifically, the court noted that "[t]he use of force in the form of extended confinement in the small, poorly ventilated, pepper spray-filled cell, when there were other readily available alternatives, was excessive." *Id*. The court also noted that by mocking Danley's distress, the guards exhibited malicious intent, and that while they "eventually did permit Danley to shower, they did not allow him the amount of time required by jail policy." *Id.* at 1309–10, 1310.

8. The Eleventh Circuit returned to the decontamination issue in *Nasseri v. City of Athens*. In that case, a guard who was responding to a jailhouse fight sprayed

Nasseri with pepper spray after Nasseri, a bystander, told the guard to "stop that mess." 373 F. App'x at 18. The circuit held that, while eyebrow-raising, this initial "use of pepper spray . . . does not shock the conscience." *Id.* What happened next did. Because ambient pepper spray had contaminated the entire jail facility, guards were forced to move detainees and inmates who also were exposed to the spray into the jail yard and allowed them access to fresh air and water from a hose. *Id*. However, the defendant placed Nasseri in the back of a police car, where he remained for an hour. *Id*. Nasseri repeatedly tried to place his head through an eight to ten inch opening in a rear window, and yelled for help, claiming he could not breathe. *Id*. Evaluating these facts, the court found that the

> confinement of [Nasseri] in an unventilated patrol car without decontamination constituted excessive force. Under this version, after being sprayed, Nasseri was cooperating, was not posing a threat to himself, the officers, or other detainees, and repeatedly cried out for medical help. . . . It is excessive force for a jailer to continue using force against a prisoner who already has been subdued.

Id. at 19. Critical to the present analysis, unlike the defendants in *Danley*, who maliciously took pleasure in Danley's distress by laughing at him, the court did not point to similar behavior on the part of the Nasseri defendant.

9. In contrast to *Danley* and *Nasseri*, in *Scroggins v. Davis*, the Eleventh Circuit found that corrections officers' failure to decontaminate Scroggins did not rise to the level of a Fourteenth Amendment violation. The corrections officers sprayed

Scroggins with chemical spray after he "disobeyed a direct order[,] . . . got involved in a scuffle with the guards, [and] made an aggressive move toward one of them." 236 F. App'x 504, 505 (11th Cir. 2009). Scroggins attempted to base an excessive force claim on *Danley*, noting that corrections officers placed him in restraints for three hours and fifteen minutes after they sprayed him and that none of them washed the spray off of him. *Id*. at 505–06. The court distinguished *Danley* for a number of reasons. Unlike in *Nasseri*, the court noted that in *Danley*, the guards made fun of the Danley's distress, and Scroggins did not make similar allegation. *Id*. at 506.This was not, however, the primary reason the court found *Danley* did not apply. *Danley*, it noted "was not a restraint case and it did not involve a dangerous, high risk inmate." *Id*. at 505–06. Most importantly, although Scroggins based his excessive force claim in part on the defendants' failure to decontaminate him,

> [t]he only time Scroggins mentioned to anyone feeling any discomfort from the O.C. spray was when he told the nurse who checked him immediately after he was put in four-point restraints, which was soon after he had been sprayed. One would expect some discomfort from the spray soon after it had been administered. Scroggins was checked every fifteen minutes thereafter during the time he was restrained but never again did he mention the slightest discomfort from the O.C. spray. . . . An inmate cannot keep his suffering to himself and then complain about jailers not doing anything to alleviate it.

Id. at 506.

10. Although it is not on point with the present facts, *Scroggins* is relevant to the court's present analysis because it illustrates that failure to decontaminate is not

a per se constitutional violation; there are circumstances, such as the risk posed by a dangerous adult inmate that may outweigh the harm caused by failing to decontaminate an individual who law enforcement have exposed to chemical spray.

11. Taken together, *Danley*, *Nasseri*, and *Scroggins* p i—&6VĐ

12. Ultimately, the crux of the matter is this: in light of *Danley* and its progeny, finding that a failure to decontaminate, under the circumstances of this case, does not violate the Fourth Amendment would require the court to conclude that school children are less deserving of protection against excessive force than adult pretrial arrestees or criminals. The court will not take such an untenable position.

13. Having concluded that, absent extenuating circumstances, failing to adequately decontaminate an individual who officers have exposed to chemical spray is excessive force and violates the Fourth Amendment, the court now turns to the question of whether the defendants adequately decontaminated the plaintiffs. The court's task here is eased, somewhat, by the fact that, with regard to most of the plaintiffs, the defendants did absolutely nothing other than call Birmingham Fire Rescue, whose paramedics, in turn, did nothing to ease the plaintiffs' pain. The plaintiffs' descriptions of being forced to sit in interior offices without airflow or in police cars with the windows rolled up or access to water is roughly analogous to the situations endured by Danley and Nasseri, who, similarly, were confined in enclosed spaces with no airflow and no access to water. While the defendant S.R.O.s testified that the B.P.D. trained them to believe that time and air are the best decontamination techniques, their actions fall short even of that. They clearly did not adequately decontaminate the plaintiffs. Moreover, while the court fully acknowledges that situations may exist in which decontamination is not feasible, sp€Ôrt eastr,

does not have access to blowing air or copious amounts of water, that was not the case here. The court heard testimony that the schools where these incidents occurred were equipped with showers in the locker rooms and eye wash stations in the chemistry labs. They also had bathrooms with sinks, and, presumably, soap. At a minimum, the officers could have taken the plaintiffs outside and exposed them to fresh air, as Officer Henderson did with B.D. There was simply no good reason for the defendant officers not to attempt to alleviate the plaintiffs' discomfort.

14. There were two exceptions[55] to this complete lack of effort to help the plaintiffs. T.A.P and Officer Tarrant testified that Officer Tarrant rolled down the windows of her patrol car while transporting T.A.P. to Cooper Green and Family Court so that the moving air would afford T.A.P. some relief. 1/22/15 at 174. Like the two-minute shower in *Danley*, however, this measure was too little, and, additionally here, too late. By the time Officer Tarrant transported T.A.P. to Cooper Green, ninety minutes had elapsed since Officer Tarrant sprayed T.A.P. *Id*. More to the point, by T.A.P.'

15. The second exception deserves more attention. Both B.D. and Officer Henderson testified that immediately after Officer Henderson sprayed B.D. with Freeze + P, he took her outside so that she could sit in fresh air while waiting for paramedics to arrive. Determining whether Officer Henderson's measures were sufficient to rise to the level of adequate decontamination turns the court's attention to what, somewhat puzzlingly, has emerged as a key point of contention between the parties, namely, whether, as the defendants contend, time and/or air are adequate measures, or, as the plaintiffs contend, whether water is necessary as well. Based on several factors, the court believes that the plaintiffs are correct and that, if practicable, access to copious amounts of flowing water is necessary for adequate decontamination after exposure to chemical spray.

16. First, Freeze +P's manufacturer, Aerko International, advocates using water for decontamination. Freeze +P's Material Safety Data Sheet states that the effects of Freeze +P "can be relieved with running water and soap for cleanup." Pl. Ex. 9 at 2. The Material Safety Data Sheet further states that Freeze +P's effect on eyes can be relieved by "[f]lushing eyes with large quantities of water to speed recovery[, f]acing [a] subject into wind or forced air source such as fans or air conditioning outlet[, and w]ashing face with mild soap," and that its effect on skin can be relieved by "[r]emov[ing] contaminated clothing[, and w]ash[ing] affected area with soap and water to transfer to more sensitive areas." *Id*.

17. Second, Dr. Tanen's testimony is very convincing. Based on annual personal exposure for training purposes during his twenty-year career in the

20. Aerko International's instructions regarding decontamination and Dr. Tanen's testimony about his personal experience convince the court that, absent ex ×h

S.R.O.s, inflicted excessive force on B.D. when he fail`e

The plaintiffs do not appear to dispute that the defendant S.R.O.s were acting within the scope of their law enforcement duties. Therefore, to prevail, the plaintiffs must present evidence that the defendant S.R.O.s fall into one of the exceptions to state-agent immunity. *See Midfield*, 2014 WL 2619862 at *4 (citing *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000)). The only potential exception in this case provides that "'a State agent shall not be immune from civil liability in his or her personal capacity . . . when the

the court finds that the defendant S.R.O.s are entitled to state-agent immunity regarding the plaintiffs

sprayed (K.B.)[60] and (2) innocent bystanders (P.S.)[61] accidentally exposed to the effects of chemical spray. *Id*. at 6. As a preliminary matter, the court will first address Chief Roper's contention that the plaintiffs' claim lacks justiciability. The court will then address the merit of the plaintiffs' claim before finally turning to the plaintiffs' contention that they are entitled to injunctive relief.

A. Justiciability

Chief Roper contends that the court lacks subject matter jurisdiction over the plaintiffs' class claim because it fails to present a justiciable case or controversy. Doc. 273 at 4–10. "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party . . . at any stage in the litigation, even after trial and the entry of judgment." *Arbeaugh v. Y&H Corp*., 546 U.S. 500, 506 (2006) (citing Fed. R. Civ. P. 12(b)(1)). Consequently, the court is obligated to [illegible] they are e

the facts supporting the contentions were established and obvious by, at the absolute latest, August 31, 2012, when the court certified the plaintiffs' class.[62] *See* doc. 187.

Standing is "perhaps the most important of [the jurisdictional] doctrines." *Am. Civil Liberties Union of Fla., Inc. v. Dixie Cnty.*, 690 F.3d 1244, 1249 (11th Cir. 2012) (alteration in original) (quoting *Allen v. Wright*, 468 U.S. 737, 750).

> The three prerequisites for standing are that: (1) the plaintiff have suffered an "injury in fact"—an invasion of a judicially cognizable interest, which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there be a causal connection between that injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it be likely, not merely speculative, that the injury will be redressed by a favorable decision.

31 Foster Children v. Bush, 329 F.3d 1255, 1263 (11th Cir. 2003) (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). "These three elements 'constitute[ ] the core of Article III's case-or-controversy requirement.'" *Id*. (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998)). This is critical because "[t]he exercise of jurisdiction by the federal courts 'depends upon the existence of a case or controversy.'" *Id.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Additionally, and relevant here, "'a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id*. (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "'Put another way, [a]

[62] As to the bystander plaintiffs, the basis for arguing that they lack standing has existed since the inception of this lawsuit in 2010.

case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.'" *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000).

With these general principles in mind, the court makes the following conclusions of law:

1. The plaintiffs' class claim is not moot. Chief Roper's position to the contrary is premised on the fact that "none of the named plaintiffs were currently enrolled as students in Birmingham City Schools at the time this litigation proceeded to trial." Doc. 273 at 5. As a result, Chief Roper contends that "all of their claims were, at a minimum, moot." *Id*. The implication—a logical one—is that because all of the named plaintiffs are no longer enrolled in Birmingham City schools, none of them will benefit from the injunction they seek. In spite of the argument's logic, however, Chief Roper's position is baffling because in the preceding paragraph, he recites, verbatim, the proper rule governing mootness in a class action: "'In a class action, the claim of the named plaintiff, who seeks to represent the class, must . . . be live both *at the time he brings suit and when the district court determines whether to certify the putative class.*'"[63] *Id*. (emphasis added) (quoting *Tucker v. Phyfer*, 819 F.2d 1030,

[63] In the briefing on the defendants' Rule 52(c) motion, Chief Roper "do[es] not concede" that this rule applies to him, but offers no reason for this stance, other than that the plaintiffs have not argued the rule applies. Doc. 273 at 5. This position carries no weight because courts are "obliged to consider standing sua sponte even if the parties have not raised the issue." *AT&T Mobility, LLC v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1356, 1360 (11th Cir.

1033 (11th Cir. 1987)); *see also Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *Murray v. Auslander*, 244 F.3d 807, 810 (11th Cir. 2001); *McKinley v. Kaplan*, 177 F.3d 1253, 1256 (11th Cir. 1999).

2. By Chief Roper's own admission, K.B. and P.S. "were Birmingham City Schools students at the time the complaint was filed and at the time of certification." Doc. 273 at 6. Consequently, because one member of each subset of named plaintiffs would have benefitted from the relief they seek at the time they filed the complaint and at the time this court certified their class, the plaintiffs' class claim is not moot.

3. Alternatively, Chief Roper contends that the plaintiffs lack standing to represent a class. Chief Roper is partially correct. P.S. cannot serve as a named plaintiff because Officer Clark did not violate her Fourth Amendment rights. P.S.

2007) (citing *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005)). Then, after the close of trial, Chief Roper filed a motion to decertify the class and dismiss all claims against him in his official capacity. Doc. 276. In it, he again notes the rule regarding class action mootness should not apply to this case because the plaintiffs have failed to invoke it. *Id.* at 4. He also argues that the rule should not apply to this action because it is brought pursuant to 42 U.S.C. § 1983 and that the Supreme Court implicitly overruled the rule in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *Id.* at 4 n. 1. The court agrees with the plaintiffs that the motion is repetitive of Chief Roper's earlier filings, but because it raises jurisdictional questions, the court must address it. *Arbeaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). The court cannot make heads or tails of Chief Roper's § 1983 argument; it is clear that he believes the class action mootness rule should not apply to the case because it is brought pursuant to § 1983, but not why that is the case. His argument that the *Wal-Mart Stores* implicitly overruled the rule is undermined by the fact that the Court cited the rule as good law in a case published two years after *Wal-Mart Stores*. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) ("In *Sosna*, the Court held that a class action is not rendered moot when the named plaintiff's individual claim becomes moot *after* the class has been certified."). As to the rest of Chief Roper's motion, because the court agrees with the plaintiffs that Chief Roper is essentially rehashing arguments he raised in opposition to class certification in 2012, the motion is denied.

testified at trial th

7. Because "'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members,'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)), P.S. cannot serve as a named plaintiff for the purpose of representing a class of Birmingham City School students.

8. On the other hand, K.B. has standing to pursue injunctive relief because, as of the time of class certification, she had established a real and immediate threat of future injury as defined by Eleventh Circuit case law.!ty`×[rH„wwwwwwwwwwwwwwwwwwww

subjected him to a chokehold that rendered him unconscious and damaged his larynx. *Id*. at 97–98. Lyons sued for damages and an injunction to bar future police use of chokeholds absent an immediate threat of deadly force. *Id*. at 98. The district court granted the preliminary injunction, which the Ninth Circuit affirmed, but the Supreme Court reversed. A sharply divided Court reasoned that Lyons' assertion of standing rested on mere speculation that police might stop him in the future, and if they did, they might subject him to the challenged chokehold. *Id*. at 108. The Court concluded that:

> [i]n order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the Cit

plaintiffs' claims, *id*. at 1266, before determining that the case was "more like *Church v. City of Huntsville* than *Lyons*," and, relying heavily on *Church*, determined that the plaintiffs largely[65] had standing to pursue the injunctive relief they sought, *id*.

The *Church* and *31 Foster Children* courts pointed to two factors that they found distinguished those cases from *Lyons*. The first is that while *Lyons* involved a member of the general public who had an unfortunate encounter with a police officer, the plaintiffs in *Church* and *31 Foster Children* were *involuntary* members of a specific group of people who, by definition, had an increased risk of exposure to the challenged behavior. As the *Church* court explained, "[t]he tenor of the plaintiffs' complaint . . . is that they are homeless involuntarily. Because of the allegedly involuntary nature of their condition, the plaintiffs cannot avoid future 'exposure to the challenged course of conduct' in which the City allegedly engages." 30 F.3d at 1338. Similarly, the *31 Foster Children* court noted that the plaintiffs in that case were "in the custody of the defendants involuntarily and will be until they are returned to their parents, are adopted, or reach the age of majority. They cannot avoid exposure to the defendants' challenged conduct." 329 F.3d at 1266.

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[65] The outcome of *31 Foster Children* is not as cut-and-dry as *Church* because of the number of plaintiffs, the different ages

The second fact

imminent risk of being exposed to Freeze +P again to have standing to pursue injunctive relief. Like the homeless in *Church* and the foster children in *31 Foster Children*, she is an involuntary member of a specific group that is at an increased risk of exposure to the challenged behavior. School attendance is compulsory.[66] S.R.O.s are stationed in all Birmingham public high schools. They carry Freeze +P and have no qualms about using it, even against a group of students who engage in the basic teenage act of gathering around to watch other students fight. These facts align K.B. more closely with the plaintiffs in *Church* and *31 Foster Children* than with Lyons. Moreover, the court heard Chief Roper testify repeatedly that the S.R.O.s acted pursuant to B.P.D. policy when they exposed the plaintiffs, including K.B., to Freeze +P. Consequently, the challenged behavior here, in the words of the *31 Foster Children* court, is the product of "injurious policy, and different from the random act at issue in *Lyons*." 329 F.3d at 1266.

13. The court turns next to Chief Roper's contention that it should find that K.B. lacks standing because "[c]ourts must generally be 'unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place

him or her at risk of that injury.’”

credible threat of detention . . . as she possesse[d] none of the listed documentation to prove that she ha[d] permission to remain temporarily in the United States." *Id.* at 1258–59. Because the challenged law empowered law enforcement to "investigate]Öà

rejected as too attenuated to confer standing. Indeed, the circumstances under which the S.R.O.s sprayed the plaintiffs in this case with Freeze + P demonstrate that a variety of normal adolescent behavior is sufficient to result in S.R.O.s spraying students with Freeze +P.

15. To the extent that Chief Roper raises concerns that by conferring standing on K.B., the court will be sanctioning behavior that falls outside the confines of the law, the court notes that while the question of whether K.B. committed a crime is not an issue in this case, the court doubts very much that by standing outside a school building and sobbing, K.B. behaved unlawfully. Moreover, as *Georgia Latino Alliance* illustrates, all that is necessary for K.B.'s feared injury to occur is for an S.R.O. to *believe* K.B. poses a sufficient threat to justify the use of Freeze +P, even though K.B.'s behavior may actually be perfectly innocuous. *See* 691 F.3d at 1259 ("[H]ere all that is necessary for application is an officer's finding of probable cause that a legal violation has occurred.").

16. The fact that although K.B. was arrested, she—nor indeed, any of the plaintiffs—did not face legal ramifications for the behavior that caused Officer Smith to spray her with Freeze +P is a further indication that her actions were within the confines of the law. Additionally, the court notes that at trial, it heard disturbing testimony from Officer Henderson and Nevitt that seemed to suggest that they always

arrest students they spray with Freeze +P as a post-hoc justification of their use of force. 2/3/15 at 5; 2/2/15 at 60.

17. In sum, because K.B. is an involuntary member of a group of people who have an increased risk of being exposed to Freeze +P compared to the population at large and because the S.R.O.s' use of Freeze +P is pursuant to B.P.D. policy, the court finds that, based on this circuit's precedent, she has standing to pursue injunctive relief against Chief Roper.

B. K.B.'s class claim against Chief Roper

K.B. pursues a claim against Chief Roper in his official capacity on behalf of herself and a certified class of Birmingham City Schools students for municipal liability under 42 U.S.C. § 1983. Doc. 188 at 57–58. "[A] suit against a governmental officer 'in his official `Ö128'Àd06 •

"A municipality may be liable under § 1983 for the actions of its police officers only if the municipality is 'found to have itself caused the constitutional violation at issue; it cannot be found liable on a vicarious liability theory.'"[67] *Ludaway v. City of Jacksonville, Fla.*, 245 F. App'x 949, 951 (11th Cir. 2007) (quoting *Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1145 (11th Cir. 2007)). "'It is only when the execution of the government's policy or custom . . . inflicts the injury that the municipality may be held liable under § 1983.'" *Id*. (quoting *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998)). "Thus, to establish municipal liability under § 1983, [a] plaintiff must show that: (1) his constitutional rights were violated, (2) the municipality had a custom or policy that constituted deliberate indifference to his constitutional rights, and (3) the policy or custom caused the violation of his constitutional rights." *Id*. (citing *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004)).

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[67] K.B. seems to argue that her municipal liability claim should be evaluated with the far easier to satisfy standard than the court uses to evaluate § 1983 claims against individual defendants. Doc. 274 at 26 (quoting *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990)) ("To prevail on a § 1983 claim, Plaintiffs must show '(1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of law.'"). This position is disingenuous for two reasons. First, [illegible]

K.B. easier to satisfy K.B

K.B. advances two theories of municipal liability against Chief Roper. The first is that Chief Roper violated her Fourth Amendment rights "[b]y promulgating an unconstitutional policy as applied in the Birmingham schools and by condoning unconstitutional customs and practices with respect to the use of chemical weapons in the Birmingham Schools." Doc. 188 at 57. The second is that Chief Roper violated her Fourth Amendment rights "[b]y failing to train, supervise, and monitor the use of Freeze +P by S.R.O.s in the Birmingham schools." *Id*. at 59. As will become apparent, there is a great deal of overlap between the two theories, but because they implicate slightly different facts, the court will address each in turn.

1. K.B.'s Policy and Custom Claim

K.B. first contends that Chief Roper rendered the city of Birmingham liable for violating her Fourth Amendment rights by promulgating an unconstitutional policy or custom. For the purposes of our analysis here, "'[a] policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality.'" *Cooper v. Dillon*, 403 F.3d 1208, 1221 (11th Cir. 2005) (quoting (quoting *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997)). "'A custom is a practice that is so

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have caused a municipal employee to violate a plaintiff’s cons

F.3d at 1187 (quoting *Cuesta v. Sch. Bd. of Miami–Dade Co*., 285 F.3d 962, 967 (11th Cir. 2002)).

The court makes the following conclusions of law:

1. The defendant S.R.O.s made a number of remarkable comments at trial. On cross-examination, it came to light that Officer Smith made an off-color joke during his deposition that chemical spray benefits the victim because it is an effective nasal decongestant. 2/3/15 at 233–34. Officer Benson testified that she never tried to separate students who were fighting because she feared that she would hurt herself. 2/3/15 at 183–84. On cross-examination, Officer Benson also confirmed that she testified in a deposition that she arrested students for cursing. *Id*. at 178. Officer Nevitt testified that he considers mace safer than hands-on techniques when small, female students are involved because of the size differential. 2/2/15 at 125–26; *c.f.* Pl. Ex. 1 at 7 (Revision 9, which states that "[w]hile soft empty hand techniques may inflict pain to gain control, they generally will not cause any form of bruising or injury to the subject"); 1/26/15 at 141 (Chief Coulombe's testimony that he used similar controls hundreds if not thousands of times during his thirty-year career, and he never injured anyone).

2. These remarks are worth mentioning, but ultimately they bear little on the court's analysis, which is simple. At trial, the court heard testimony from multiple

defendant S.R.O.s and, most importantly, Chief Roper, that Birmingham police officers are allowed to respond to a given level of resistence with a degree of force up to two levels higher than the resistance at issue. 1/23/15 at 150; 2/2/15 at 166; 2/3/15 at 54. Chief Roper explicitly testified that this practice meant that chemical spray, a Level 4 use of force, is a permissible response to verbal noncompliance, which is Level 2 resistance. 1/23/15 at 128. In short, the interplay between B.P.D. policy and custom explicitly permitted Officer Smith to spray K.B. with Freeze +P, which the court previously determined was excessive force.

3. As disturbing as all of this is, as explained above, Chief Roper is not liable for maintaining this state of affairs unless K.B. can point to evidence of a history of widespread prior abuse or similar prior incidents in which S.R.O.s violated constitutional rights. At trial, the plaintiffs submitted into evidence 110 use-of-force reports describing incidents in which S.R.O.s sprayed Birmingham City Schools students with Freeze +P between 2006 and March 2014. The incidents, which involve some in which the students made verbal threats, include:

- Officer Joel Davis, who is not a defendants in this case, spraying a student because he "was very loud and boisterous and created a big commotion." Pl. Ex. 15 at 0052. In the arrest narrative, Officer Davis noted that the student "had to be maced because he was completely out of control." *Id*. But, it appears from the report that the student was merely, albeit loudly and profanely, arguing with an assistant principal and that Officer Davis was physically restraining the student when he sprayed him. *Id.*

- Officer Tarrant sp

as the court has previously explained, the inquiry is whether the force was reasonable. Here, the reports describe a pattern of incidents in which S.R.O.s used force in a manner that was disproportionate to the threat posed by the student at issue.[69] In short, they describe S.R.O.s using excessive force in violation of the Fourth Amendment.

5. At trial, Chief Roper testified that he reviews all use-of-force reports.[70] 1/23/15 at 86. Consequently, the court finds that he was aware of a pattern of ongoing constitutional violations that resulted from B.P.D. policy or custom and nonetheless continued to maintain the policy or custom. To the extent that the significant shortcomings described above are more aptly characterized as the later, the court finds that the use-of-force reports establish "a widespread practice that, 'although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.'" *Brown v. City of Fort Lauderdale*, 923 F.2d at 1481 (quoting *Praprotnik*, 485 U.S. at 127).

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[69] In this circuit, courts evaluate Fourth Amendment excessive force claims by considering "1) the need for the application of force, 2) the relationship between the need and the amount of force used, and 3) the extent of the injury inflicted." *Vinyard*, 311 F.3d at 1347 (citing *Leslie*, 786 F.2d at 1536). While the reports, not surprisingly, are silent as to the pain experienced by the students the S.R.O.s sprayed, the court finds, based on the testimony by the plaintiffs in this case about the pain they experienced after S.R.O.s sprayed them with Freeze +P, that it was not so de minimus as to counsel tipping the balancing test in Chief Roper's favor, especially given the court's conclusion that the amount of force used here significantly exceeded the amount needed.

[70] "[M]unicipal policymakers cannot evade liability for unconstitutional acts by delegation." *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 998 (11th Cir. 1990) (citing *Praprotnik*, 485 U.S. at 127).

6. Since the use-of-force reports more or less make or break K.B.'s claim against Chief Roper, he unsurprisingly raises several objections to them.[71] First, Chief Roper contends that the incidents described in the use of force reports are insufficiently similar to establish deliberate indifference.[72] *See* doc. 273 at 19 (quoting *Mercado v. City of Orlando*, 407 F.3d 1152, 1162 (11th Cir. 2005)) ("[P]rior incidents demonstrating notice must have 'involved factual situations that are substantially similar to the case at hand.'"). Here, K.B. alleges that Officer Smith inflicted excessive force on her by spraying her with Freeze +P because she was verbally non-compliant. The use-of-force reports describe incidents in which, based on the content of the reports, S.R.O.s inflicted excessive force on students by spraying them with Freeze +P because they were verbally noncompliant. They are sufficiently similar to establish deliberate indifference.

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[71] In addition to the cases discussed *supra*, perhaps in an attempt to highlight a circumstance where a report generated by a municipality was nonetheless insufficient to put the municipality on notice of unconstitutional behavior, Chief Roper also points to *Church v. City of Huntsville.* In *Church*, the Eleventh Circuit found a demographic study commissioned by the city noting that "street people in Huntsville had been 'rousted' with some regularity by police and [illegible]

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7. Next, Chief Roper direct

reports were prepared by the S.R.O.s who sprayed students with Freeze +P. They had no incentive to exaggerate the details of the circumstances under which they used Freeze +P so as to make it appear that they had inflicted excessive force when in fact they had not; to the contrary, just as the citizens in *Brooks* had a motive for exaggerating about the officer's alleged misconduct, the S.R.O.s had a motive for minimizing the

787 F.2d [redacted] t 1345 (citing *Depew* ap[redacted] the alleged victims testified[redacted]as elicited from city [redacted]s regarding the other two. *Id*. at 1[redacted] *Depew*, the court [redacted]en incidents—those involving K.[redacted]tion to the nine [redacted]essive force wh[redacted]rigger municipa[redacted]r § 1983.

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9. [redacted] from the use-of-force reports, [redacted]ds that K.B.'s po[redacted]im fails because K.B. has fai[redacted]ct causal link betwee[redacted]licy or custom and [redacted]rights. Doc. 273 at 21–2[redacted]not be liable unless it [redacted]" behind the plaintiff's [redacted]

10. More to the point, the court cannot conceive how Officer Smith's decision to spray K.B. with Freeze +P can be anything other than inextricably intertwined with a policy or custom that explicitly permitted him to spray her under the circumstances. It logically follows that the custom caused Officer Smith to consider spraying K.B. with Freeze +P to be an appropriate use of force.

11. In sum, the interplay between the B.P.D.'s use of force classifications and its custom of permitting officers to respond to resistance with a use of force two steps higher than that resistance caused K.B.'s injury. Moreover, the court finds that the use-of-force reports generated in connection with each use of Freeze +P put Chief Roper on notice of ongoing excessive use of force by S.R.O.s, and by maintaining the status quo, he expressed deliberate indifference to the constitutional rights of Birmingham City Schools uatan tsvi

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administered," Pl. Ex. 3 at 3, which could reasonably signal to an officer that no decontamination efforts are necessary. On the other hand, on the same page, the policy states that "[f]ollowing the use of chemical spray the officer will ensure that the subject receives adequate decontamination as soon as practical." *Id*. Problematically, the policy provides officers with no guidance on what constitutes "adequate decontamination."

14. At trial, Chief Roper offered some clarification:

> The policy requires officers to take adequate decontamination efforts. And so under decontamination, that can be water. That can be time. That can be air. Our policies also requires [sic] the officers to notify the Birmingham Fire and Rescue[73]. . . . [I]f you're asking me does the policy specifically say large qualities of water, then the policy does not say that.

1/23/15 at 68. In other words, Chief Roper

[73] sic

continued resistance may pose such a danger to the officer,

heard no testimony indicating that Officer Smith did *anything* to decontaminate K.B. He did so in reliance on a subpar policy that permits S.R.O.s to spray students with Freeze +P and then do nothing to alleviate their pain. In other words, the policy caused K.B.'s injury. Chief Roper knew of the custom and condoned it. Taken together, these facts are sufficient for the court to hold the B.P.D. liable through Chief Roper for Officer Smith's failure to decontaminate K.B.

2.

Brown, 520 U.S. at 407 (citing *Cannon*, 489 U.S. at 1209 (O'Connor, J. concurring and dissenting in part) ("[M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations . . . .")).[74]

The court makes the following conclusions of law:

1. With rega i

regimen that have a connection to officers' use of force. In particular, half of the defendant S.R.O.s testified that they had not received training in soft empty hand and pressure point techniques since their initial training at the police academy. *See* 2/2/15 at 47; 2/3/15 at 166; *id*. at 236. This fact is relevant because the plaintiffs contend that these techniques are an appropriate alternative to chemical spray, and, as Chief Coulombe testified, they are a skill set that officers need to maintain over time. 1/27/15 at 63. The court also heard testimony that the B.P.D. either failed to educate its officers about the differences between Revision 9 and Revision 10, or waited for over a year after the implementation of Revision 10 to do so. 2/2/15 at 49, 54–55; *id*. at 162; 2/3/15 at 184. This is relevant here because Revision 10, unlike Revision 9, explicitly instructs officers to take into account, among other factors, an individual's age and size when determining whether a given degree of force is appropriate. Pl. Ex. 2 at 11. More generally, some of the defendant S.R.O.s' testimony called into question whether they had received adequate S.R.O.-specific training, 2/2/15 at 60, and, in particular, *id*. at 205, whether they had received adequate training regarding adolescent-specific deescalation techniquesin particular, all

they sprayed students because they felt they did not know how to employ lesser degrees of force. Rather, they testified that they sprayed students, even those engaging solely in verbal resistance, because B.P.D. policy allowed them to do so. As explained above, it seems clear to the court that, with regard to Officer Smith's initial use of Freeze +P, the "moving force" behind K.B.'s injuries was that, per B.P.D. policy or custom, officers are allowed to respond to verbal noncompliance with Freeze +P. In sum, K.B.'s failure-to-train argument is really just another way of getting at her policy-or-custom claim, and because this approach lacks sufficient causation, the court rejects it.

3. With regard to the decontamination component of K.B.'s claim, five of the six[75] defendant S.R.O.s testified that, based on their training, they believed that the appropriate methods for decontamination were time, air, and calling Birmingham Fire Rescue Services. 2/2/15 at 12; *id*. at 262; 2/3/15 at 30; *id*. at 225; 2/4/15 at 70. As the court previously explained, however, absent circumstances that make its use impractical, providing affected students with copious amounts of water and soap is a necessary component of decontamination. Consequently, the S.R.O.s' training was

[75] At trial, rather than ask Officer Benson what decontamination measures an S.R.O. was supposed to undertake after spraying a student with Freeze +P, counsel for the plaintiffs referenced Officer Benson's deposition testimony that she "did not have any understanding of the appropriate procedures for decontamination of someone who has been sprayed." 2/3/15 at 189.

constitutionally inadequate.[76] Nonetheless, this claim is fundamentally no different that K.B.'

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006) (citing *Weinberger v. Romero—Barcelo*, 456 U.S. 305, 311–313 (1982); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

Chief Roper contends that *Lyons*, which the court previously discussed in its standing analysis, bars K.B. from seeking injunctive relief. Doc. 273 at 24. In *Lyons*, after concluding Lyons lacked standing because his contention that the police were likely to subject him to an allegedly unconstitutional chokehold in the future did not allege a sufficiently imminent injury, the Court stated that:

> Lyons fares no better if it be assumed that his pending damages suit affords him Article III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again—a likelihood of substantial and immediate irreparable injury. The speculative nature of Lyons' claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.

Lyons, 461 U.S. at 111. However, in this circuit, "[a]lthough the irreparable-injury requirement cannot be met absent a real or immediate threat that the plaintiff will be wronged again," *Thomas v. Bryant*, 614 F.3d 1288, 1318 (11th Cir. 2010) (citing *Lyons*, 461 U.S. at 111), "it is also well-established that injunctive relief is appropriate 'to prevent a substantial risk of serious injury from ripening into actual harm,'" *id*. (citing *Farmer v. Brennan*, 511 U.S. 825, 845 (1994)). "In such circumstances, the irreparable-injury requirement may be satisfied by demonstrating

a history of past misconduct, which gives rise to an inference that future injury is imminent." *Id*. (citations omitted).

Consistent with these cases, the court makes the following conclusions of law.

1. At trial, the court heard testimony and the parties submitted evidence that between 2006 and 2014, at a bare minimum, S.R.O.s have sprayed eleven Birmingham City School students solely for verbal noncompliance. In fact, the defendant S.R.O.s readily admit that they consider the use of Freeze +P as an appropriate response to students who refuse their commands, for example, to stop crying, or who simply challenge them by backtalking or cursing at them. Moreover, based on the defendant S.R.O.s' testimony about their decontamination practices and Chief Roper's testimony about the B.P.D.'s decontamination policy, the court finds heard

that misconduct is unlikely to cease without the court's intervention. Consequently, K.B. has satisfied the injury requirement for injunctive relief.

2. Chief Roper next contends that K.B. is not entitled to injunctive relief because damages afford her an adequate remedy at law. Doc. 273 at 25. This stance ignores both the pattern of misconduct at issue here and the class nature of this action. If the court adopts Chief Roper's position, S.R.O.s can continue to commit constitutional violations with impunity as long as they are willing to pay damages. Because the damages available with this kind of claim are relatively minor, the S.R.O.s will be further disincentivized from modifying their behavior. For this reason, the court does not believe that damages afford K.B. an adequate remedy at law.

In sum, K.B. has standing to pursue a municipal liability claim against the B.P.D. through Chief Roper. The remaining plaintiffs, including the bystander plaintiffs who either did not bring individual claims for damages or disclaimed damages, do not. K.B. is due to prevail on her municipal liability claim because Officer Smith sprayed her with Freeze +P and then failed to decontaminate her pursuant to B.P.D.'s unconstitutional policy or custom. Finally, K.B. has made a sufficient showing to render her entitled to injunctive relief.

III. Damages and Equitable Relief.

In light of the court's findings, the court turns finally to the relief portion of its ruling.

A. Damages

Six of the eight plaintiffs are entitled to monetary damages. First, G.S., B.D., T.L.P., and T.A.P. are each entitled to $5,000 in damages on their failure to decontaminate claims. While the S.R.O. who sprayed them with Freeze +P had legitimate reasons for doing so and have prevailed on that aspe

B. Equitable Relief

As previously stated, the plaintiffs ask the court to temporarily enjoin the use of Freeze +P in Birmingham City high schools until Chief Roper, the plaintiffs, and the court can craft policy changes aimed at addressing the constitutional violations at the center of this case. Doc. 274 at 53. However, because the plaintiffs concede that there wev†@Ò

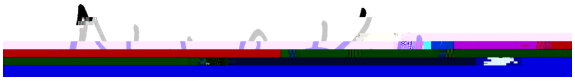
that will address the current deficiencies and form the template for S.R.O.s' use of Freeze +P going forward.[81]

In contrast, the relief regarding the decontamination portion of K.B.'s municipal liability claim is simple: S.R.O.s must decontaminate all students they spray with Freeze +P. As the parties craft an appropriate decontamination plan, here are some general practices to guide them: (1) unless doing so would endanger the student, officer, or bystanders, after an S.R.O. sprays a student with Freeze +P and hat

available at the start of each week is always the same as the initial number agreed on by the parties. Finally, because of Freeze +P's impact on nearby students and to generally educate students about its effects, the parties are also directed to jointly draft, by November 15, 2015, a one-page flyer that is to be posted prominently on each high school's central bulletin boards or to be disseminated electronically to each enrolled student that, among other things, outlines the effects of Freeze +P and the suggested methods to use to obtain relief in the event a student is exposed to Freeze +P.

The court will issue an order and judgment, including taxing costs, after November 15, 2015.

DONE this 30th day of September, 2015.



ABDUL K. KALLON