

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

J.W., et al.,

Plaintiffs,

v.

A.C. ROPER, et al.,

Defendants.

CLASS ACTION

CASE NO. CV-10-B-

injunctive and declaratory relief to end the unconstitutional use of chemical restraints and, so long as the Birmingham Board of Education (the “School Board”) permits SROs to be stationed on school grounds, ensure that the use of chemical weapons by SROs is in accordance with applicable federal and state law.¹ Because all children – persons under the age of 18 as defined by Alabama law – who attend Birmingham high schools are uniformly at risk of harm due to the Police’s unconstitutional policy and deficient training program, the Plaintiffs request that the Court certify all current and future Birmingham high school

He has no standing in this aspect of the litigation – because he successfully sought to have the class claims against him dismissed. He should not now be permitted to weigh in on the class claims.

II. Numerosity

The Police policy and training program on chemical restraints permits SROs to use the weapon in such a way that all students are at risk for exposure and, as result, possible psychological harm. *see Dr yton et al v Western A to pply Co*, No. 01-10415, 2002 U.S. App. LEXIS 28211, *19 (11th 2002)(requiring a proposed class representatives to allege “real and immediate” threat of future injury to request injunctive relief). Therefore, every student attending high school in Birmingham is an appropriate class member. Accordingly, joinder is impracticable in this case. *see* Fed. R. Civ. P. 23(a)(1). Police officers are stationed at every Birmingham high school and are permitted to carry and use mace against students. *see* Ex. 1, Kennedy-Peoples Dep. 55: 1-4. Because of the limited guidance provided in Police policy on mace and the deficient mace training program, SROs use mace on students unnecessarily and in inappropriate situations. One SRO directly sprayed a female student in the face with mace after she refused to stop crying because she had been sexually harassed by a male student. Doc. 75-5, Dec. of K.B. Furthermore, SROs recklessly deploy mace so that students standing in proximity to intended targets are also affected by the chemical. *see*

Doc. 75-5, Dec. of P.S., Dec. of T.L.P. Moreover, SROs often deploy mace in closed and poorly ventilated spaces, such as hallways, classrooms, and lunchrooms, so that students and teachers are also exposed to mace simply by virtue of attending school. *see* Ex. 2, Lyons Dep. 93: 2-16, 95: 12-15 (school principal deponent stating that he and students have been affected by mace after a SRO sprayed the chemical); *see also* Ex. 3, Nevitt Dep. 45: 20-23, 46:1-7 (Defendant Officer stating that Officers do not consider the ventilation of an area prior to deploying mace in schools); Third Amend. Cmplt. ¶ 39 (detailing statements of School Board member Edward Maddox concerning the use of mace by SROs in Huffman high school and the affect that use had on students who were not the SROs intended target); Doc. 75-5, Dec. of J.W. Accordingly, all Birmingham high school children – those who are accused of engaging in misconduct, those who are standing near students accused of misconduct, and those who are merely attending school – are at risk of harm by SROs’s use of mace in the school setting.

Because every Birmingham high school student is at risk for exposure, each is at risk for psychological injury. *see* Ex. 4, Dec. of Daphne Glindmeyer, ¶ 9. Use of chemical restraints, like mace or pepper spray, against adolescents in school environments is a form of corporal punishment that may be perceived by youth as a traumatic event. *d.* at ¶ 4, 6, 7. Experiencing such a traumatic event may have

negative psychological effects for the youth – regardless of whether the youth was sprayed directly or indirectly with the chemical, or affected by backdraft. *d.* at ¶

6. As a result, Birmingham City high school students are at risk for several negative psychological consequences, including emotional and psychological,

but only two were reported as being maced. *d.* Given that mace is airborne and travels, the third student in such a case would likely have been affected, even if not sprayed directly. And this figure does not even begin to address the students, like P.S. and J.W., who are not involved in an incident but are in the vicinity.

Furthermore, the Police Defendants' characterization of all the children who were maced as "violent" or "criminal" is inaccurate. *ee* Doc. 83, pp. 3, 12.

Neither J.W. nor P.S. was engaged in any violent or even disrupting behavior.

Doc. 75-5. K.B. was crying after being sexually harassed by another student. *d.*

G.S. was chasing after another student who had hit her. *d.* Further, none of the named Plaintiffs was prosecuted for the conduct that led to their macing and arrest.

None of the macing incidents for the named Plaintiffs involved "drugs, guns, knives and gangs" – the specter of violence the Police Defendants used to justify the use of chemical weapons against children. *ee* Doc. 83, p. 2. Indeed, the incident reports and police reports for all the macings in the schools since 2004 reveal that none of the macings involved students with guns, knives or drugs, and only one incident (in which two students were maced) included any allegation that the children were in gangs. *ee* Doc. 75-6; Ex. 1 to Plaintiffs' Response to Defendants' Motion to Strike Exhibits to Plaintiffs' Motion for Class Certification.

Indeed, the Police policy on mace is so broad there are virtually
circumstances in which it is considered inappropriate. Kennedy-Peoples Dep. 120:
11-21.

Given the testimony regarding the low levels of misconduct that led to the
macings of the named Plaintiffs, the dearth of evidence of weapons connected with
the macings, and the extraordinarily broad policy o

provides further evidence of the extent of the commonality of the proposed class claims. Defendant SROs provided varying standards

matters covered during the trainings despite the claim that the training occurs every year. Nevitt Dep. 47: 10-22, 167-170; Clark Dep. 51: 8-13, 203: 21-23, 204:1-4;

representatives in *err* requested class certification pursuant to Rule 23(b)(3) and were seeking compensatory and punitive damages for the class, while the Plaintiffs in this matter have requested certification pursuant to Rule 2(b)(2) and are not seeking damages for the class. *d.* at 1557-58. Rule 23(b)(3) requires that the Plaintiffs show that “questions of law or fact common to class members

questions of law necessary for class certification. *See Anderson*, 22 F.Supp. 2d at 1387.

Defendant Moss also argues, relying on *Mertores v. Des*, 131 S. Ct. 2541 (U.S. 2011), that because the Police Defendants' policy allows discretion in the use of mace, commonality is lacking. Doc. 84, pp. 7-8. Moss's reliance on *Mert* is misplaced. In *Mert*, the plaintiffs alleged that, in violation of Wal-Mart's stated policy of non-discrimination, the company, through

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behavior. *Id.* *Mort* does not support a finding that the Plaintiffs' claims here lack commonality.

IV. Adequacy of Representation

Plaintiffs adequately represent the interests of the proposed class because there are no conflicts between the named Plaintiffs and the proposed class and counsel for the Plaintiffs are more than equipped to represent the class. *See Hey Drug Co. v. Gene Pharms, Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003).

A. Adequacy of the Class Representatives

Courts are clear that "the existence of minor conflicts alone will not defeat a party's claim to class certification." *See Hey Drug Co.*, 350 F.3d at 1189. Rather, "the conflict must be a 'fundamental' one going to the specific issues in controversy." *Id.* Essentially, the "fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.* The named Plaintiffs in this matter have no such conflict. As provided in Plaintiffs' motion for class certification, the named Plaintiffs and the members of the proposed class all have an interest in attending school in a safe environment in which they are not at risk for exposure to a dangerous chemical. *See* Doc. 75, 75-1, p. 17.

Defendants' opposition briefs fail to provide any sustainable argument to the contrary. The opposition briefs allude to possible antagonistic interests between

that was at the center of the case, whereas the putative class representatives had been economically harmed by the transaction and were seeking damages. *See Hey Drug Co*, 350 F.3d at 11. Here, there is no such direct or fundamental conflict. First, there is no evidence of any sort of a conflict between the named Plaintiffs

the arrests is even more dubious given SRO testimony that all children maced are arrested to provide the officer with cover from potentially angry parents. Clark Dep. 206: 14-23, 207: 1-9. Finally, what is at issue in the class claims are the policy and the training, not the individual actions.

B Adequacy of Class Counsel

Plaintiffs' counsel has demonstrated that they will adequately represent the proposed class in this matter. "Counsel will be deemed adequate if they are shown to be qualified, adequately financed, and possess sufficient experience in the subject matter of the class action." *City of St. Petersburg et al. v. [redacted]*, *Continental v. [redacted]*, 265 F.R.D. 630, 651 (S.D. Fla. 2008)(citing *Dahlgren v. Nersery Inc. v. E.D. Pont De Neors Co.*, No. 91-8709-CIV, 1994 WL 1251231, at *6,-*7 (S.D. Fla. 1994)). In their motion for class certification, Plaintiffs' counsel submitted a declaration from Mary Bauer swearing to her extensive experience in civil rights and class action litigation, as well as the experience of co-counsel Ebony Howard. *See In re Amerquest Mortgage Co.*, 2010 Bankr. LEXIS 3755, *26,*27 (Bankr. N.D. Ala. 2010)(finding plaintiffs' counsel inadequate to represent the proposed class because he had not provided an affidavit, testimony, or any other evidence as to his qualifications to serve as class counsel); *In re Bitterorth et al.*, 170 F.R.D. 509, 517 (N.D. Fla. 1997).

Police Defendants specifically admit the competency of Mary Bauer, the attorney overseeing this litigation, to handle it. Doc. 83, p. 19. They question only whether attorney Howard possesses sufficient experience in handling class action matters. *ee* Doc. 83, p. 19. Attorney Bauer's extensive experience, along with experience of the Southern Poverty Law Center generally with regard to complex litigation in the southern region fully, meets the adequacy requirement. The work submitted to the Court by Plaintiffs' counsel during the course of this litigation demonstrates that they are not only competent to manage this class action, but also that they possess the rigor and dedication necessary to pursue the interests of the class. *ee* *Lifestar America, Inc. et al. v. U.S., et al.*, 211 F.R.D. 688, 701 (M.D. Ga. 2003)(finding that class counsel's experience along with their efforts during the course of litigation demonstrated commitment to vigorous prosecution of the action and the accompanying skills necessary for the litigation). The Police Defendants provide no information to suggest any deficiency in the litigation team, complaining only that they do not believe attorney Howard is adequate. They make this assertion despite the sworn attestation of attorney Howard's supervisor – whose competence they admit – regarding attorney Howard's years of experience and competence to handle this litigation. The combined experience and commitment to this case demonstrated thus far that the

For the foregoing reasons, the Plaintiffs request that the Court grant their motion for class certification.

Respectfully submitted,

/s/ Ebony Glenn Howard
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