UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 14-cv-14221-MIDDLEBROOKS

TAYLOR ZIEGLER, SARINA WHITE, DOUG BASS AS THE PARENT AND NEXT FRIEND OF MINOR CASSIDY BASS, KENDALL MCCORMICK, AMANDA KATZ, KELLY MCKEE, HALEY O'HANNA, KAELYN DRAZKOWSKI, TYLAR JORDAN, MORGAN KLEABIR, SCOTT BROTHERS, and TIM ALLEN,

Plaintiffs,

v.

MARTIN COUNTY SCHOOL DISTRICT, JENSEN BEACH HIGH SCHOOL, LORIE KANE, individually and in her official capacity as Dean of Students, LAURIE GAYLORD, individually, GREG LAWS, individually and in his official capacity as Principal, THERESA IULIUCCI, individually and in her official capacity as Vice Principal, NORM BRUSH, individually and in his official capacity as the Resource Officer for Jensen Beach High School, and MARTIN COUNTY SHERIFF WILLIAM SNYDER,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Motions for Summary Judgment, filed on January 9, 2015 by Defendant Deputy Norm Brush ("Deputy Brush") (DE 63), Defendant William Snyder in his official capacity as Sheriff of Martin County ("Defendant Sheriff") (DE 64), and Defendants Martin County School District ("Defendant School Board"), Principal Greg Laws ("Defendant Laws"), Assistant Principal Theresa Iuliucci ("Defendant Iuliucci"), and Dean

of Students Lori Kane ("Defendant Kane") (collectively, the "School Defendants") (DE 66)[1] (collectively, "Motions for Summary Judgment"). On January 26, 2014, Plaintiffs filed an Omnibus Response (DE 74), to which Defendants School Board, Laws, Iuliucci, and Kane replied (DE 78) on February 2, 2015. For reasons stated below, Defendants' Motions for Summary Judgment are granted.

I. BACKGROUND

On May 23, 2014, Plaintiffs[2] filed a Complaint, which was later amended, against Defendants, alleging Defendants violated Plaintiffs' constitutional rights when they delayed Plaintiffs' entrance to the school prom. (DE 1). On Saturday, May 3, 2014, Jensen Beach High School held its Senior Prom (the "Prom") at the Port St. Lucie Civic Center ("Civic Center"). (DE 65 at ¶ 1). Plaintiffs were either students at Jensen Beach High School, or guests of another student. (DE 74 at 3, at ¶ 1). Each student who purchased a prom ticket was required to sign the School Board's zero tolerance form for off campus activities (DE 63 at 5, ¶ 6), which provides:

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[1] Defendant Gaylord was not named as a Defendant in the original Complaint. (DE 1). Defendant Gaylord was subsequently named in her individual capacity in the Amended Complaint. (DE 42 at ¶ 16). On July 23, 2014, Robert C. Shearman, the attorney for the other School Defendants, filed an answer on behalf of Defendant Gaylord. (DE 48). However, the School Defendants' Motion for Summary Judgment (DE 66), filed by Robert C. Shearman, does not reflect that it was filed on behalf of Defendant Gaylord. Because the Motion (DE 66) includes arguments by Defendant Gaylord and is made on behalf of the Martin County School District (which, according to the Amended Complaint, includes Defendant Gaylord) the Court construes the Motion (DE 66) as also being filed by Defendant Gaylord.

[2] For ease, Taylor Ziegler, Sarina White, Doug Bass, Kendell McCormick, Amanda Katz, Kelly McKee, Haley O'Hanna, Kaelyn Drazkowski, Tylar Jordan, Morgan Kleabir, Scott Brothers, and Tim Allen will be referred to collectively as "Plaintiffs." On January 21, 2015, Plaintiffs Doug Bass and Kelly McKee filed Notices of Voluntary Dismissal Without Prejudice. (DE 70, 71). Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, a plaintiff may voluntarily dismiss an action by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. *See* Fed. R. Civ. P. 41(a)(1)(A)(i). Here, Defendants served their answers and motions for summary judgment prior to Plaintiffs' Notices of Voluntary Dismissal. Accordingly, the Notices of Voluntary Dismissal are ineffective and the claims of Plaintiffs Doug Bass and Kelly McKee are resolved in this Order.

> Jensen Beach High School, along with Martin County School District, has a **ZERO TOLERANCE POLICY** for alcohol, drugs, or tobacco. Any form of tobacco, alcoholic beverages, or drugs is not permitted on property owned or controlled by the Martin County School District or at any school-sponsored activity, including activities conducted outside of Martin County. Students and guests attending such activities and events may be subject to a breath test.
>
> Any form of profanity is strictly prohibited. School policies are enforced.
>
> ***Please be advised that failure to uphold these rules will result in immediate disciplinary action and possible recommendation for expulsion.***

(DE 63-1, Ex. 3). Plaintiffs Tim Allen and Scott Brothers did not sign the form because they were not students of Jensen Beach High School. (DE 74 at 3, ¶ 4).

On May 3, 2014, Plaintiffs arrived at the Prom between 10:15 p.m. and 10:36 p.m. in a rented party bus. (DE 65 at ¶ 5). Plaintiffs were among the approximately 37 students and guests who arrived on the party bus. (*Id.* at ¶ 6). Defendant Kane, Dean of Students, stopped Plaintiffs as they exited the bus and were told to wait until the bus could be inspected. (DE 63-1, Brush Aff. at ¶ 7). Deputy Brush then asked the driver if he could search the bus for drugs and alcohol. (DE 65 at ¶ 6). The bus driver allegedly gave Deputy Brush permission to search the bus. (*Id.*). During the search, Deputy Brush located an empty champagne bottle inside of the bus. (DE 63 at 5, at ¶ 7). The bus driver told Deputy Brush that the champagne bottle belonged to the students. (DE 65 at ¶ 6). Each of the students, including Plaintiffs, denied knowledge and/or ownership of the champagne bottle. (*Id.* at ¶ 8).

Plaintiffs were then informed that they would be required to take and pass a breathalyzer test before entering the Prom. (*Id.* at ¶ 10). Defendant Kane asked Assistant Principal Iuliucci, who had already left to go home, to return to the Civic Center because she was the only Jensen Beach High School official certified to administer breathalyzer tests. (*Id.*). Defendant Iuliucci returned to the Civic Center approximately 45 minutes later, and administered breathalyzer tests

to Plaintiffs. (*Id.* at ¶ 12). All students passed the test. (DE 74 at 13, ¶ 60). Once the breath tests were completed, Plaintiffs were permitted to enter the prom. (DE 65 at ¶ 13). Ultimately, Plaintiffs missed almost the entire Prom, which ended at midnight. (DE 74 at 13, ¶ 62).

During Plaintiffs' interaction with Defendants, Plaintiff Drazkowski used profanity, and was later suspended for three days. (DE 65 at ¶ 18); (DE 74 at 14, ¶ 77). Principal Laws, who was also present, overheard Plaintiff McCormick use profanity, and McCormick was suspended for 3 days. (*Id.*).

Plaintiffs filed an Amended Complaint (DE 42) alleging: (1) violation of Fourth Amendment – unlawful search and unconstitutional breath test; (2) violation of Fourth Amendment – unlawful seizure; (3) violation of Equal Protection Clause of Fourteenth Amendment – discriminatory school policy; (4) violation of First Amendment based on the suspensions of Plaintiffs McCormick and Drazkowski; and (5) failure of Martin County Sheriff's Office to properly train its police officers. On January 9, 2015, Defendants filed Motions for Summary Judgment, arguing they are entitled to judgment as a matter of law on all claims. (DE 63, 64, 66).

II. MOTION TO STRIKE

Prior to addressing the Motions for Summary Judgment, the Court must address Defendants' Motion to Strike Plaintiffs' 68-page Omnibus Response to Defendants' Motions for Summary Judgment (DE 75), filed on January 27, 2015.[3] Southern District of Florida Local Rule 7.1(c)(2) provides that, absent prior permission from the Court, responsive memoranda are limited to 20 pages. *See* S.D. Fla. L.R. 7.1(c)(2). Plaintiffs did not seek permission from the Court before filing its 68-page Omnibus Response.

[3] Plaintiffs also filed a response (DE 76) to the Motion to Strike on January 27, 2015.

While Plaintiffs "admit that they filed a 68-page response to three separate motions for summary judgment," they argue that "the response is well with the page limit to respond to the three motions' for summary judgment and is in a form the undersigned genuinely believed would be easier for the Court to understand." (DE 76 at ¶ 1). Having reviewed Plaintiffs' response, it is clear that Plaintiffs' strategy of combining all of its responses certainly gave themselves extra pages to address Defendants' motions. Nevertheless, Defendants' Motion to Strike (DE 75) is denied because any perceived advantage to Plaintiffs is overcome by the resolution of the Motions for Summary Judgment in Defendants' favor.

III. LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)(1)(A)). Where the non-moving party bears the burden of proof on an issue at trial, the movant may simply "[point] out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden shifts to the non-moving party to establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). Although all reasonable inferences are to be drawn in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), he "must do more than simply show that there is some metaphysical doubt as to the

material facts." *Matsushita*, 475 U.S. at 586. The non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but instead must come forward with "specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (citing Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the non-moving party fails to make a sufficient showing on an essential element of his case on which he has the burden of proof, the moving party is entitled to a judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323.

IV. DISCUSSION

A. Count I: Violation of Fourth Amendment

1. **Count I (A) – Search of the Bus** (against Defendants Sheriff, Deputy Brush, School Board, and Kane)

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court has held that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citations omitted). Establishing a legitimate expectation of privacy is "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *United States v. Ford*, 34 F.3d 992, 995 (11th Cir. 1994) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967) (Harlan, J., concurring)). "[T]he Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or

otherwise illegitimate." *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985) (citations omitted). Further, Plaintiffs bear the burden of demonstrating a legitimate expectation of privacy in the area searched. *See Rakas*, 439 U.S. at 143 n.12.

Plaintiffs argue they had a reasonable expectation of privacy "aboard their privately chartered party bus." (DE 74 at 18). Plaintiffs note that they paid $3,000 to charter the bus for a total of six hours, and "[t]he written contract between Plaintiffs and the bus company in effect gave Plaintiffs the right to exclude all others from the cabin of the bus during the time period stated in the contract." (*Id.* at 20). Plaintiffs assert that "[j]ust as a person who rents a hotel room acquires a reasonable expectation of privacy in his hotel room for the duration of his stay, Plaintiffs, by paying for the exclusive use of the entire cabin of the bus, acquired a reasonable expectation of privacy in that area of the bus for the duration of the rental period." (*Id.* at 19).

Defendants do not dispute that Plaintiffs had a legitimate expectation of privacy in the cabin of the bus at some point. Rather, Defendants assert that "the evidence fails to demonstrate that the Plaintiffs had a legitimate expectation of privacy aboard the party bus at the time it was searched by Deputy Brush." (DE 63 at 11). Defendants maintain that "[t]here is no doubt that the students' rental agreement had ended when they arrived at their final destination, and the students had no intention of boarding the bus again at any time that evening." (*Id.*). Accordingly, Defendants argue that "Plaintiffs could not have had a legitimate expectation of privacy at the time Deputy Brush conducted the search," and, therefore, Plaintiffs lack standing to challenge the constitutionality of Deputy Brush's search. (*Id.*).

In response, Plaintiffs contend there is a factual issue as to whether or not the rental period had actually expired upon reaching the Civic Center, thereby precluding a finding that

Defendants are entitled to summary judgment.[4] (DE 74 at 21). This factual dispute, however, need not be resolved because it is not material. *See Anderson*, 477 U.S. at 248 (noting that "[f]actual disputes that are irrelevant or unnecessary" are not material). Even assuming Plaintiffs had a legitimate expectation of privacy in the cabin of the bus at the time of the search, the bus driver validly consented to the search.

"A search of property, without warrant or probable cause, is proper under the Fourth Amendment when preceded by valid consent." *United States v. Dunkley*, 911 F.2d 522, 525 (11th Cir. 1990) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). "A consensual search is constitutional if it is voluntary; if it is the product of an essentially free and unconstrained choice." *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001) (citations omitted). A third party who has "common authority over or other sufficient relationship to the premises or effects sought to be inspected" may give valid consent to search an area. *Fernandez v. California*, 134 S. Ct. 1126, 1133 (2014) (citing *United States v. Matlock*, 415 U.S. 164, 170 (1974)). Specifically, a third party's consent is valid if he has mutual use of the property, with joint access to, or control of, the area for most purposes. *See Matlock*, 415 U.S. at 171 n.7. However, "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Fernandez*, 134 S. Ct. at 1133 (citing *Georgia v. Randolph*, 547 U.S. 103, 122-23 (2006)). The Eleventh Circuit has applied the "joint-access or control" test for valid third-party consent to the search of a vehicle. *Dunkley*, 911 F.2d at 525-26.

[4] Plaintiffs maintain that the bus was reserved for Plaintiffs beginning at 5:30 p.m. on May 3, 2014 for six hours. (DE 74 at 21). Accordingly, Plaintiffs argue that when they arrived at the Civic Center at approximately 10:15 p.m., about five hours later, the rental agreement had not expired.

In response to Deputy Brush's request to search the bus, Deputy Brush alleges the bus driver said "go ahead," and gestured for him to enter the bus. (DE 63 at ¶ 5). Defendants argue that "at the time Deputy Brush asked the bus driver for permission, the students ended their trip, were off the bus, and at that time the bus driver had sole authority and dominion over the bus, sufficient to convey consent for the search." (DE 63 at 12). Further, Defendants maintain that "[t]here is no evidence that the consent given by the bus driver was coerced by Deputy Brush," and that "it is undisputed that the consent was given voluntarily both verbally, and physically by motioning Deputy Brush to enter the bus." (*Id.*). Accordingly, Defendants argue that Deputy Brush's search was constitutional.

Plaintiffs argue that the bus driver's alleged oral statement and hand gesture are inadmissible hearsay. (DE 74 at 23-24). Specially, Plaintiffs maintain that the bus driver's statement "go ahead" is hearsay because it is "an out of court statement being offered by the Defendants to prove the truth of the matter asserted, namely that the bus driver was giving his consent." (*Id.* at 23). Additionally, Plaintiffs assert that the bus driver's gesture is "an assertion because it was intended by the bus driver as a communicative sign," and "is hearsay because the Defendant is offering the gesture to prove the truth of the matter asserted, that the bus driver gave [Deputy] Brush consent to enter and search the bus." (*Id.* at 24). Thus, Plaintiffs contend that "there is no non-hearsay record evidence to suggest that the bus driver gave Defendant Brush his consent to search the bus," and that "[w]ithout any non-hearsay evidence, there [can] be no finding that the bus driver's consent made the search constitutional." (*Id.* at 23).

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). A statement is "a person's oral assertion, written assertion, or nonverbal

conduct, if the person intended it as an assertion." Fed. R. Evid. 801(a). However, when an out-of-court statement's significance

> lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. . . . The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parities or is a circumstance bearing on conduct affecting their rights.

Fed. R. Evid. 801(c), Advisory Committee's Note to Subdivision (a); *United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986) ("[v]erbal acts are not in the first instance assertive statements and not offered to prove the truth of the matter asserted.").

Courts have found that an utterance of consent to a search amounts to a verbal act, and is not hearsay. *See United States v. Mena*, 863 F.2d 1522, 1531 (11th Cir. 1989) (explaining that foreign government's expression of consent "is not hearsay at all but rather a verbal act, similar to the utterances involved in making a contract, to which the law attaches independent significance"). This is because "statements that grant or withhold permission to authorities to conduct a search carry legal significance independent of the assertive content of the words used." *See United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) (noting defendant's statement of consent to search is a verbal act, and is not inadmissible hearsay). The bus driver's statement "go ahead," and gesture waiving Deputy Brush onto the bus, are indications of consent that amount to verbal acts, and as such, are not hearsay.

This consent was sufficient to allow Deputy Brush's search of the bus. *See United States v. Geboyan*, 367 F. App'x 99, 101 (11th Cir. 2010) ("As the driver, [Defendant] could consent to a search of the car."). The bus driver's consent was given voluntarily, evidenced by the bus driver's statement and gesture motioning Deputy Brush onto the bus. (DE 63-1, ¶ 5). Even if Plaintiffs' retained some expectation of privacy after exiting the bus, the bus driver had common

authority over the bus sufficient to give Deputy Brush consent because the bus driver "maintained joint access and immediate control over the vehicle." *See Matlock*, 415 U.S. at 171 n. 7; *Dunkley*, 911 F.2d at 526. Further, there are no allegations that Plaintiffs objected to the bus driver's consent. *See Fernandez*, 134 S. Ct. at 1133 (noting a physically present party's objection to search is dispositive as to him, regardless of fellow occupant's consent) (citations omitted). Accordingly, Deputy Brush's search of the bus did not violate the Fourth Amendment, and Defendants are entitled to summary judgment as to Count I (A).

2. **Count 1 (B) and (C) – Breath Test Unconstitutional** (against Defendants Sheriff, Deputy Brush, School Board, Gaylord, Laws, Kane, and Iuliucci)

Plaintiffs divide Count I into two additional subsections ("(B)" and ("C")). In the Amended Complaint, Count I (B) is entitled, "The Breath Test Policy is Unconstitutional," and Count I (C) as "Even If Breath Testing is Constitutional, the Tests Must Be Reasonable and Are Unconstitutional as Applied to the Plaintiffs." (DE 42). Despite their titles, the Court is unable to discern any substantive difference between the two subsections.[5] Essentially, these subsections both attack the breath tests as unconstitutional searches under the Fourth Amendment.

[5] Defendants have briefed Count 1 (B) as a facial challenge to the School Board's breath test policy and Count 1 (C) as an as-applied challenge to the application of the breath tests to Plaintiffs. Despite the Parties' briefing, there are no allegations in Count 1 (B) to support a facial challenge of breath test policy. Even if there were, Plaintiffs have not satisfied the Court that they have standing to challenge the policy. *See, e.g.*, *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000) ("It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy."). Indeed, the record indicates Plaintiffs Ziegler, O'Hannah, and Drazkowski have all graduated from Jensen Beach High School, and they do not allege they will be subject to the Breath Test Policy again. (DE 63-2, 63-3, and 64-4). As will be discussed below, I find that the breath tests were reasonable under the Fourth Amendment, and Plaintiffs are, therefore, not permitted to an award of damages. The only other relief sought in Count I is declaratory relief, which Plaintiffs have not attempted to demonstrate standing to pursue.

The Supreme Court has held that the Fourteenth Amendment extends the constitutional protections of the Fourth Amendment to searches and seizures conducted by public school officials. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985). With respect to searches by school officials, the Supreme Court has instructed that

> the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception . . . [and] second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Id. at 341 (citations omitted). Typically, a search of a student by a school official will be "justified at its inception" "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. Such searches are "reasonably related in scope" "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

Here, Defendants had reasonable suspicion that Plaintiffs had consumed alcohol in violation of school policy (and presumably state law) once Deputy Brush informed school administrators that there was a champagne bottle on the bus, the bus driver attributed ownership of the bottle to Plaintiffs, the bus driver indicated that Plaintiffs had been drinking, and the students all denied consuming alcohol. (DE 65 at ¶¶ 6-8). The use of the breathalyzer test was reasonably related to the objective of determining whether Plaintiffs were intoxicated prior to entering the Prom because the breathalyzer test specifically tested for the presence of alcohol in Plaintiffs' bloodstream. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625-26 (1989) (finding that breath tests are conducted "with a minimum of inconvenience or embarrassment" and "breath tests reveal the level of alcohol in the [] bloodstream and nothing

more."). Additionally, the breath test was not excessively intrusive in light of Plaintiffs age and sex because the test merely required Plaintiffs to exhale. *See Board of Ed. of Indep. School Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002) (finding that given the "minimally intrusive nature of the [urine] sample collection and the limited uses to which the tests results are put, we concluded that the invasion of students' privacy is not significant."). Accordingly, the breath tests did not violate Plaintiff's rights under the Fourth Amendment, and Defendants are entitled to summary judgment on Count I (B) and (C).

B. Count II: Unlawful Seizure (against Defendants Martin County Sheriff, School Board, Deputy Brush, Kane, and Iuliucci)

Pursuant to the Fourth Amendment, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). The Eleventh Circuit has instructed that the "reasonableness standard articulated in *New Jersey v. T.L.O.* . . [applies] to school seizures by law enforcement officers." *Gary ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304 (11th Cir. 2006). First, "a school official may detain a student if there is a reasonable basis for believing that the pupil has violated the law or a school rule." *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 641 (6th Cir. 2008) (citing *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004)). Second, the detention must be "reasonably related in scope to the circumstances which justified [it] in the first place." *Gary ex rel. Alexander*, 458 F.3d at 1305 (citing *T.L.O.*, 469 U.S. at 341).

It is undisputed that Plaintiffs arrived at the Civic Center between 10:15 p.m. and 10:36 p.m. (DE 65 at ¶ 5). Plaintiffs argue that "[t]he record evidence, when viewed in the light most favorable to the Plaintiffs, shows the Plaintiffs were immediately lined up as they exited the bus." (DE 74 at 49). Plaintiffs contend that upon leaving the bus, "they were told they could not

enter the Prom" and "were also told that they could not leave by themselves or even with a parent." (*Id.*). Plaintiffs allege "[t]hey could not use the restroom, and even then could do so with an escort" and that "[t]hey could not talk to any of the students who were not part of the detained group." (*Id.*). Plaintiffs further argue they waited "at least 45 minutes or even a little more for the breathalyzer strips to be brought to Prom," and were then required to wait, even after having passed the breath tests, for their fellow students to be tested before being let into the Prom. (*Id.*). Although Defendants assert the last breathalyzer test was performed at 11:31 p.m. (DE 65 at ¶ 13), Plaintiffs allege the breathalyzer tests were finished "much closer to midnight." (DE 74 at 4, ¶ 13). Accordingly, Plaintiffs argue that the approximately hour and a half detention was unconstitutional.

Defendants disagree, and first argue that Plaintiffs were not seized under the Fourth Amendment. (DE 66 at 10). "At no time were the students prevented from leaving the premises provided they were not going to operate a vehicle." (*Id.*). Rather, Defendants argue, "the students were prohibited from entering the school prom, and prevented from driving themselves anywhere until a breath test was administered." (*Id.*). Alternatively, Defendants argue that even if "the Court finds a dispute of material fact[] regarding the Plaintiffs ability to leave the civic center at all prior to the breath test, the [Defendants'] conduct did not violate the Plaintiffs Fourth Amendment Rights" because Defendants (1) had a reasonable basis for believing Plaintiffs had violated the law and/or a school rule, and (2) the alleged detention was reasonably related in scope. (*Id.*).

Although the record is not entirely clear as to what the students were told once Deputy Brush found the champagne bottle, all reasonable inferences are to be drawn in favor of the non-moving party, and the Court will presume Plaintiffs were seized under the Fourth Amendment

immediately upon exiting the bus.[6] To determine whether the seizure was reasonable, the Court first looks to whether the detention was justified at its inception. *See T.L.O.*, 469 U.S. at 336-37 (1985). As described in Count I, once the champagne bottle was found on the party bus rented by Plaintiffs, School Defendants, as well as Deputy Brush, had reasonable suspicion to believe Plaintiffs had consumed alcohol prior to the Prom, in violation of the school's Zero Tolerance Policy. Based on this reasonable suspicion, Defendants' decision to investigate whether Plaintiffs were indeed under the influence of alcohol was appropriate. *See United States v. Harris*, 928 F.2d 1113, 1117 (11th Cir. 1991) (noting that "[w]here, as here, the initial stop was legal, the [officer] had the duty to investigate suspicious circumstances that then came to his attention.") (citations omitted). This is especially true because no one came forward claiming ownership of the bottle.[7] (DE 65 at ¶ 8). Defendants were, therefore, justified in detaining Plaintiffs upon discovery of the champagne bottle.

Next, the Court must consider whether the detention was "reasonably related in scope to the circumstances which justified [it] in the first place." *Gary ex rel. Alexander*, 458 F.3d at 1305 (citing *T.L.O.*, 469 U.S. at 341). The Supreme Court has held that "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot

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[6] Indeed, Deputy Brush's Incident Report states that, after Deputy Brush found the champagne bottle, the students were told they were not permitted to leave. (DE 63-1, Ex. 2). A reasonable person would not "feel free to leave" under these circumstances (*i.e.*, after being instructed by a uniformed police officer that they "could not just leave").

[7] Plaintiffs argue that "[t]he *T.L.O.* standard of reasonableness under the circumstances . . . cannot be met when 40 students are seized over one bottle." (DE 74 at 51). Plaintiffs assert that "[t]here appears to be no record evidence that the School Defendants (or Brush) tried to figure out which students were sitting nearest to the bottle . . . ." (*Id.*). However, without knowing which Plaintiffs were responsible for the empty champagne bottle, Defendants were justified in detaining all of the passengers, at a minimum on a theory of constructive possession, until they could determine which Plaintiffs violated the Zero Tolerance Policy. *See United States v. Leonard*, 138 F.3d 906, 909 (11th Cir. 1998) (noting "[c]onstructive possession exists when a defendant has ownership, dominion, or control over an object itself or dominion or control over the premises or the vehicle in which the object is concealed.").

disregard the schools' custodial and tutelary responsibility for children." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). Here, Defendants' responsibility for the welfare and safety of Plaintiffs dictated that Defendants could not have allowed the students to leave under the circumstances because "many of them had driven themselves to the Civic Center earlier in the afternoon, and had parked their cars at the Civic Center, and would have gotten behind the wheel to drive home." (DE 63 at 20) (citing Statement of Undisputed Facts at ¶ 8). Indeed, as Defendants argue, "the failure of the School Board to conduct breathalyzer tests on the students in light of the discovery of alcohol . . . could potentially have subjected the School Board to liability to a third party injured by the Plaintiffs." (DE 66 at 12).

Although it is clear that "the brevity of the invasion of [an] individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," the Supreme Court has "emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (citations omitted). This "case does not involve any delay unnecessary to the legitimate investigation," and there is "no evidence that [school officials] were dilatory in their investigation." *Id.* at 687. Even though the detention was prolonged because Plaintiffs had to wait for Defendant Iuliucci (the only Defendant capable of performing the tests) to return to the Civic Center, the Prom tickets expressly stated that the doors closed at 10:00 p.m. (DE 65 at ¶¶ 2, 10). Plaintiffs did not arrive until well past 10:00 p.m., and, therefore, Defendants cannot be faulted for failing to have someone on site to immediately administer the breath tests. Similarly, as Defendants note, the "unforeseen use of numerous breathalyzer mouth pieces prior thereto [] contributed to the length of time the students were required to wait before entering the prom."

(DE 66 at 12). For these reasons, the first portion of the detention (*i.e.*, when Plaintiffs had to wait for Defendant Iuliucci and additional breathalyzers tests to arrive) was reasonable under the circumstances. *See United States v. French*, 974 F.2d 687, 690 (6th Cir. 1992) (finding detention of defendants while waiting for drug dog located 50 miles away was reasonable).

Relatedly, the amount of time it took to administer all of the breathalyzer tests to the students was reasonable. The record is clear that Defendant Iuliucci was the only school official certified to administer the breath tests. (DE 65-1, Iuliucci Aff. at ¶ 5). Defendant Iuliucci was tasked with breathalyzing approximately 37 students. Plaintiffs allege it took "[Defendant] Iuliucci two to four minutes to test each student." (DE 74 at 12, ¶ 49). Given the fact that Defendants were limited in how quickly they could administer the tests, the additional 30-45 minutes it took to test all of the students was reasonable under the circumstances.

However, Plaintiffs also challenge Defendants' decision to prohibit Plaintiffs from entering the Prom until all of the students on the bus had passed the test. (DE 74 at 52). However, "the preservation of order . . . requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *T.L.O.*, 469 U.S. at 339. Indeed, "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Bd. of Ed. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 831 (2002). Defendant Iuliucci asserts "[t]he reason for this decision was to ensure that no student was given an unfair advantage due to his or her position in line, to avoid any appearance of favoritism in the order in which the Students were breathalyzed, and for investigative purposes." (DE 65-1, Iuliucci Aff. at ¶ 11); *see also* (DE 65-2, Laws Aff. at ¶ 16). Additionally, Deputy Brush notes that the students made "disparaging comments" while waiting for the breath tests, and "some of

the students continued to be disruptive" while the breath tests were administered. (DE 63-1, Brush Aff. at ¶¶ 11, 13). For these reasons, I find that Defendants' decision to detain Plaintiffs until all of the breath tests were administered was reasonable under the circumstances. Accordingly, the detention (comprising of the time it took to retrieve the breath tests and administer the breath tests to all students) was reasonable under the circumstances, and Defendants are entitled to summary judgment as to Count II.

C. Count III: 14th Amendment – Equal Protection Clause (against Defendants Sheriff, Deputy Brush, School Board, Gaylord, Laws, Kane, and Iuliucci)

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. However, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "[U]nless the case involves a suspect class or a fundamental right, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest." *Bah v. City of Atlanta*, 103 F.3d 964, 966 (11th Cir. 1997) (citations omitted). Here, Plaintiffs allege "[t]he Defendant School District and Defendant Gaylord's policy is unconstitutional on its face and as applied and violates the Equal Protection Clause of the Fourteenth Amendment." (DE 42 at ¶ 163). "Specifically, Plaintiffs allege that the school instituted a de facto policy whereby all students attending the prom were subject to a vehicular search and/or a breath test." (DE 74 at 44). Plaintiffs argue that the policy "was applied in a discriminatory manner given the fact that only buses or limos arriving at prom were searched for evidence of alcohol, and only students arriving on buses or limos were given breath tests." (*Id.*). These claims fail.

Plaintiffs have failed to articulate a facial challenge to the policy. To the extent Plaintiffs claim that on the night of the Prom the policy was applied in a discriminatory matter, Plaintiffs fail to provide any evidence to demonstrate that Defendants instituted a policy, formally or informally, that "only buses or limos arriving at prom were searched for evidence of alcohol" and/or "only students arriving on buses or limos were given breath tests."[8] Accordingly, Defendants are entitled to summary judgment as to Count III.

D. Count IV: Violation of First Amendment – Plaintiffs McCormick and Drazkowski (against Defendants School Board, Gaylord, Laws, Kane, and Iuliucci)

In Count IV, Plaintiffs Kaelyn Drazkowski ("Drazkowski") and Kendall McCormick ("McCormick") allege Defendants violated their First Amendment rights when they suspended them for three days for cursing while waiting to be breathalyzed, or sometime shortly thereafter. (DE 42 at ¶ 189). Specifically, the Amended Complaint alleges that "Plaintiff Kendall McCormick used profanity on the day of the prom while engaged in a private conversation with her mother" and "Plaintiff Kaelyn Drazkowski was suspended for using profanity while muttering to herself on the day of the prom." (*Id.* at ¶¶ 165, 166). Both Plaintiffs were suspended for three days for their alleged use of profanity outside of the Prom. (*Id.* at ¶ 171). Defendants argue that Drazkowski and McCormick's claim must fail because "(1) the undisputed evidence establishes that Plaintiffs Drazkowski and McCormick used profanity at a school sponsored event, and (2) the School Board is permitted to discipline students for using profanity at a school sponsored event." (DE 66 at 15).

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[8] Defendants argue that searching party buses is rationally related to maintaining order, ensuring student safety, and educating students as to the dangers of alcohol use. (DE 66 at 14); *see also*, *T.L.O.*, 469 U.S. at 339 (noting "the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."). As the Parties agree the appropriate basis of review of the breath test policy is rational basis, it appears, even if such an informal policy existed, it would pass constitutional muster.

Plaintiffs first challenge the authority of Defendants to discipline Drazkowski and McCormick's alleged use of profanity because the speech at issue was voiced off-campus. In *Morse v. Frederick*, the Supreme made clear that school officials have the authority to regulate student speech at an off-campus, school sponsored event. *See* 551 U.S. 393, 410 (2007) ("The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers [*i.e.*, use of illegal drug use]."). Here, it is uncontested that the Prom was a school sponsored event. Plaintiffs signed the "Zero Tolerance Policy" form, which noted that "[s]chool polices [will be] enforced" at the Prom. (DE 63-1, Ex. 3); *see also*, *Morse*, 551 U.S. at 401-02 (noting that the fact that the school event was "an approved social event" which was "subject to district rules for student conduct" was relevant in determining defendant's speech was school speech). Under these circumstances, the fact that the profanity was uttered off-campus does not change the ability of the School Board to regulate the speech.

Next, Plaintiffs argue that, to the extent Defendants are able to discipline at off-campus events, Defendants violated Plaintiffs' First Amendment rights by disciplining them for their use of profanity. The Supreme Court has long held that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, the Supreme Court has cautioned that "the constitutional rights of students are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). In *Bethel Sch. Dist. No. 403 v. Fraser*, the Supreme Court noted that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." 478 U.S. at 683.

The Supreme Court further opined, "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[9] *Id.*

Consistent with these principles, the School Board was justified in regulating Drazkowski and McCormick's use of profanity at the Prom. Drazkowski and McCormick's use of profanity "offends for the same reasons obscenity offends" because it was not used as an "essential part of any exposition of ideas" and thus carries very "slight social value." *Bethel Sc. Dist.*, 478 U.S. at 683. The students were on notice that the Prom was a school sponsored event, and that drugs, alcohol, and tobacco, as well as the use of profanity, were banned. Just as school officials need not tolerate the use of profanity in the classroom or in the halls of the school building, Defendants did not have to tolerate the use of profanity at the Prom, where school officials were tasked with ensuring a safe and comfortable environment for all students. *See Fraser*, 476 U.S. at 685-86 (noting "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."). For these reasons, Defendants are entitled to summary judgment as to Count IV.

E. Count V: Failure to Properly Train Officers (against Defendant Sheriff)

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[9] Plaintiffs argue that in order to regulate their speech, Defendants must show that school administrators had a well-founded belief that a "substantial disruption or material interference with school activities" would occur. (DE 74 at 56) (citing *Tinker*, 393 U.S. at 514). While Plaintiffs are correct that the *Tinker* test is often the prevailing standard in student-speech cases, several Supreme Court cases have carved out exceptions to the *Tinker* test. As explained above, in *Bethel School District No. 403 v. Fraser*, the Supreme Court upheld the discipline of a student's "offensively lewd and indecent speech" uttered during a speech at a school assembly. 478 U.S. at 685. Further, in *Morse v. Fredrick*, the Supreme Court upheld the suspension of a student for displaying a banner promoting illegal drug use during an off-campus school event. 551 U.S. at 405-06. Given the facts of this case, the holdings in *Bethel* and *Morse* are more appropriate than the more general *Tinker* standard. Indeed, unlike *Tinker*, the speech in question was not political or otherwise protected speech, but instead involves profanity.

In Count V of the Amended Complaint, Plaintiffs allege a failure to train claim against Defendant Sheriff based on Deputy Brush's violations of Plaintiffs' constitutional rights. Because Plaintiffs have not established any violation of their constitutional rights, there is no basis for Count V.[10] Defendant Sheriff is, therefore, entitled to summary judgment as to Count V. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant Deputy Brush's Motion for Summary Judgment (DE 63) is **GRANTED;**
2. Defendant Martin County Sheriff's Office (DE 64) is **GRANTED**;
3. Defendants Iuliucci, School Board, Jensen Beach High School, Laws, and Kane, and Gaylord's Motion for Summary Judgment (DE 66) is **GRANTED**;
4. Defendants' Motion to Strike (DE 75) is **DENIED**; and
5. The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida on this 2 day of ~~February~~ March, 2015.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

[10] For this reason, the Court also need not address Defendants School District, Jensen Beach High School, Laws, Iuliucci, Kane, and Deputy Brush's qualified immunity arguments. (DE 66 at 17); (DE 63 at 17).