UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

N.S., *by and through his Parent (J.S.)*, and S.T., *by and through his Parents (M.T. and M.T.)*,	)	
Plaintiffs,	)	
v.	)	**Case No. 3:16-cv-0610**
	)	**Judge Aleta A. Trauger**
TENNESSEE DEPARTMENT OF EDUCATION, TENNESSEE STATE BOARD OF EDUCATION, KNOX COUNTY BOARD OF EDUCATION, and KNOX COUNTY,	)	
Defendants.	)	

MEMORANDUM

Pending before the court are: 1) a Motion for Summary Judgment filed by defendants Tennessee Department of Education ("TDOE") and Tennessee State Board of Education ("TBOE") (collectively, the "State Defendants") (Docket No. 99), to which the plaintiffs, N.S. and S.T., by and through their parents, have filed a Response in opposition (Docket No. 111), and the State Defendants have filed a Reply (Docket No. 119); and 2) a Motion for Summary Judgment filed by defendants Knox County Board of Education and Knox County (collectively, the "Knox Defendants") (Docket No. 103), to which the plaintiffs have filed a Response (Docket No. 110), and the Knox Defendants have filed a Reply (Docket No. 120). For the reasons discussed herein, the motions will be denied.

BACKGROUND AND PROCEDURAL HISTORY

The plaintiffs in this action are developmentally disabled children who formerly attended several public schools in Knox County, Tennessee. The defendants, who oversee Knox County Schools ("KCS") at the state and local levels, are recipients of federal funding and are required

to adhere to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 (the "IDEA"), in providing all students with special needs with a free appropriate public education ("FAPE"). As explained in the court's previous Memoranda (Docket No. 38, p. 15, n.4; Docket No. 92, p. 18), the IDEA further provides that the defendants must uphold applicable State regulations regarding the education of students with special needs, including the Tennessee Special Education Behavior Support Act, Tenn. Code Ann. § 49-10-1304 *et seq*. (the "SEBSA").

The claims in this action are based on allegations that the defendants have systemically violated the SEBSA and, by extension, the IDEA by carrying out practices and policies that lead to the misuse and overuse of isolation and restraint procedures on students with disabilities in KCS. Specifically, this action is based on allegations that KCS faculty and staff regularly perform restraints and isolations without the legally requisite parental notification and official documentation, for longer periods of time and/or in smaller spaces than allowed under the law, and for reasons other than the emergency circumstances in which these procedures are legally permitted to be used. Moreover, the plaintiffs allege that KCS faculty and staff sometimes refer to isolations and restraints by other names in order to justify their use when isolations and restraints are not legally warranted and to avoid compliance with the laws governing the use of isolation and restraint. The plaintiffs allege that the defendants were on notice of these practices but did nothing to address the situation. Finally, the plaintiffs allege that, despite the SEBSA mandate to reduce or eliminate the use of isolations and restraints, the defendants have failed to properly train and instruct KCS faculty and staff to collect necessary information about environmental antecedents to dangerous outbursts by students with special needs and to implement strategies that could de-escalate these situations so as to obviate the need for isolation and restraint procedures.

According to the plaintiffs, all of these actions and omissions by the defendants not only violate the IDEA but also constitute illegal discrimination against the plaintiffs and other special needs students based on their disabilities, in violation of Title II of the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("Title II"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). As a result of having experienced a number of allegedly improper and/or avoidable isolations and restraints throughout various KCS schools, the plaintiffs assert that they have suffered psychological and emotional damage. The plaintiffs also assert that, due to the impact this has had on them, they are no longer able to attend KCS schools, at great expense and emotional suffering to themselves and their families.

On March 16, 2016, the plaintiffs filed the Complaint in this action against TDOE and the Knox Defendants, bringing claims for violation of the IDEA, Title II, and Section 504, and seeking compensatory damages as well as injunctive relief. (Docket No. 1.)

On July 14, 2016, the court issued an Order denying the defendants' Motions to Dismiss for failure to state a claim under Rule 12(b)(6) that were based on the argument that the plaintiffs' claims should have been exhausted through state administrative procedures before being brought in federal court. (Docket No. 39.)[1] The court explained, in its accompanying Memorandum, that exhaustion of the plaintiffs' claim in this action is not necessary because the claims are about systemic practices at the state and local level that effect all students with disabilities, rather than merely challenging the content or implementation of any single student's individualized education plan ("IEP"). (Docket No. 38.) For the same reasons, on April 12,

[1] For reasons discussed more fully therein, this Order also granted the plaintiffs permission to amend their Complaint to add as defendants the TBOE and the Tennessee Advisory Council for the Education of Students with Disabilities (the "Council"). (Docket No. 39.) The plaintiffs did, in fact, file such an Amended Complaint on July 15, 2016 (Docket No. 41), but the Council was later dismissed by agreement of the parties and is no longer a party to this action (Docket No. 71).

2017, the court denied the Knox Defendants' Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) that was based on a renewed argument that the claims should have been administratively exhausted. (Docket Nos. 92, 93.)

On June 13, 2017, the State Defendants filed the pending Motion for Summary Judgment (Docket No. 99), along with a Memorandum in support (Docket No. 102), arguing that they have not violated the SEBSA or the IDEA because there is no evidence to show a systemic practice of misuse or overuse of isolations and restraint in KCS, let alone that the State Defendants knew of and either condoned or overlooked any such practice. Moreover, the State Defendants argue that the plaintiffs cannot prove a violation of Title II or Section 504 because there is no evidence of bad faith or gross misjudgment. The State Defendants also assert that the plaintiffs are not entitled to the injunctive relief they seek because they are no longer enrolled in KCS and there is no evidence to show that they intend to re-enroll there. Additionally, the State Defendants argue that the plaintiffs are not entitled to damages for the *emotional* suffering of their parents, who have brought this action on the plaintiffs' behalf but without naming themselves as parties. Finally, the State Defendants request oral argument on their Motion. In support of their motion, the State defendants filed a Statement of Undisputed Material Facts (Docket No. 100) and a number of documents (Docket Nos. 101, 106).

Also on June 13, 2017, the Knox Defendants filed a separate Motion for Summary Judgment (Docket No. 103), along with a Memorandum in support (Docket No. 105). The Knox Defendants reiterate the arguments made by the State Defendants that injunctive relief is not appropriate and that the plaintiffs' parents' emotional damages cannot be recovered. They also add the additional arguments that 1) not only is there no *systemic* practice of misuse or overuse of isolations and restraints in KCS but *none* of the isolations and restraints carried out on the

plaintiffs were improper, and so there is no evidence of *any* SEBSA or IDEA violation by the Knox Defendants; 2) there is no evidence of the requisite *intent* to discriminate on the basis of the plaintiffs' disabilities to support the plaintiffs' Title II and Section 504 claims; and 3) none of the plaintiffs' claims can be based on occurrences that took place outside of the relevant limitations periods (more than two years prior to the filing of this action, or earlier than March 16, 2014, for the Title II and Section 504 claims, and more than one year prior to filing, or earlier than March 16, 2015, for the IDEA claims). In addition, the Knox Defendants filed their own Statement of Undisputed Material Facts (Docket No. 104) and a Notice of Filing regarding a recently issued opinion from the Eastern District of Tennessee, *I.L. v. Knox County Board of Education*, 3:15-cv-558 (E.D. Tenn. June 15, 2017) (Docket No. 107).

On July 5, 2017, the plaintiffs filed a Response in opposition to the Knox Defendants' Motion for Summary Judgment (Docket No. 110) along with a number of supporting documents (Docket Nos. 113, 114). On the same day, the plaintiffs filed a Response in opposition to the State Defendants' Motion for Summary Judgment (Docket No. 111), again attaching a number of supporting documents. On July 8, 2017, the plaintiffs filed a Response to the State Defendants' Statement of Undisputed Material Facts. (Docket No. 117.)

On July 24, 2017, the State Defendants filed a Reply in further support of their Motion for Summary Judgment (Docket No. 119) and the Knox Defendants also filed a Reply in further support of their Motion (Docket No. 120).

On July 25, 2017, with leave of court, the plaintiffs filed a complete Response to the Knox Defendants' Statement of Undisputed Material Facts.[2] (Docket No. 126.) Also on July

[2] The plaintiffs had earlier filed an incomplete Response to the Knox Defendants' Statement of Undisputed Material Facts (Docket No. 112) and then supplemented the record with their complete Response after the deadline had passed. For this reason, the Knox Defendants argue in

25, 2017, the plaintiffs filed a Notice of New Authority regarding another recent decision from the Eastern District of Tennessee, *L.H. v. Hamilton Cty. Bd. of Educ.*, 1:14-cv-126 (E.D. Tenn. Jan. 17, 2017). (Docket No. 121.)

THE EVIDENCE IN THE RECORD[3]

It is undisputed that S.T. attended kindergarten, first, and second grades at Cedar Bluff Elementary School within KCS for the 2011/12, 2012/13, and 2013/14 school years. He then transferred to Amherst Elementary School, also within KCS, for third grade in the 2014/15 school year, and remained there until May of 2015, when he transferred back to Cedar Bluff. Soon thereafter, he was placed in the Knoxville Adaptive Education Center (KAEC) in KCS and attended school there from May of 2015 through the rest of that school year and the summer after, and he began fourth grade at KAEC in the 2015/16 school year. S.T. then received homebound services through KCS from November of 2015 through February of 2016, before returning to Amherst for the remainder of the school year and beginning fifth grade at Amherst in the 2016/17 school year. In October of 2016, S.T. withdrew from KCS altogether and has been homeschooled by his mother ever since.

It is also undisputed that N.S. first enrolled in KCS for second grade at South Knoxville Elementary School in the 2013/14 school year. In April of 2014, he transferred to Dogwood Elementary School, also within KCS, where he remained for the duration of second grade as well

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their Reply that any statements not addressed in the earlier filing should be deemed conceded for purposes of this motion. In light of the voluminous number of filings in this action, however, the court has already granted the plaintiffs permission to file their completed Response. (Docket No. 125.) Moreover, the court's review of the Knox Defendants' Statement of Undisputed Material Facts and the plaintiffs' Response thereto reveals that the disputes are mostly about the characterization of the evidence in the record rather than what the record actually contains. The court, thus, does not find the late Response to be prejudicial and will neither disregard it nor make any factual determinations in favor of the defendants due to the timing of this filing.

[3] For purposes of the pending motions for summary judgment, the facts recounted in this section are either undisputed or are presented in the light most favorable to the plaintiffs.

as third grade in the 2014/15 school year, and part of fourth grade in the 2015/16 school year. Following a brief hospitalization in the fall of 2015, N.S. received homebound services through Dogwood from November of 2015 through January of 2016. Then, in January of 2016, in the middle of his fourth grade year, N.S. transferred to Spring Hill Elementary School, also within KCS, but only attended Spring Hill for 6 days before his mother began to homeschool him and then officially withdrew him in February of 2016 and homeschooled him for the remainder of the school year. The following school year, N.S. enrolled in another school district outside of KCS in Blount County, Tennessee, where he remains enrolled.

It is further undisputed that the plaintiffs' parents did not have complaints about the content or implementation of the plaintiffs' IEPs during their enrollment in various KCS schools. Rather, as discussed in the background section, the plaintiffs base this action solely on allegations that they suffered improper isolations and restraints while attending all of the KCS schools referenced above. To support their claims, the plaintiffs have placed in the record the deposition testimony and Declarations of their parents, recounting in detail regular recurring incidents of the plaintiffs being subjected to isolations and restraints without formal parental notification, without official documentation, in isolation rooms or areas that were less than forty square feet in volume, for hours at a time, and/or for disciplinary reasons that were not responsive to emergency behavior.[4] Moreover, the plaintiffs proffer their parents' statements, as

[4] A major issue in this action is the question of whether many of the incidents recounted in the record are truly "isolations" under the legal definition. The defendants take issue with the plaintiffs' parents' characterizing as isolation incidents that the defendants claim were truly "time outs" or other non-isolation, permissible disciplinary procedures. The plaintiffs' parents, in turn, take issue with the KCS faculty and staff having labeled these incidents as something other than isolation when, in fact, they assert that the plaintiffs were involuntarily confined to areas they were prevented from leaving, conditions they claim constitute isolations under the legal definition. As discussed more fully below, it will ultimately be for the trier of fact to determine whether the alleged incidents took place as reported by the plaintiffs and their parents,

well as point to documentation in the record of isolations and restraints that were reported by KCS staff, to show that KCS staff at the above-mentioned schools did not pay sufficient attention to antecedent environmental triggers in order to reduce the outbursts that necessitated the isolations and restraints. The plaintiffs have also placed evidence in the record of at least one other Tennessee public school student who experienced similar incidents.

Further, it is undisputed that the plaintiffs did not file any administrative complaints with TDOE or the State of Tennessee regarding their concerns about isolations and restraints. Instead, the plaintiffs assert other grounds for finding the State Defendants to have been on notice of potential abuses of isolation and restraint procedures in KCS and throughout the state. Specifically, the plaintiffs have placed evidence in the record regarding data collected by the State Defendants about isolation and restraints as well as recommendations made by the Tennessee Advisory Council for the Education of Students with Disabilities (the "Council").

In response, the defendants have placed in the record reports of the plaintiffs' documented isolations and restraints, the Behavioral Intervention Plans ("BIP"s) and Functional Behavior Assessments ("FBA"s) for the plaintiffs that were prepared by KCS staff, all of which were agreed to and signed by the plaintiffs' parents, and documentation of the training programs and other measures provided by the State Defendants in an effort to reduce the use of isolations and restraints throughout the state.

All of this evidence is discussed in greater detail in the subsections below.

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whether the factual circumstances meet the legal definition of isolation, and, if so, whether they were carried out in accordance with the applicable regulations. At this stage, however, the plaintiffs have certainly put forth sufficient evidence that the incidents meet the legal definition of isolation and, for purposes of recounting the facts in the light most favorable to the plaintiffs, the court will employ the "isolation" terminology used by the plaintiffs' parents in their testimony.

I. Incidents of Isolations and Restraints

S.T.'s mother, Ms. M.T., testified that, while S.T. was at Cedar Bluff, she was regularly notified that he had been restrained and/or placed in isolation from anywhere between two and four hours and had missed a great deal of the school day.[5] (Docket No. 110-3 at 78:20-79:10, 91:19-92:15.) Any documented reports of these incidents (when completed) did not include information about what environmental antecedents triggered S.T.'s outbursts, and her communications with the school led Ms. M.T. to believe that this information was not being collected or recorded. (*Id.*) Ms. M.T. further testified that, while S.T. was at Amherst, she received regular messages from a classroom aide that S.T.'s teacher, Mr. Hagood, was not following S.T.'s BIP, was ignoring known antecedents to S.T.'s outburst behavior, was unwilling and unable to de-escalate situations in which S.T. would become agitated and ultimately require isolation or restraint, restrained S.T. without documentation on at least one occasion, and scratched S.T.'s face while he was in a safe space in the classroom, and that the principal of Amherst was not responsive to any of these issues. (*Id.* at 53:4-62:25, 66:11-67:20.)

Finally, Ms. M.T. testified that, while he was at KAEC, S.T. was subject to rampant isolations and restraints. (*Id.* at 37:19-43:25.) These often occurred because staff members would ask S.T. to stay behind and write sentences at the end of the school day, forcing him to sit in a room next to the playground where he could see other children be dismissed and go outside to play, even though this was a known trigger for him to become aggressive, at which point he would be placed in a "time away" room. (*Id.*) Ms. M.T. also stated that KAEC staff members would overlook other known triggers to S.T.'s outbursts, such as refusing to allow S.T.'s parents

[5] Ms. M.T. states that she was notified either by S.T. or by members of the school staff. It is not entirely clear whether she always received proper and timely official parental notification from Cedar Bluff.

to enlarge his worksheets or giving S.T. work well beyond his ability, though he continued to act aggressively in response, resulting in the need for isolation or restraint. (*Id*.) Both Ms. M.T. and S.T.'s father, Mr. M.T., have stated that the "time away" room at KAEC was really a converted bathroom with no windows and an open doorway that was often barricaded with a large gym mat.[6] (Docket No. 110-7 (Declaration of Ms. M.T.); Docket No. 110-2 (Declaration of Mr. M.T.).) The room had nothing inside (not even a desk or chair). (*Id*.) S.T. would regularly be isolated in this room for hours at a time, even for most of the school day, and was further told to remain in a small space within the room demarcated by a painted green line on the floor until he could complete the tasks of sitting with crisscrossed legs, verbally requesting a staff member to begin a five-minute timer, and then remaining perfectly still or quiet for five continuous minutes. (*Id*.) Failure to complete these instructions, in this order, would result in S.T.'s continued isolation in the room, regardless of whether any outburst had subsided and he was otherwise composed. (*Id*.)

On one occasion, S.T. became trapped between the gym mat and the wall of this room and was badly bruised, and KAEC staff provided inconsistent reports to S.T.'s parents about how the injury had taken place. (Docket No. 110-3 at 30:18-31:19.) Ms. M.T. stated that she has witnessed her son isolated in this room and has suffered nightmares, loss of sleep, and bouts of crying as a result. (Docket No. 110-7.) According to Mr. M.T., S.T. referred to this room as the "evil room" and reported being trapped inside. (Docket No 110-3 at 28:19-30:16; Docket No. 110-2.) As a result, S.T. is afraid of gym mats and enclosed spaces, often being unable to complete occupational therapy when gym mats are used, and experiencing severe anxiety at doctors' appointments where patient rooms are small and confined. (*Id*.)

[6] Photographs of this room indicating its size (less than 40 square feet in volume) are attached to Mr. M.T.'s Declaration. (Docket No. 110-2.)

Similarly, N.S.'s mother, J.S., has stated in her Declaration that, on at least five occasions while N.S. was at South Knoxville, he was placed alone inside a storage closet with the door closed.[7] (Docket No. 110-4; Docket No. 110-5 at 37:9-40:17.) There was nothing inside this closet (not even a desk or chair) other than an air conditioning unit that on one occasion N.S. dismantled. (Docket No. 110-4.) While the door was left unlocked, N.S. was told, like S.T., that he could not leave this room until he demonstrated calm hands and feet and was quiet for five consecutive minutes. (*Id*.) Accordingly, he was left in this room for hours at a time when he was unable to comply with these instructions, irrespective of being otherwise composed. (*Id*.) South Knoxville staff referred to these incidents as "time aways" rather than isolations, and the principal at South Knoxville told J.S. that these incidents were not isolations because isolations require a locked door, a statement clearly at odds with the SEBSA regulations, which prohibit locked doors during isolations. While at South Knoxville, N.S. was also subjected to dozens of undocumented restraints, sometimes with J.S. never even being notified by school staff, where no information about the incidents was documented, including whether J.S.'s behavior even warranted such consequence. (*Id*.; Docket No. 110-5 at 42:16-44:13.)

While enrolled at Dogwood, N.S. was again regularly sent to a "time away" room with a closed but unlocked door, where he would be prevented from leaving until he could demonstrate calm hands and feet and remain quiet for five consecutive minutes. (*Id*.) N.S.'s anxiety surrounding these incidents ultimately led him to run away from school and into traffic, after which he was hospitalized.[8] (*Id*.) Also, while at Dogwood, N.S. was again restrained on

[7] Photographs of this closet area, indicating its size of less than forty square feet, are attached to J.S.'s Declaration. (Docket No. 110-4.)

[8] The evidence indicates that N.S. was hospitalized to treat suspected emotional disturbance causing this incident rather than any physical injury.

multiple occasions without documentation. (Docket No. 110-5 at 44:16-45:23.) In addition, during the six days he attended Spring Hill, N.S. was regularly placed in a section of his classroom referred to as the "calming area," but, when N.S. would be placed there, staff members would reposition bookshelves around the area to create a physical barricade so that he could not leave, and this was frightening to him. (Docket No. 110-4; Docket No. 110-5 at 61:17-62:11.) These incidents, however, were not referred to by Spring Hill staff as isolations and, therefore, were not subject to isolation protocol. Also while at Spring Hill, N.S. was unnecessarily restrained by staff on at least one occasion, when no de-escalation procedures were implemented between his initial outburst and his violent aggression, despite an opportunity presenting itself, as witnessed by J.S.[9] (*Id.*)

J.S. also stated that none of the schools N.S. attended noted or recorded what antecedents triggered N.S.'s undesirable behaviors that led to the use of isolation and restraint (though his outburst behavior itself was recorded whenever isolations and restraints were labeled as such and actually documented). (Docket No. 110-4.) She also states that she received reports from many teachers at all of the schools N.S. attended indicating that restraint or isolation were used as an initial tactic or disciplinary measure, rather than after an unsuccessful attempt to de-escalate the situation, and often without behavior that was dangerous enough to justify the use of these procedures. (Docket No. 110-5 at 56:20-60:19.) Finally, J.S. stated that, on many occasions, N.S. came home from school with finger-shaped bruises and burn marks under his arms from his skin being pressed and twisted during restraint procedures. (Docket No. 110-5 at 63:25-65:20.)

[9] Whether the restraint was warranted is ultimately a question for the trier of fact. J.S. recounts that, while N.S. had become physically aggressive, he had paused and requested that staff members stop talking, at which point she believes de-escalating the situation would have been possible but, instead, staff members continued to give instructions, which further aggravated N.S., at which point he threw a chair and staff members restrained him. (Docket No. 84:18-86:1.)

Nancy Brown, a licensed clinical psychologist who is currently treating both plaintiffs in her practice, states in her Declaration that the plaintiffs have experienced trauma from the way they were treated by adult authority figures at KCS, including being isolated for long periods of time until able to sit still and quietly for five consecutive minutes. (Docket No. 111-5.) Ms. Brown states that she wrote to the Director of Special Education for KCS, Melissa Massie, in October of 2015 on behalf of N.S., asking that he receive a more collaborative approach to changing his undesirable behavior and that more attention be paid to the antecedent causes of this behavior so as to reduce the occurrence of behaviors that would necessitate isolation and restraint. (*Id*.) She also states that she attended several IEP meetings for N.S. and made these same suggestions but that nothing changed, and she ultimately recommended that N.S. transfer to a school outside of KCS. (*Id*.)

While the plaintiffs are no longer enrolled in KCS, the plaintiffs' parents have expressed that their decision to withdraw their children from KCS is due to no other reason than the isolations and restraints the plaintiffs experienced while in KCS. (*See* Docket No. 110-2, Docket No. 110-5 at 111:10-113:25.) While there is no evidence that N.S. has plans to re-enroll in KCS at the present time and he currently resides outside of Knox County, J.S. testified that this move was done at great expense to the family and despite an increased commute to her place of employment, solely for the purpose of avoiding having N.S. remain in KCS schools. (Docket No. 110-5 at 111:10-113:25.) Ms. M.T., meanwhile, has expressly stated that, while she currently has no intention of re-enrolling S.T. in KCS because he is scared to return, she would consider doing so in the future, if the family's therapist indicated that S.T. was ready and if changes were made with respect to KCS's use of isolations and restraints on children with special needs. (Docket No. 110-3 at 24:14-25; 130:20-131:11.) Specifically, Ms. M.T. said that,

if she "felt like Knox County could do a better job of isolations, restraints, and antecedents . . . [she] would love for [S.T.] to get back into school and be able to finish, but [she's] got to know he's going to be safe and he's going to be taken care of." (*Id.*)

Finally, the plaintiffs have placed in the record the Declaration of P.M., the parent of J.M., an autistic student who attends public school in Dickson County, Tennessee, stating that J.M. was also isolated at school in a room that was less than 40 square feet in volume and without parental notification, with the school staff referring to these incidents as placement in an "intensive problem solving room" rather than isolation.[10] (Docket No. 111-6.)

II. Statewide Isolation and Restraint Data and the Council Recommendation

Rachel Wilkinson, who is the Executive Director of Data Services for the TDOE, testified that the TDOE began collecting data on isolations and restraints in the 2012/13 school year, in response to the enactment of the SEBSA and its requirement that such data be collected. (Docket No. 115 at 7:15-10:2.) The TDOE has its own task force to review the isolation and restraint data that is collected, in order to ensure that the collection of data complies with the SEBSA regulations, though this task force does not substantively review the data. (Docket No. 115 at 54:19-55:25.) Instead, the data is given to the Council for substantive review and for making recommendations to the TBOE. (*Id.*) The TDOE task force was established by Alison Gauld at the TDOE and it meets three times per year, with the sole objective of ensuring that data is properly collected for the Council to analyze. (Docket No. 115-1 at 12:2-14:12.)

Chip Fair, a member of the Council and the TDOE task force for the past several years, explained in his testimony that, four years ago, the Council established a five-person committee with the sole responsibility of reviewing isolation and restraint data that is collected by the

[10] J.M. has also filed an action against the TDOE that is pending in the Middle District of Tennessee, *J.M. v. Dickson Cty Sch. Dist.*, case No. 3:17-cv-405.

TDOE from school districts throughout the state and making recommendation to the TBOE based on that data, again in order to comply with the SEBSA. (Docket No. 113 at 17:17-19:9.) Mr. Fair, who was the chair of the Council committee, recalls that isolation and restraint data began to be collected for the 2012/13 school year and that Ms. Wilkinson at TDOE is the person who collects the data and provides it to the Council. (*Id*. at 22:1-46:23.) It is undisputed that the numbers of reported isolations and restraints, both statewide and within KCS, steadily declined over the 2012/13, 2013/14, and 2014/15 school years.[11] This data was not broken down by district or school but included the overall number of isolations and restraints statewide and included documented reports of individual instances of isolation and restraint for the Council to review. (Docket No. 113 at 22:1-46:23.)

It was not until January of 2015 that the Council finally voted to present a report on this data to the TBOE, which included the committee's recommendation that a "Q&A" document be prepared to disseminate to the schools regarding the legal definitions of isolations and restraints and the applicable regulations. (*Id*.; Docket No. 101-16.) At the same time, the TDOE task force was finding that schools throughout the state were reporting incidents that should not have been reported because they did not meet the legal definition of isolation and restraint. (Docket No. 113 at 22:1-46:23; Docket No. 101-16.) In turn, this raised the inference that there might have been confusion among faculty and staff members in various schools as to how isolation and restraint are defined, which could have also led to incidents not being reported that should have

[11] It is also undisputed that, in 2014/15, Knox County reported 301 isolations and restraints while Davidson, Hamilton, and Shelby Counties reported just 29, 29, and 13, respectively. The plaintiffs make much, in their briefing, over the fact that KCS also has only 6% of the disabled student population in the state, based on data that is shown in an exhibit to the Wilkinson Deposition. (Docket No. 115, pp. 68-75.) It is not entirely clear from the record that this document supports the plaintiffs' calculation but, for the reasons discussed below, this information is ultimately not pertinent to the holdings in this Memorandum.

been. (*Id*.) Overall, the task force found that the data being collected was unclear and that it would be difficult to draw meaningful conclusions from it about the general use of isolation and restraint in state schools.

Accordingly, the TDOE task force, independent of the Council's recommendation, also began working on a Q&A document to distribute to schools to clarify any misunderstanding about the terminology surrounding isolations and restraints. (*Id*.; Docket No. 115-1 (Deposition of Alison Gauld) at 21:5-23:8.) The draft of the TDOE task force Q&A that is in the record contains definitions of "restraint" and "isolation" pursuant to the SEBSA and contrasts "isolation" with "time out." It also explains what constitutes an emergency situation legally warranting the use of isolation or restraint and recommends trainings for staff to reduce the use of isolation and restraint procedures, including trainings on de-escalation, positive behavioral supports, and understanding environmental antecedents. (Docket No. 111-2.) This document also outlines procedures for parental notification and official documentation of isolation and restraint incidents.[12] (*Id*.) This document has not yet been completed or distributed. (Docket No. 113 at 22:1-46:23.) Nor is there any evidence in the record that the TBOE has ever heeded the Council's recommendation to prepare its own Q&A document.

III. FBAs, BIPs, and Isolation and Restraint Reports

The State Defendants have filed Functional Behavior Assessments ("FBAs") and Behavior Intervention Plans ("BIPs") that were prepared for the plaintiffs during the time they

[12] Of note, the draft suggests – inconsistent with the testimony of Ms. Gauld that is discussed below – that the isolation reports need only contain the student's behavior preceding the isolation or restraint and not the antecedent environmental trigger that led to the student's disruptive behavior. Ultimately, it is clear, however, that the TDOE was aware of the need to document and pay attention to antecedent environmental triggers in order to reduce isolation and restraint use, irrespective of whether it is necessary to include that information on state reported documentation.

were enrolled in KCS schools. (Docket Nos. 101-2, 101-3.) The FBAs include "A-B-C Diagrams" for examples of typical problem behavioral scenarios (such as physical aggression or running away) that took place with the plaintiffs and, for each one, the charts list the antecedent (which is filled in with the environmental stimulus or social interaction that was external to the plaintiff and triggered the behavior), the behavior itself, and then the consequences. Examples of antecedents listed in these charts are: a teacher going through a lesson too quickly for N.S., N.S. being told by a peer that the peer could push the merry-go-round faster than N.S., N.S. being transitioned from a preferred to a non-preferred activity, N.S. being given unwanted consequences, N.S. being given certain work demands such as group work or reading on a topic he does not like, S.T. being transitioned from one task or space to another, S.T. being presented with less structured or unfamiliar activities, S.T.'s work product not turning out as he would like, staff members that are unfamiliar to S.T. intervening in a conflict, or either plaintiff being tired, hungry, or physically uncomfortable. The FBAs also list scenarios in which the undesirable behaviors are least likely to occur.

The BIPS then list strategies to alter the environment for the plaintiffs and to teach them replacement behaviors for their undesirable behaviors, as well as procedures to reinforce positive behaviors. The BIPs also include some information about less problematic behaviors that often precede the truly dangerous behaviors and may serve as a warning before the situation escalates, as well as methods for de-escalation. The BIPs then include the instruction that, in the event of outburst behavior that presents a physical danger to the plaintiff or others, physical intervention may be used, including restraint or isolation, and varying time limits are given for such measures in each of the BIPs in the record; times listed are as long as restraint for 15 minutes and isolation for one hour. It is undisputed that most of the plaintiffs' BIPs and FBAs were signed by the

plaintiffs' parents.[13] The State Defendants have also filed reports of documented isolations and restraints of the plaintiffs while in KCS schools, all of which appear to indicate serious behaviors by the plaintiffs that could pose a threat to their own safety or the safety of others (physical violence or aggression toward other students or staff members, including biting, kicking, scratching, and hitting staff members and other students and throwing objects and/or throwing heavy objects and running from the classroom) prior to the use of isolation or restraint. (Docket Nos. 101-4, 101-5.) These reports also indicate that parental notification was given for each of these documented incidents and that any isolations took place in rooms greater than forty square feet in volume. (*Id*.) They do show, however, that the isolations and restraints often lasted for hours at a time, though sometimes with breaks in between.

IV. State Programs and Regulations Addressing the Use of Isolation and Restraint

Ms. Gauld, the TDOE's Behavior and Low Incidents Disability Coordinator for Instructional Programming and Special Populations for the past three years, has developed a webinar that is available online to school districts throughout the state and explains the SEBSA definition of "isolation" and "restraint," as well as what constitutes an emergency warranting the use of isolation and restraint. (Docket No. 115-1 at 6:4-9:13.) Ms. Gauld is not, however, aware of which school districts have actually accessed the webinar or how it has been used. (*Id*.) Ms. Gauld has also developed a series of educator trainings on working with children with disabilities, including one titled "A is for antecedent," which explains the importance of

[13] The plaintiffs' parents, however, state that they signed the BIPs while having never received a copy of the SEBSA regulations or the TBOE Regulation that governs the timing of isolations and restraints. (Docket No. 110-4, Docket No. 110-2.) The plaintiffs cite to Tenn. Comp. R. & Regs. 0520-01-09-.23, but this regulation simply defines as "extended isolations" those that last longer than one minute per year of the student's age or longer than provided in the IEP, while defining "extended restraints" as those lasting longer than five minutes or than the time provided in the student's IEP. There is nothing in this regulation or in the SEBSA that renders "extended" restraints or isolations illegal or otherwise suggests a cap on the amount of time they can be used.

educators paying attention to, and attempting to mitigate, antecedent environmental triggers that cause a given student to have a violent or aggressive outburst of the type that could require the use of isolation or restraint if not prevented. (*Id*. at 27:20-31:17; Docket No. 106-1 (Gauld Affidavit).) Ms. Gauld states that the schools should be recording these antecedents to the students' behavior on the isolation reports that are documented with the state, rather than simply recording the student's aggressive behavior itself that is a precursor to the isolation or restraint. (Docket No. 115-4 at 27:20-31:17.) There is no evidence in the record to suggest that viewing Ms. Gauld's webinar, attending any of her trainings, or accessing any other training materials on isolations and restraints is mandatory for school faculty within the state of Tennessee, and it appears to be at the discretion of individual schools and districts.

It is also undisputed that, as explained by Ms. Gauld, the TDOE has over the past several years established and implemented the Positive Behavioral Interventions and Supports ("PBIS") and Tennessee Behavior Supports Project ("TBSP") programs, in which millions of dollars were allocated to providing school districts throughout Tennessee with training from local universities on working with students with special needs, including behavioral support methods to prevent undesirable behaviors. (Docket No. 106-1.) KCS has participated in these programs and received a significant amount of training support from the University of Tennessee at Knoxville. Finally, Ms. Gauld also states in her Declaration that she has had in-person and telephonic discussions with KCS administrators to assist them with addressing issues related to the education of students with disabilities and was never given reason to believe that KCS personnel were engaging in unlawful isolations or restraints. Eve Carney, Executive Director of Consolidated Planning and Monitoring for the Department since March 2014, who is responsible for monitoring IDEA compliance through on-site visits and electronic monitoring and review of

IEPs, has likewise stated that she has no knowledge of anyone raising any issue with respect to KCS's use of isolations and restraints. (Docket No. 106-10.) There is no evidence in the record to the contrary. This testimony, of course, must be taken against a backdrop of the TDOE task force and the Council's finding that schools were not necessarily aware of the legal definitions of isolations and restraints and is in no way conclusive of whether these procedures were, in fact, being carried out in compliance with the SEBSA.

Finally, Fielding Rolston, Chairman of the TBOE, states in his Affidavit that, for 2017, the TBOE has recommended the adoption of a rule establishing a discipline schedule for public school teachers that will appear at Tenn. Comp. R. & Regs. 0520-01-03-09, if adopted. (Docket No. 101-10.) According to Ms. Rolston, this rule will allow for the revocation of a teacher's license if the teacher engages in harmful physical contact with a student, which could include inappropriate isolation or restraint, and the TBOE believes the rule will reduce the use of isolations and restraints. (*Id.*)

LEGAL STANDARD

Rule 56 requires the court to grant a motion for 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). If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party." *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

At this stage, "'the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient," and the party's proof must be more than "merely colorable." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 252 (1986). An issue of fact is "genuine" only if a reasonable jury could find for the non-moving party. *Moldowan*, 578 F.3d at 374 (citing *Anderson*, 477 U.S. at 252).

ANALYSIS

The defendants have raised a number of overlapping grounds for dismissing all or part of the claims in this action. The court will address each of these arguments in turn, with respect to both the State Defendants and the Knox Defendants. While the State Defendants have requested oral argument on their Motion, the court finds that oral argument is not necessary to resolve this matter, and that request will be denied.

I. Plaintiffs' Standing for Injunctive Relief

The Sixth Circuit has held that a plaintiff's standing to bring a claim for injunctive relief is established through the following elements: "(1) the plaintiff suffered an 'injury in fact' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical;' (2) the injury must be 'fairly traceable to the challenged action of the defendant;' and (3) 'it must be likely . . . that the injury will be redressed by a favorable decision.'" *Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 579 (6th Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The defendants argue that the plaintiffs are not entitled to the injunctive relief they seek because they are no longer enrolled in KCS schools and there is no evidence that they intend to

enroll in KCS schools in the future. This is a shortsighted interpretation of the evidence before the court. Both minor plaintiffs are still at an age where they are entitled to enroll in public schools, and there is evidence in the record that both plaintiffs left KCS simply because of the alleged occurrences giving rise to this action. S.T. still lives within Knox County and is currently being homeschooled by his mother, Ms. M.T. Ms. M.T. has expressed in her deposition her willingness to allow S.T. to return to KCS schools in the event that the issues at the heart of this lawsuit are favorably resolved, i.e., if the injunctive relief sought is granted. Moreover, part of the apparent injury to S.T. is that he is currently unable to attend school and his mother homeschools him, which is a burden on S.T. and his family. That alone is sufficient to allow the plaintiffs' claims for injunctive relief to proceed, because it creates a likelihood that some of the injuries alleged could be redressed by an injunction that would permit S.T. to return to school. In fact, the Sixth Circuit has held that, where a plaintiff bringing an IDEA claim against a school district "remains eligible for and interested in enrollment in the school district," the case will not be deemed moot based on the fact that the plaintiff is not currently enrolled because of the likelihood that such a holding would cause the controversy to repeat and evade review. *Hudson by and through Hudson v. Bloomfield Hills Pub. Sch.*, 108 F.3d 112 (6th Cir. 1997).

Moreover, while N.S. has moved to a different county, he is still attending public school within the state of Tennessee. While there is no express evidence showing that N.S's parents would re-enroll him in KCS schools if injunctive relief is granted, N.S.'s parents have stated that they relocated at significant expense and inconvenience to their family solely to avoid having N.S. remain in KCS schools while the issues giving rise to this lawsuit are unresolved. This fact

leads to the inference that they might consider returning to Knox County and re-enrolling N.S. in KCS schools were injunctive relief to be granted.[14]

Finally, the court finds that it would be an absurd result to find that the plaintiffs lack standing to seek injunctive relief that could allow them to return to KCS schools, simply because they have withdrawn from KCS schools based on the very practices that the requested relief seeks to redress. For these reasons, the court will not dismiss the plaintiffs' claims for injunctive relief due to lack of standing.

II. Statutes of Limitations

The Knox Defendants are correct that the statute of limitations for IDEA claims is two years (20 U.S.C. § 1415(b)(6)(B)) and that the statute of limitations for Title II and Section 504 claims is one year in Tennessee. *See McCormick v. Miami Univ.*, 693 F3d 654, 662-63 (6th Cir. 2012) (holding that the state statute of limitations for personal injury actions applies to Title II and Section 504 claims); *Moreno v. City of Clarksville*, 479 S.W.3d 795, 802 (Tenn. 2015) (holding that the statute of limitations for personal injury claims in Tennessee is one year). The Knox Defendants thus argue that the court should not consider any events that took place prior to the beginning of the relevant limitations periods in determining whether the plaintiffs have sufficient evidence to proceed with their claims and that the plaintiffs may not recover damages associated with these events.

The court finds, however, that, given the systemic nature of the claims at issue in this action, the statutes of limitations are not applicable to bar consideration of incidents that took place outside of the strict limitations period. The plaintiffs are not seeking relief from any single

[14] Moreover, the injunctive relief sought against the State Defendants would arguably impact the use of isolations and restraints even in N.S.'s current school district and could, therefore, prevent any potential future violations there, even though none has yet been specifically alleged.

incident and, therefore, the timing of any incidents referenced in the record is tangential to the question of whether the claims have been timely brought. The plaintiffs are seeking relief from a system-wide pattern of practices by KCS faculty and staff that they have alleged was ongoing at the time this action was filed. Accordingly, this action is necessarily timely and is not barred by the statute of limitations. Evidence of incidents illustrating these practices and how they continued over a period of time unabated is relevant to the ultimate questions of fact in this case.

Moreover, because the plaintiffs are seeking damages for the *cumulative* effect of these practices on their education and overall well-being, it would be impossible to parse the incidents for purposes of calculating damages. Moreover, as the plaintiffs have pointed out, in cases of this nature, the continuing violation theory can be invoked to override the statute of limitations, and this is regularly done in the Sixth Circuit in the context of hostile work environment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. *See Katz v. Village of Beverly Hills*, 677 F. App'x 232, 236 (6th Cir. 2017) (citing *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003)). This action is akin to a hostile work environment claim because it is based on an ongoing pattern of alleged discrimination against the plaintiffs in a school, which is qualitatively similar to a workplace.[15]

[15] The Knox Defendants cite to *Frank v. Univ. of Toledo*, 621 F.Supp.2d 475 (N.D. Ohio 2007) for the proposition that the continuing violation theory should not apply to Title II and Section 504 claims. The court, however, is not persuaded by this non-binding district court opinion, which anyway arises in a factually distinguishable context. *Frank* involved an isolated incident in which the plaintiff alleges he was not given reasonable accommodations to take an exam at a school to which he was applying for enrollment, and the court found that the claims began accruing at the time of the exam, irrespective of the fact that he made subsequent attempts to be given accommodations and also retook the exam several times without accommodation. All of the facts that he needed to know about the denial of accommodation were present at the time of the first exam, and there is no claim based on the cumulative effects of multiple violations, nor is there a systemic claim that would have required a pattern of occurrences to identify.

The court is inclined to agree with the plaintiffs that, not only do all of the alleged incidents contribute to the continuing violation theory, but also the plaintiffs might not have been on notice of a systemic violation until they experienced a number of incidents over a period of time in a number of different schools, triggering the discovery rule to also apply to extend the limitations period. The court need not, however, reach the question of the whether the discovery rule applies to all of the plaintiffs' claims in order to resolve this issue, because the court finds that the continuing violation theory is sufficient to allow the plaintiffs' claims to proceed on all allegations.[16] Nor will the court reach the question of whether equitable tolling should apply for claims like those at issue in this action when brought by minor plaintiffs.

In conclusion, the court finds that, based on the continuing violation theory, the statutes of limitations will not bar the plaintiffs from proffering any of the evidence in the record, or from seeking damages based on the cumulative impact of all alleged incidents as part of a pattern or policy by the defendants that violated their rights under the IDEA, Title II, and Section 504.

III. Sufficiency of Evidence to State a Claim under the IDEA

As explained above, the defendants are required under the IDEA to comply with the SEBSA regulations. The plaintiffs' claims in this action arise from allegations that the SEBSA has been systemically violated by both the State Defendants and the Knox Defendants in a manner that discriminates against KCS students with disabilities. The pertinent SEBSA regulations are as follows:

[16] The court notes, however, that, at least with respect to IDEA claims, the wording of the statute itself indicates that the discovery rule is applicable. 20 U.S.C. § 1415(b)(6)(B) (stating that the limitations period begins on "the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint"). The defense would undoubtedly argue that the plaintiffs' parents knew of the individual incidents of isolation or restraint at the time they occurred, but the court finds that, again, since the claims here are based on a systemic violation, the plaintiffs were not necessarily on notice of the larger pattern of violation until a more significant volume of incidents had taken place.

- A special education student may be restrained or isolated only in "emergency situations" (Tenn. Code Ann. § 49-10-1304(a)), which are defined as situations in which "a child's behavior poses a threat to the physical safety of the student or others nearby." (Tenn. Code Ann. § 1303(3)).
- A "physical holding restraint" is defined as "the use of body contact by school personnel with a student to restrict freedom of movement or normal access to the student's body." Tenn. Code. Ann. § 49-10-1303(8).
- "Isolation" is defined as "the confinement of a student alone in a room with or without a door, or other enclosed area or structure . . . where the student is physically prevented from leaving" and this expressly does not include "time-out, a behavior management procedure in which the opportunity for positive reinforcement is withheld, contingent upon the demonstration of undesired behavior." Tenn. Code Ann. § 49-10-1303(4).
- "Any space used as an isolation room shall be: (1) unlocked and incapable of being locked; (2) free of any condition that could be a danger to the student; (3) well ventilated and temperature controlled; (4) sufficiently lighted for the comfort and well-being of the student; (5) where the school personnel are in continuous direct visual contact with the student at all times; (6) at least forty square feet (40 sq. ft.); and (7) in compliance with all applicable state and local fire, health, and safety codes." Tenn. Code Ann. §49-10-1305(g).
- "The use of isolation of physical holding restraint as a means of coercion, punishment, convenience, or retaliation on any student receiving special education services . . . is prohibited." Tenn. Code Ann. § 49-10-1305(e)(1).

Finally, the SEBSA delineates the duties of TDOE, the Board, the Council, and the local education agencies, with respect to the use of isolation and restraint, as follows:

> (a) Each school shall maintain all records of isolation and restraint.
>
> (b) On a semiannual basis, using existing student-level data collection systems to the extent feasible, each school shall submit a report to the local education agency that includes: (1) the number of incidents involving the use of isolation and restraint since the previous semiannual report; (2) the number of instances in which the school personnel imposing physical restraint or isolation were not trained and certified; (3) any injuries, deaths, or property damage that occurred; (4) the timeliness of parental notification; and (5) demographic information to determine whether disproportionate use of these interventions exists.
>
> (c) The local education agency shall use the information obtained from records of isolation and restraint in developing its behavior intervention training program.
>
> (d) The local education agency shall submit information to [TDOE] each year on the use of isolation and restraint in the school district.

> (e) Annually, this information shall be reported to the [Council] pursuant to § 49-10-105. This information must also be made readily available to the public. The [C]ouncil shall use this information to report annually to the [Board] with recommendations to reduce the use of isolation and restraint in public education programs. The [Board] shall use these recommendations as well as data, documentation and reports to establish policy or strategies or both to reduce or eliminate the use of isolation and restraint in schools.
>
> (f) The [Board], in consultation with [TDOE] . . . shall promulgate rules and regulations concerning the use of isolation or restraint with students who receive special education services so that isolation or restraint is not used when such procedures are unsafe, unreasonable, or unwarranted.

Tenn. Code Ann. § 49-10-1306.

The parties agree that, under the SEBSA, school staff are permitted to implement isolations and restraints only to respond to emergency situations, when a student's behavior poses a danger to the student or to others. The parties, disagree, however, as to whether the plaintiffs were only isolated or restrained in such emergency situations, whether the isolations and restraints were always carried out in accordance with the SEBSA's procedural regulations, and whether the systemic practices of the defendants encouraged noncompliance with the SEBSA requirements and/or failed to make efforts to reduce the overall use of isolations and restraints and mandated by the SEBSA. The defendants' primary grounds for arguing that summary judgment is warranted is their reliance on the documented isolation and restraint reports from incidents involving the plaintiffs, which indicate that each of these incidents was justified and followed the proper SEBSA procedures. The plaintiffs, however, have proffered sufficient evidence to show, even though the documented reports from incidents in which they were isolated and restrained in KCS schools indicate that the isolations and restraints were implemented in response to emergency behaviors (such as biting, kicking, scratching, throwing objects, and hitting staff members and other students), that these were not the only incidents in which they were subject to isolation and restraint, often because these procedures were called by

other names and/or were otherwise undocumented. The plaintiffs have also put forth sufficient evidence that they were isolated or restrained for longer periods than necessary to respond to emergency behavior (and often as disciplinary tactics), in rooms smaller than the legally required minimum, and/or without requisite parental notification, often resulting in physical or psychological injury.

Finally, the plaintiffs have put forth evidence that, even where isolations or restraints may have been justified and properly carried out, the defendants did not take measures that could have reduced the onset of emergency behavior, thus obviating the need for the isolations and restraints in the first place. In particular, there is evidence in the record that there is confusion about when and whether to collect and record information about antecedent environmental triggers and implement de-escalation methods. While the defendants have placed evidence in the record that FBAs and BIPs were prepared on the plaintiffs' behalf that included this information, the plaintiffs have put forth evidence that these FBAs and BIPs were not consistently heeded and carried out in the classroom setting. Moreover, simply because the BIPs recorded typical antecedents, this does not mean that additional information should not have been collected as new incidents of isolation and restraint arose, and it appears from the record that this may not have been consistently done.[17]

In addition to preparing the FBAs and BIPs, the State Defendants emphasize in their briefing that they have invested a great deal of resources into programs and training (such as

[17] The plaintiffs also emphasize the relative numbers of isolations and restraints in KCS compared to other counties in the state. The court finds, however, that these facts, on their own, are not sufficient to support the plaintiffs' claims, because they do not provide evidence as to why the isolations and restraints took place, whether they were being done in accordance with the law, and whether efforts were made by the defendants to comply with SEBSA and attempt to mitigate their use. Nevertheless, the other evidence the plaintiffs have put forward does provide a sufficient basis for their claims to survive the summary judgment stage.

PBIS and TBSP) to teach faculty and staff in public schools throughout the state about antecedent behaviors and de-escalation tactics, so as prevent undesirable behavior in students and, thereby, reduce isolations and restraints.[18] While this is commendable, it does not in fact save the State Defendants from liability in this action for not upholding the SEBSA mandate to reduce or eliminate the use of isolations or restraints. If anything, these efforts support the plaintiffs' argument that this is precisely the sort of training that was needed to be consistently implemented and enforced but, as the plaintiffs have demonstrated in the record, this was not done in KCS. Not only is there no evidence in the record that KCS faculty and staff specifically accessed these training programs, there is a great deal of evidence to suggest that the content of these training programs was not evident in the plaintiffs' classroom environment. Antecedents were not recorded, de-escalation procedures were not implemented, and the SEBSA procedures for isolations and restraints were not consistently followed.[19] There also was a great deal of confusion about the definition of emergency behaviors, the legal definitions of isolations and

[18] The Knox Defendants similarly state in their briefing that the KCS employees who carried out isolations and restraints on the plaintiffs had all completed Therapeutic Crisis Intervention training and were familiar with the SEBSA requirements. It is not at all clear that these statements are supported by facts in the record, other than the documented isolation and restraint reports showing these documented incidents were all responsive to emergency situations. These reports, however, do not address antecedents or de-escalation attempts.

[19] The defendants also rehash an argument that was rejected by the court in an earlier opinion in this case: that even the use of improper isolations and restraints does not constitute an IDEA violation because it is not related to the denial of a FAPE. To support this argument, the defendants cite *Fry v. Napoleon Cty. Schs.*, 137 S.Ct. 743 (2017). As the court has explained before, the test under *Fry* for whether a discriminatory incident that takes place in a school qualifies as a violation of the IDEA is whether it is the sort of incident that happens only in a *school* and only to *students* (rather than a type of discrimination – such as lack of physical accessibility – that could impact disabled non-students in a school or disabled people in any other public place). (Docket No. 92, pp.22-23.) Accordingly, the improper use of isolation and restraint procedures falls squarely within the IDEA's domain. In fact, even *Beckwith v. Dist. of Columbia*, 208 F. Supp.3d 34 (D.D.C. 2016), which is cited by the defense, actually confirms that the improper use of an isolation or restraint can constitute the denial of a FAPE and a violation of the IDEA.

restraints compared to other disciplinary tactics. Specifically, the plaintiffs have pointed to at least one incident in which the principal of a KCS school was unclear that isolation rooms are prohibited from being locked, to at least one incident of an isolation room that contained a hazard to a child (an air conditioning unit), and many instances in which isolation was used to coerce a child into complying with certain disciplinary procedures, despite the child no longer exhibiting any signs of dangerous behavior.[20]

The State Defendants also argue that there is no evidence of a system-wide failure to properly regulate or attempt to mitigate the use of isolations and restraints. The State Defendants, however, overlook the fact that the plaintiffs have put forth not only evidence of SEBSA violations in several different schools but also evidence that the State Defendants were on notice of potential problems with the implementation of the SEBSA, based on the findings of the Council and the TDOE task force, yet took no action to even implement simple recommendations. While the State Defendants are correct that the SEBSA does not strictly mandate that the recommendations by the Council be implemented by the TDOE or TBOE, it is also the case that the SEBSA does mandate that efforts are made to reduce isolations and

[20] The State Defendants argue that the plaintiffs' parents' testimony about documented and undocumented restraints and isolations on the plaintiffs is inadmissible because they did not witness the incidents firsthand and, therefore, the information is hearsay. The court finds this assertion to be untenable. The parents have specifically stated that their testimony is based on same-day reports from their children, which meet the hearsay exception for present sense impressions, as well as reports from staff, which are likely party admissions. While the State Defendants are correct that the plaintiffs may be unable to identify the difference between a legally defined isolation and restraint or other legally defined disciplinary measures such as "time outs" that are expressly not subject to the SEBSA regulations governing isolation and restraint use, there is no reason to assume that the plaintiffs could not accurately describe their experience, and the parents' characterization of these incidents as isolations and restraints is based on their understanding that the description meets the legal definition. As noted above, it is ultimately for the trier of fact to ascertain whether or not these incidents occurred, whether they meet the definition of isolation or restraint, and whether, if so, they were carried out in accord with the governing legislation regarding the use of isolation and restraints on children with disabilities in Tennessee public schools.

restraints, and it is ultimately up to the trier of fact to determine whether overlooking the Council's recommendation, among other oversights and omissions, violates that mandate. The State Defendants, nevertheless, argue that they did not have notice of the systemic issues alleged in this action because the plaintiffs never lodged complaints about their own isolations and restraints. The governing legislation, however, requires the State Defendants to be actively monitoring the use of isolation and restraint procedures for compliance with the law and with the goal of reducing or eliminating the use of these procedures. The plaintiffs have put forth sufficient evidence that the State Defendants were not only shirking this responsibility but also that evidence was directly brought to their attention that there was confusion among faculty and staff at schools throughout the state regarding the basic terminology surrounding these procedures and the basic laws governing them, and that specific and simple recommendations were made. Yet, again, the State Defendants failed to implement the recommendations or otherwise resolve these issues.

Finally, the State Defendants argue that the plaintiffs have put forth no evidence of causation between the alleged SEBSA violations by the State Defendants and the isolations and restraints carried out on the plaintiffs. The State Defendants essentially argue that the plaintiffs would have been subject to isolations and restraints in the same manner they were, regardless of the State Defendant's efforts to reduce isolation and restraints, due to the plaintiffs' dangerous outbursts. While the *documented* isolations and restraints of the plaintiffs indicate behavior warranting their use, the plaintiffs have put forth sufficient evidence that they were isolated and restrained at other times that were undocumented and in ways that did not comply with the SEBSA, and this fact can be directly attributed to the alleged lack of understanding of basic terminology and rules by KCS faculty. Moreover, once again, the plaintiffs have put forth

sufficient evidence that it might have been possible to prevent the use of isolations and restraints, in both documented and undocumented incidents, had the State Defendants and Knox Defendants intervened to ensure that staff members were properly trained to pay attention to the very sorts of antecedent information and de-escalation techniques that were already gathered and documented with respect to the plaintiffs in their FBA and BIP reports.

The plaintiffs do not dispute that isolations and restraints are appropriate in certain instances and that the plaintiffs themselves did exhibit on occasion the type of behavior that warrants isolation and restraint. The gravamen of this case, however, is not whether individual documented isolations or restraints were implemented in response to emergency behaviors. The claims in this action are, instead, about whether there was a systemic misuse of isolation and restraint procedures in instances where such emergency behaviors were not present or in situations where such emergency behaviors could have been prevented if KCS staff, under guidance and enforcement by the Knox Defendants and the State Defendants, were properly trained and supervised. The evidence in the record shows that such training and supervision could have included utilizing information the defendants had already developed in training programs and materials they had prepared, as well as knowledge that they had already accumulated about individual students in their FBAs and BIPs. It also could have included following recommendations to prepare a Q&A document as recommended by the Council as well as the TDOE task force.

It is for the trier of fact to determine whether the evidence the plaintiffs have proffered is credible and, if so, whether it constitutes a violation of the SEBSA, including a systemic violation of the SEBSA's mandate to reduce isolations and restraints statewide. There is certainly enough evidence in the record, however, for the plaintiffs to proceed with their claims.

The defense has failed to show that there is no dispute of material fact with respect to the plaintiff's claims and, therefore, the claims will not be dismissed at this time.

IV. Requisite Intent for Title II and Section 504 Claims

As the court has stated in a prior Memorandum in this action, both Title II and Section 504 claims arising from the alleged denial of a FAPE require evidence of discriminatory intent, in the form of bad faith or gross misjudgment in addition to the other elements of an IDEA claim. (Docket No. 38, p. 23 (citing *Campbell*, 58 F. App'x *v. Bd. of Educ. of Centerline Sch. Dist.*, 58 F. App'x 162, 167 (6th Cir. 2003); *Hill v. Bradley Cty Bd. of Educ.*, 295 F. App'x 740, 742 (6th Cir. 2008); *S.S. v. Eastern Ky. Univ.*, 532 F.3d 445, 452-53 (6th Cir. 2008) (quoting *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 146 n. 6 (2d Cir. 2002). The court is, thus, not persuaded by the plaintiffs' cites to district court cases holding that no intent is required whatsoever in order for Title II and Section 504 claims to proceed.[21]

Nevertheless, the court finds no merit to the defendants' argument that there is not sufficient evidence of the requisite discriminatory intent for the claims to survive summary judgment. The State Defendants argue that there is no evidence in the record of bad faith or gross misjudgment. To the contrary, the evidence, if found true, may show that the defendants regularly allowed restraints and isolations to be performed on disabled children without

[21] The plaintiffs cite *I.L. v. Knox County Board of Education*, 3:15-cv-558 (E.D. Tenn. June 15, 2017) and *L..H. v. Hamilton Cnty. Bd. of Educ.*, No. 1:14-cv-126 (E.D. TN Jan, 17, 2017) which are non-binding district court opinions. The plaintiffs also cite *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 908-09 (6th Cir. 2004), but this case is readily distinguishable because *Ability* does not involve a claim for the denial of a FAPE. For policy reasons, it would not make sense to find discrimination under Title II and Section 504 every time the IDEA is not wholly complied with, without any additional requirements. The IDEA already sets a higher bar for the treatment of students with disabilities in order to ensure that they have equal access to educational benefits. Failure to meet this heightened standard cannot, thus, on its own be held to equal discrimination against disabled students relative to their nondisabled peers.

following the applicable regulations governing their use and that this was due to a failure to train and instruct faculty and staff members on the governing law. At the very least, this provides a basis by which a trier of fact could find gross misjudgment. The State Defendants were, further, on express notice that there was a lack of clarity among educators throughout the state as to the applicable laws, which should have put them on notice that these laws were not being followed and could have resulted in violations of rights to disabled students. Yet, the State Defendants did not act to implement even very basic recommendations by the Council to prepare and disseminate a Q&A document that could offer some clarity, let alone take other affirmative efforts to ensure the enforcement of SEBSA regulations. Again, the trier of fact could certainly infer that this is the result of gross misjudgment, if not bad faith.

The Knox Defendants go further than the State Defendants and argue that bad faith or gross misjudgment is not, in fact, the applicable standard of intent for the plaintiff's Title II and Section 504 claims. The Knox Defendants cite *Gohl v. Livonia Pub. Sch. Dist.*, 836 F.3d 672 (6th Cir. 2016), for the proposition that the correct standard of intent is behavior that "shocks the conscience." *Gohl*, however, involved discrete incidents of mistreatment of a disabled student by a single teacher and did not involve denial of access to a FAPE, so the court required evidence of malicious intent to mistreat her on the basis of her disability. 836 F.3d at 682-83. This is quite different from the instant case, where there is a clear disparate impact on disabled students based on the systemic allegations of mishandling of isolation and restraint procedures. The Knox Defendants also cite *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623 (6th Cir. 2013), which actually confirms that the correct standard of intent for these claims is bad faith or gross misjudgment.

The Knox Defendants also argue that there can be no showing of intentional discrimination because there is no showing that the plaintiffs were treated differently than non-

disabled students. But the facts clearly allege that isolation and restraint are primarily used on children with special needs, who are more likely to demonstrate the types of dangerous emergency behaviors that would warrant such responses, as well as other disciplinary challenges for staff. And the defendants' failure to take measures to mitigate the use of these procedures and find other ways of dealing with these students' problematic behaviors clearly impacts disabled students more than others. Finally, the Knox Defendants appear to mistakenly believe that the Title II and Section 504 claims in this action are based solely on the behavior of S.T's third grade teacher, Mr. Hagood. In fact, the plaintiffs' Title II and Section 504 claims are based on all of the alleged acts and omissions of the State Defendants and the Knox Defendants, and the court finds that any discussion of Mr. Hagood's behavior is relevant only to showing that there was not sufficient training of classroom teachers on how to deal with students with disabilities, particularly relating to the issue of preventing or properly implementing isolations and restraints. And, again, such failure can be found to be the result of bad faith or gross misjudgment by the defendants.

As a result, the plaintiffs' Title II and Section 504 claims will not be dismissed at the summary judgment phase for lack of evidence of requisite intent.

V. Damages for Parents' Emotional Distress

The Knox Defendants argue that the text of Title II and Section 504 prohibits only discrimination against individuals with disabilities themselves and, therefore, the plaintiffs' parents' emotional damages cannot be recovered in this action. With respect to Title II, the Knox Defendants appear to refer to 42 USC § 12132, which states that "no qualified individual with a disability shall, by reason of such disability" be denied access to public benefits or subjected to discrimination. And, with respect to Section 504, they appear to refer to the language that "no otherwise qualified individual with a disability" can be discriminated against.

The Knox Defendants also cite *Tucker v. Tennessee*, 443 F. Supp. 2d 971, 973 (W.D. Tenn. 2006) for the proposition that the plaintiff must prove that the discrimination was directed toward him or her in particular. *Tucker*, however, does not involve a claim for denial of a FAPE that mirrors a claim for violation of the IDEA. Nor do the Knox Defendants argue that the plaintiff's parents are unable to recover damages under the IDEA.[22]

The plaintiffs argue that the plaintiffs' parents can recover damages for their own emotional distress because, under the IDEA, they have "independent, enforceable rights," citing *Winkelman ex rel. Winkelman v. Parma City Sch. Dist*., 550 US 516, 526 (2007), and Section 504 and Title II track the IDEA when claims involve the denial of a FAPE. While *Winkelman* refers only to financial rather than emotional damages, it does state that "the IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents." The court finds this language sufficient to establish that parents and children alike may recover all types of damages under the IDEA and that the plaintiffs are correct that Title II and Section 504 will mirror the IDEA in claims for the denial of a FAPE, as noted above. Moreover, as a practical matter, the plaintiffs are bringing claims under the IDEA as well as Section 504 and Title II based on the same factual allegations, and they cannot prevail on their Title II and Section 504 claims without first prevailing on their IDEA claims, which present a lower threshold due to not requiring evidence of discriminatory intent. Accordingly, there would be

[22] Additionally, the defendants raise their argument to dismiss claims for the parents' damages only with respect to emotional damages. The court notes that it is clear that any other types of financial damages resulting from the plaintiffs' treatment at school, including the costs of caring for and treating the plaintiffs, transferring them between schools, relocating, and/or withdrawing them from school and homeschooling are costs that are borne not by the plaintiffs alone, as minors, but by their families. It will ultimately be up to the trier of fact to determine which, if any, of these damages sufficiently resulted from the alleged violations, if established. But, at this stage, the fact that the financial burden may have rested on the parents rather than the plaintiffs is not a ground for dismissing any claims resulting from these damages.

little import in dismissing their ability to recover damages under some of these claims but not others.

The court does note, however, that there is one critical fact that distinguishes the instant case from *Winkelman*, and that is that the parent in *Winkelman* was named directly as a plaintiff, whereas here, the claims are brought "by and through" the plaintiffs' parents, who are not official parties to the action. Given the nature of this action involving minor plaintiffs under a legal framework that does not wholly differentiate between parents and children, however, the court is not persuaded that this technicality is a reason to foreclose the plaintiffs at this stage from recovering all damages sought that impact the plaintiffs and their parents.

Accordingly, the court will not dismiss any damages based on the plaintiffs' parents' emotional suffering at the summary judgment phase.

CONCLUSION

For the foregoing reasons, none of the claims or requests for damages at issue in this action will be dismissed, and both pending Motions for Summary will be denied.

An appropriate Order will enter.

ENTER this 28th day of September 2017.

ALETA A. TRAUGER
United States District Judge