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Commentary

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THE USE OF RESTRAINTS WITH STUDENTS WITH DISABILITIES?: AN UPDATED EMPIRICAL ANALYSIS OF THE CASE LAW^a

The use of restraints with students with disabilities continues to be a controversial issue nationally. At the Congressional level, the culmination of a series of proposed federal laws to reduce the use of restraints and seclusion has been an anticlimactic reinforcement of the restrictive trend among state laws. More specifically, the conference committee's joint explanatory statement that is part of the legislative history of the successor of the NCLB, the Every Student Succeeds Act of 2015,¹ expressed the intent for states to take steps to reduce aversive procedures including restraint.² This Congressional action came in the wake of a recent marked trend in favor of state law restrictions on the use of restraint and seclusion.³ Congressional hearings that did not succeed in terms of federal legislation,⁴ and U.S. Department of Education action limited to resource guidance.⁵

***2** For an even longer period, as the Congressional hearings recognized,⁶ THE LITIGATION concerning the restraint of students with disabilities has had an upward trajectory, which shows the continuing incidence and the increasing controversy concerning this practice. More specifically, the most recent Senate committee report cited the only empirical analysis of these court decisions,⁷ in which Zirkel and Lyons found an upward trend from the late 1990s, with particular growth during the final four-year interval of 2007–2010.⁸ Moreover, the 61 cases generated 89 court decisions with 458 final claim rulings.⁹ None of these claim rulings was conclusively in favor of the plaintiff–parents, whereas approximately 60% were conclusively in favor of the district defendants.¹⁰ The remaining rulings were inconclusive, such as denials of the defendants' motions for dismissal or summary judgment, thus reserving the matter for further proceedings. These inconclusive rulings were particularly prevalent for those based on state law, typically declining to exercise federal court jurisdiction,¹¹ although the failure to exhaust administrative remedies accounted for a notable proportion of the inconclusive rulings on claims based on federal law.¹² Moreover, in light of the multiple claim rulings per case, the inconclusive outcomes category expanded from approximately 60% upon counting each case based on its most plaintiff– *3 favorable ruling.¹³ The overall conclusion, subject to extending the analysis to future years, was that, in the absence of specialized legislation that provides for liability suits, litigation was not a favorable route for plaintiff–parents except to the extent that the substantial proportion of inconclusive outcomes served as leverage for settlements.

The purpose of this article is to provide a concise updated analysis,¹⁴ incorporating the Zirkel and Lyons data with limited methodological adjustments for increased clarity. As explained *infra*,¹⁵ the adjustments concern simplifying the boundaries for the claim rulings and the categories of the outcomes scale. The next sections of the article follow the conventional format for empirical research—literature, methods, results, and discussion—with the first two sections focusing on the changes from the original analysis.

Other Recent Legal Literature

In their literature review section, Zirkel and Lyons canvassed the special education journal articles that showed a shift against restraints¹⁶ and other aversive interventions in favor of positive behavior reinforcement strategies.¹⁷ Similarly, they traced the development of the successive federal bills and the various state laws until the year of their article.¹⁸ Finally, they summarized prior literature that addressed the case law concerning the use of restraints in the P–12 context, finding the coverage to be far from comprehensive and systematic.¹⁹

More recently, the professional literature in special education has focused on state laws or otherwise largely lacked updated case law coverage.²⁰ *4 Similarly, the legal literature has focused on the proposed federal legislation,²¹ the state laws,²² or very limited sampling of more recent relevant case law.²³ In contrast, the only related empirical analysis was a counterpart of seclusion case law.²⁴

Method

The sources²⁵ and search strategy²⁶ were the same as in Zirkel and Lyons,²⁷ but the ending date extended the case coverage to September 2015.²⁸ *5 The selection criteria for the resulting court decisions were also the same, consisting of the following combination: (a) parental suit on behalf of a student with a disability,²⁹ (b) at least one adjudicated claim of any type of restraint,³⁰ and (c) an education institution within the pre–K to grade 12 range as at least one of the listed defendants.³¹

As a result of the selection criteria, the analysis did not extend to hearing or review officer decisions, OCR rulings, or state complaint resolution process decisions³²; court decisions that focused on physical abuse separable from restraints³³; those exclusively targeted to non–education defendants,³⁴ those where the use of restraint was tangential to the adjudicated issues in the case³⁵; those limited to other issues, such as admission of *6 evidence³⁶ and attorneys' fees³⁷; those specific to criminal prosecution³⁸; those specific to termination or other employee discipline³⁹; those where parents sought institutional use, rather than prohibition, of restraints⁴⁰; and court–approved settlement agreements (without specific claim rulings).⁴¹

Upon completion of the search and selection process, the results were tabulated for three successive units of analysis: cases, decisions, and claim rulings.⁴² The tabulation followed the previous process⁴³ with three adjustments for improved clarity and consistency: (1) claims under § 504 and ADA that had the same outcome were counted as one claim ruling⁴⁴; (2) claim rulings similarly represented the conflation of claims with more than one *7 plaintiff and/or defendant⁴⁵ unless the outcome was different among them⁴⁶; and (3) the outcomes scale consisted of three categories via conflation of the three intermediate categories within the Zirkel and Lyons' five–category outcomes scale.⁴⁷

A spreadsheet, which contains the citations and related information for all of the cases⁴⁸ and which is available from the author upon request, was the record of the data collection. The tabulation of claim rulings was limited, to the extent feasible, to those specific to the use of restraints; however, it extended to rulings where the claim targeted a cluster of aversives that included one or more instances of a restraint. The claim rulings fit into two broad jurisdictional bases: federal and state. The federal claim rulings were based on the U.S. Constitution or federal statutes, regardless of whether

the plaintiff pled § 1983. The state claims, often added in federal court suits ancillary to the federal bases, included but were not limited to common law torts, such as assault/battery or negligence.

The data analysis also followed the Zirkel model and Lyons, including starting with a focus on cases and decisions, then proceeding to disaggregate *8 the unit of analysis further to claim rulings for outcomes, and finally returning to the cases for the final outcomes distribution. The conversion was based on the claim ruling in the case that was most favorable to the plaintiff-parent because, upon multiple claims, the one that at least partially “sticks” provides the foundation for a remedy either directly when conclusive or via further proceedings or settlement when inconclusive.⁴⁹

Results

The total number of pertinent cases was 111, which successively consisted of 148 court decisions and 573 claim rulings.⁵⁰ Most (specifically, 102) of the 111 cases were in federal court, with two of them consisting of a pair of federal and state court decisions.⁵¹ Although often in combination so as to constitute multiple disabilities, the most frequently identified IDEA classifications in the 111 cases were separately as follows: autism – 54%; emotional disturbance – 7%; and intellectual disabilities – 7%.⁵² The distribution of types *9 of restraints, which were often in combination with other aversives, such as physical abuse or seclusion, was approximately as follows:⁵³ physical – 66%; mechanical – 32%; and chemical – 2%.⁵⁴

Figure 1 summarizes the frequency of the cases and decisions in four-year increments for the entire period (including a projected estimate for the final interval).⁵⁵ For each interval, the “r” at the top of the pair of bars shows the average ratio of decisions per case.⁵⁶

Figure 1: Longitudinal Frequency of Court Cases (n=111) and Decisions (n =148)

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Review of Figure 1 reveals that the volume of court decisions concerning restraints appears to have approximately fit in three ascending stages: a negligible level from the first decision in 1987 until 1998; a modest level for the next two four-year intervals; and a higher, less steady level since 2007. However, the average ratio of decisions per case for each interval has fluctuated inconsistently, and the projection for the recent period is markedly *10 tentative based on its limited segment to date.⁵⁷ Depending on the eventual extension of the latest, limited segment, the full interval of 2011–2014 may signal the end of the upward trend line in the volume of this litigation.

Figure 2 presents the outcome distribution of the claim rulings for the same intervals⁵⁸ based on the three-category outcome scale.⁵⁹ The references to “parent” and “district” are generic to the plaintiffs and defendants, respectively.⁶⁰

Figure 2: Longitudinal Outcome Distribution of Claim Rulings (n=573)

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The differentiated bars in Figure 2 show that the district defendants won the majority of the claim rulings at an unevenly descending rate until the most recent, only partial interval,⁶¹ with all but two of the remaining rulings being in the inconclusive outcome category.⁶²

*11 Table 1 summarizes the three-category outcomes distribution for the federal and state claim rulings, respectively, in descending frequency order.

Table 1: Frequency and Outcomes Distribution of Claim Rulings (n=573)

TABLE 1: FREQUENCY AND OUTCOMES DISTRIBUTION OF CLAIM RULINGS (N=573)				
	NO.	OUTCOMES		
		FOR PARENT	INCONCLUSIVE	FOR DISTRICT
FEDERAL CLAIM RULINGS				
Am. XIV substantive due process	98	0%	35%	65%
ADA/§504	68	1%	37%	62%
IDEA	56	2%	36%	63%
Am. IV seizure	25	0%	28%	72%
Am. XIV equal protection	25	0%	44%	56%
Am. XIV procedural due process	17	0%	12%	88%
Am. VIII cruel/unusual punishment	5	0%	20%	80%
Miscellaneous other ⁶³	4	0%	25%	75%
<i>Federal Total</i>	298	1%	35%	65%

STATE CLAIM RULINGS				
Negligence	68	0%	50%	50%
Intentional infliction of emotional distress	57	0%	60%	40%
Assault/battery	42	0%	71%	29%
Statutes (various)	20	0%	50%	50%
False imprisonment	19	0%	53%	47%
Negligent infliction of emotional distress	19	0%	37%	63%
Unspecified state laws	16	0%	69%	31%
Civil conspiracy	14	0%	14%	86%
Breach of fiduciary duty	13	0%	69%	31%
Fraud	4	0%	25%	75%
Torts generally ⁶⁴	3	0%	100%	0%
<i>State total</i>	275	0%	55%	45%

Footnotes

⁶³ These few rulings consisted of two claims that specified ?1983 without identifying a specific constitutional provision or other federal law and two claims that specified remotely relevant federal laws, such as the Bill of Rights for the Developmentally Disabled.

⁶⁴ For these rulings the court referred generically to tort claims as contrasted with the even more general category separately designated in the Table as unspecified state

[The preceding image contains the references for footnotes ⁶³ and ⁶⁴.]

As Table 1 shows in detail, the clear majority of all the federal claim rulings, led by Fourteenth Amendment substantive due process, were conclusively in favor of the district defendants, and the remainder—with the two aforementioned ⁶⁵ exceptions—fitting in the inconclusive category.⁶⁶ In partial contrast, *12 the state claim rulings, led by negligence and intentional infliction of emotional distress, had a larger proportion of inconclusive outcomes, largely attributable to the discretionary disposition based on ancillary jurisdiction in federal courts⁶⁷ and, to the extent the exceptions may apply, denials of summary dispositions of governmental and official immunity.⁶⁸ Conspicuously absent are claims rulings specifically based on state laws banning or restricting the use of restraints.⁶⁹

Finally, Table 2 presents the overall outcomes distribution of the claim rulings and, based on the aforementioned ⁷⁰ best-for-plaintiff approach, of the cases for the entire period.

Table 2: Overall Outcomes of the Claim Rulings and, on a Best-for-Plaintiff Basis, the Cases

TABLE 2: OVERALL OUTCOMES OF THE CLAIM RULINGS AND, ON A BEST-FOR-PLAINTIFF BASIS, THE CASES

	FOR THE PLAINTIFF-PARENT	INCONCLUSIVE	FOR THE DISTRICT DEFENDANTS
Claim Rulings (n=573)	< 1n=2)	44% (n=254)	55 n=317)
Cases (n=111)	2% (n=2)	69% (n=77)	29n=32)

Table 2 reveals that the majority of the claim rulings were conclusively in favor of the defendants, with almost all of the substantial minority being inconclusive; however, upon conversion to the case as the unit of analysis based on the most plaintiff-favorable ruling within each one, the inconclusive category accounted for more than two thirds of the cases, with all but two of the remaining 34 cases being conclusively in favor of the defendants.⁷¹

Discussion

The updated results largely represented a continuation of the pattern in the Zirkel and Lyons analysis that had an ending date five years earlier. More specifically, the continuing features included (1) the predominance of students with autism, physical restraints, and federal courts; (2) the multiple claim rulings per case; (3) the strong skew, among the conclusive rulings, in *13 favor of the defendants; and (4) the much more pronounced proportion of inconclusive outcomes upon conflation, on a best-for-plaintiff approach among the claim rulings, to the customary case unit of analysis. In partial contrast, the difference may be a leveling off of the upward trajectory in the frequency of this litigation, but this finding is only tentative in light of the limited length of the most recent interval.⁷²

The predominance of autism is likely attributable to the severity of this classification, particularly in light of its frequent combination with other IDEA classifications and/or DSM-type diagnoses, and the partially resulting placement in segregated settings, often with small, relatively homogeneous classes.⁷³ The limited communication ability of these children is an additional contributing factor to their vulnerability, and the at least occasional frustration of their teachers and aides similarly served to contribute to the physical propensity of the teachers and aides. Although these attributions are not directly evident in the cases, the difficulty of proof⁷⁴ and the clustering of cases⁷⁵ were more obvious. Similarly, the predominance of physical restraints, often in combination with other aversives, such as physical abuse and seclusion, were more direct indications of this repeating cyclical pattern.

The heavy predominance of federal courts largely reflects the primary emphasis on federal claims and the higher likelihood of larger verdicts.⁷⁶ Similarly, the multiple rulings in most of these cases⁷⁷ reflect the plaintiffs' "spaghetti strategy of throwing everything against the wall and hoping something sticks."⁷⁸ Although this litigation strategy has yielded only negligible results in terms of conclusive rulings,⁷⁹ the high proportion of inconclusive outcomes, particularly on a per case basis,⁸⁰ provided leverage for at least partial victory via further judicial proceedings or settlement.⁸¹ However, the *14 proportion of these cases resulting in settlement, as compared with withdrawal or abandonment, and the nature of these settlements are subject to speculation, being in the layer of the litigation iceberg⁸² that is well beyond the generally available databases.⁸³ Moreover, they do not have precedential value in its broad accepted legal meaning.⁸⁴

Similarly, the ultimate proportion of conclusively favorable judicial results is, like the findings of this analysis, subject to the major limitation that trial court verdicts and other dispositions without an opinion are not published in these databases.⁸⁵ Moreover, because these rulings were typically in response to pretrial motions, such as dismissal or summary judgment, a closer examination of the claim rulings in the inconclusive category revealed major differences within this category that were more significant than the party that initiated these motions.⁸⁶ For example, some of the court determinations made explicit the difference between the respective screening standards of the two successive stages of dismissal and summary judgment.⁸⁷ Similarly, within the inconclusive category the considerations for the parties' choices as to whether and how to proceed that are different among (a) those claims *15 disposed of by way of the exhaustion doctrine or discretionary ancillary jurisdiction, (b) those preserved for further proceedings on other threshold adjudicative grounds, and (c) those preserved for further proceedings on the merits.⁸⁸

Finally, although the pretrial posture of these cases limited the "facts" to allegations and affidavits, the decisions also revealed other legal consequences for the teachers and aides identified as the perpetrators. More specifically, some of the court opinions incidentally referred to administrative child abuse proceedings⁸⁹ and criminal prosecution.⁹⁰

In sum, despite the limitations, this updated analysis confirms the Lyons and Zirkel disproof of the Congressional Research Service's summary statement: "Although there are some judicial cases, they do not provide clear guidance on when, if ever, ... restraint may be used in schools."⁹¹ There are far more than "some" cases, and their rulings make rather clear that schools have reasonable latitude in using restraints for students with disabilities. The pertinent literature and professional norms both suggest that districts use this latitude for proactive policies and practices that are rigorously restrictive with regard to the use of restraints. However, with the imprecisely limited exception for inconclusive rulings,⁹² the basis should be concerns for effective education and parental trust, not for fear of legal liability. If advocates and/or policymakers consider district policies and practices to fall short in terms of cost/benefit analysis, including considerations of student safety and school climate, they should not rely on liability litigation or federal legislation. Instead, in light of the outcomes trend in the case law to date and the national political tide against activist federal legislation,⁹³ it would appear *16 advisable to focus on bolstering state laws in terms of providing a private right of action.⁹⁴

Footnotes

a1 The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 327 Ed. Law Rep. [1] (April 7, 2016).

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¹ The President signed the ESSA on December 10, 2015. See, e.g., Greg Korte, *The Every Student Succeeds Act v. No Child Left Behind: What's Changed?* USA TODAY, Dec. 11, 2015, <http://www.usatoday.com/story/news/politics/2015/12/10/every-student-succeeds-act-vs-no-child-left-behind-whats-changed/77088780/>

² See, e.g., Mark W. Sherman, ESEA Bill Called Modest But Vital Step in Reducing Restraint, Seclusion (Dec. 2, 2015), <http://www.specialedconnection.com/LrpSecStoryTool/index.jsp?contentId=22701128&query=%28%28ESEA+BILL%29%29&topic=Main&chunknum=&offset=7&listnum=1>: It is the conferees' intent that each state describes how it will support local educational agencies and schools by providing resources and guidance, professional development, and technical assistance to reduce techniques, strategies, interventions, and policies that compromise the health and safety of students, such as seclusion and restraint.

³ See, e.g., Jessica Butler, How Safe Is the Schoolhouse?: An Analysis of State Seclusion and Restraint Laws and Policies (July 2014), <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf>. For the earlier segment of this upward trend, which was recognized in the earlier push for federal legislative action, see, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-719T, SECLUSIONS AND RESTRAINTS: SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS (2009).

⁴ See, e.g., U.S. Senate Health, Education, Labor, and Pensions Committee, Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy (Feb. 2014), <http://www.help.senate.gov/imo/media/doc/Seclusion%20and%20Restraints%20Final%20Report.pdf> (report from the most recent hearings under the leadership of now retired Senator Harkin).

⁵ U.S. Department of Education, Restraint and Seclusion: Resource Document (May 2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>

⁶ See *supra* note 4, at 7.

⁷ *Id.* at 7 n.8.

⁸ Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 340 (2011). The specific period that this analysis covered was from January 1, 1980 until June 30, 2010. *Id.* at 332.

⁹ *Id.* at 337-39. As explained therein, they found it useful to differentiate three successively smaller units of analysis: (1) the "case," which was the reported adjudication of the plaintiffs' suit; (2) the "decision," because some of the cases generated more than one relevant reported judicial decision; and (3) the "claim ruling," a term that the authors coined, based on a cited line of previous research, for each of the separable rulings within the court's decision representing the alternative claims, such as Fourteenth Amendment substantive due process, Section 504, or state law. Moreover, they limited the analysis to final decisions and rulings on the merits, thereby excluding not only those on merely adjudicative issues, such as admission of evidence and attorneys' fees, but also on those on the merits that were reversed or modified upon further judicial proceedings. Conversely, "final" in this context included outcomes, as explained *infra* note 10, that were inconclusive (i.e., rulings in response to pretrial motions that preserved the claim(s) at issue for further proceedings, which could be decided in either party's favor if not withdrawn or settled).

¹⁰ *Id.* at 341-42. They used a five-category outcomes scale: 1=conclusively for plaintiff-parents; 2=inconclusively for plaintiff-parents; 3=inconclusively for both parties; 3 =inconclusively for district defendants; 5=conclusively for district defendants). Inasmuch as all of the decisions were based on pretrial motions, the three intermediate categories were based on denials (e.g., "2" for denials of dismissal or defendants' motion for summary judgment; "3" for denials of both parties' motions for summary judgment; and "4" for denials of plaintiff's motion for summary judgment) or granting with the allowance for further proceedings (e.g., "2" for ordering dismissal without prejudice or preliminary injunction. *Id.* at 336-37.

¹¹ *Id.* at 336-37 (citing, e.g., *D.N. v. Sch. Bd. of Seminole Cnty.*, 52 IDELR ¶ 282 (M.D. Fla. 2009) in which the court declined supplemental jurisdiction for ancillary state claims).

¹² *Id.* The exhaustion rulings were based on the provision of the Individuals with Disabilities Education Act (IDEA) that allows for claims on non-IDEA bases but only after exhausting the IDEA impartial hearing mechanism. 20 U.S.C. § 1415(l) (2012).

13 Zirkel & Lyons, note 8, at 344. The best-for-plaintiff procedure for moving from the rulings to the case as the unit of analysis, is to use the single most plaintiff-favorable claim ruling within each case as the outcome. The rationale is that when the plaintiff raised multiple claims as alternative bases for relief, the claim ruling that was the most successful represented the outer boundary for the outcome in terms of the defendants' liability. *Id.* Within the inconclusive outcomes on this basis, the nuanced differentiation of the five-category scale (*supra* note 10), those in favor of the parents predominated. *Id.* However, as recognized *infra* note 77, these differences warrant conflation for summary calculations and closer qualitative examination of intra-category differences for interpretive explanation.

14 Because, this article is only an update that extends the original analysis to include the most recent five years, its treatment of the background (e.g., literature review and legal framework) and the methodology is limited to recent developments and clarifying refinements, respectively. For the readers' ease of access, the author has posted the original article, which is available via Westlaw, on his website—perryzirkel.com.

15 See *infra* notes 44–47 and accompanying text.

16 For the broad, generally accepted formulation in terms of physical, mechanical, and chemical restraints, see Zirkel & Lyons, *supra* note 8, at 324.

17 *Id.* at 325–26 (citing, e.g., Julie Fogt & Christine Piripavel, *Positive School-Wide Interventions for Eliminating Physical Restraint and Exclusion*, 10 RECLAIMING CHILD. & YOUTH 227, 228–31 (2002)).

18 *Id.* at 326–30 (citing, e.g., Keeping All Students Safe Act, S. 3895, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s3895is/pdf/BILLS-111s3895is.pdf>).

19 *Id.* at 330–32 (citing, e.g., Michael E. Rozalski Mitchell L. Yell, & Lynn A. Boreson, *Using Seclusion Timeout and Physical Restraint*, 19 J. SPECIAL EDUC. LEADERSHIP 13 (2006); Perry A. Zirkel, *Discipline of Students with Disabilities*, 174 Ed. Law Rep. 43 (2013)).

20 See, e.g., Jennifer Freeman & George Sugai, *Recent Changes in State Policies and Legislation Regarding Restraint or Seclusion*, 79 EXCEPTIONAL CHILD. 427 (2013) (confusing or at least failing to differentiate legislation from proposed statutes, regulations, and nonbinding policy guidance); Reece L. Peterson & Carl R. Smith, *Law, Policy, and Litigation on Physical Restraint and Seclusion in Schools*, in PHYSICAL RESTRAINT AND SECLUSION IN SCHOOLS 15, 24–28 (Reece L. Peterson, Joseph B. Ryan & Michael E. Rozalski eds., 2013) (citing only one court decision after 2010); *cf.* Douglas Gagnon, Matybeth Mattingly, & Vincent J. Connelly, Restraint and Seclusion of Students with a Disability Continue to Be Common in Some School Districts Patterns: Remain Relatively Consistent Despite Recent Policy Changes (2014), http://scholars.unh.edu/carsey/?utm_source=scholars.unh.edu%2Fcarsey%2F224&utm_medium=PDF&utm_campaign=PDFCoverPages (finding a rather consistent pattern between the 2009–10 and 2011–12 CRDC survey results seemingly unaffected by state laws and policies, although not carefully examining the limitations of district self-reporting and the differentiation among state laws).

21 See, e.g., Alyssa Kaplan, Note, *Harm Without Recourse: A Private Right of Action in Federal Restraint and Seclusion Legislation*, 32 CARDOZO L. REV. 581 (2010) (observing that the proposed federal law lacks an express right to sue and also recommending the elimination of the exhaustion requirement).

22 See, e.g., Daniel Stewart, *How Do the States Regulate Restraint and Seclusion in Public School? A Survey of the Strength and Weaknesses in State Laws*, 34 HAMLINE L. REV. 531 (2011) (assessing the state laws based on 11 principles developed in his 2010 doctoral dissertation); Elizabeth Shaver, *Should States Ban the Use of Non-Positive Interventions in Special Education? Re-Examining Positive Behavior Supports under the IDEA*, 44 STETSON L. REV. 147 (2014) (opposing a complete ban on aversive interventions in state laws, while proposing amendment of the IDEA to clarify positive behavior interventions). For the most current canvassing of state laws, see Butler, *supra* note 3.

23 See, e.g., Ifeanyi Ezeigbo, *The Questionable Constitutionality of Mechanical Restraints in the Classroom: A Critique of the Tenth Circuit's Decision in Ebonie S. v. Pueblo School District No. 60*, 22 AM. U. J. GENDER SOC. POL'Y & L. 193 (2013) (disagreeing with a single decision in 2012 without discussing other recent restraints-based case law).

24 Susan C. Bon & Perry A. Zirkel, *The Time-Out and Seclusion Continuum: A Systematic Analysis of Case Law*, 27 J. SPECIAL EDUC. LEADERSHIP 35 (2014) (finding approximately parallel pattern for frequency and outcomes of cases focusing on time-out or seclusion).

25 The case databases were Westlaw and, for specialized supplementation, LRP's Special Ed Connection?. The citations from Special Ed Connection? are 'IDELR' (with a case no. represented as "?" rather than a page no.) for those in hard copy and 'LRP' for those that are only available electronically.

26 The search terms included "restraint" and "aversives," each in various combinations with "special education," "student," and "disability." Moreover, the author's regular review of the updating services of Special Ed Connection? and West's EDUCATION LAW REPORTER yielded additional decisions, especially due to the inconsistent terminology and imprecise boundaries for the various forms of restraint.

27 See *supra* note 8 (ending date of June 30, 2010).

28 The ending date for the search was Dec. 1, 2015, with the latest resulting decision being Sept. 16, 2015 (*Miller v. Monroe Sch. Dist.*, 66 IDELR ¶ 99 (W.D. Wash. 2015)). Given the imprecise time lag for publication in Westlaw and Special Ed Connection?, the ending date is only approximate; subsequently, other relevant decisions issued before that ending collection date may appear in either or both of these databases.

29 As a very limited exception, an occasional case included rulings on claims that the parents raised on their own behalf in addition but independent of those on behalf of their children. Moreover, in such cases, the parent's claim is arguably excludable as being a step removed from the restraint. See, e.g., *Vargas v. Special Educ. Serv., Inc.*, 62 IDELR ¶ 182 (Conn. Super. Ct. 2015) (parent's claim for intentional infliction of distress was based on lack of notification, whereas parallel claim on behalf of the student was based on the restraint itself).

30 The basis was a well-recognized professional definition that differentiated three basic forms of restraint: physical, mechanical, and chemical. Zirkel & Lyons, *supra* note 8, at 324 (citing *CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings*, 34 BEHAV. DISORDERS 223, 223–24 (2009)).

31 The defendants, as treated in Zirkel & Lyons, *supra* note 8, included both (a) institutions, typically local education agencies, but also private schools and occasionally state education agencies, and (b) individuals, typically teachers and/or administrators but sometimes specialists or aides. Similarly, based on the prior model, within the cases that met these criteria, the analysis excluded claim rulings concerning separable issues and non-education defendants, such as hospitals or the police.

32 See, e.g., Chapel Hill Carrboro (NC) City Sch., 66 IDELR ¶ 53 (OCR 2015) (finding, via OCR complaint investigation, that the brief restraint for student's safety did not violate § 504 or the IDEA); Canyon Indep. Sch. Dist., 65 IDELR ¶ 115 (Tex. SEA 2015) (finding, via IDEA impartial hearing, denial of FAPE based in part on improper restraint); Forest Lake Pub. Sch. Dist. No. 831–01, 115 LRP 30411 (Minn. SEA 2015) (finding improper restraint via IDEA complaint resolution process).

33 See, e.g., *Shadie v. Hazleton Area Sch. Dist.*, 580 Fed.Appx. 67, 310 Ed.Law Rep. 668 (3d Cir. 2014) (challenged aide's alleged grabbing, shaking, and striking student with autism); *B.B. v. Appleton Area Sch. Dist.*, 61 IDELR ¶ 187 (E.D. Wis. 2014) (concerning grabbing, squeezing, and force-feeding); *Austin v. Escondido Union Sch. Dist.*, 57 Cal.Rptr.3d 454, 219 Ed. Law Rep. 91 (Ct. App. 2014) (challenging use of "deep pressure" technique)

34 See, e.g., *C.B. v. City of Sonora*, 769 F.3d 1005, 310 Ed.Law Rep. 28 (9th Cir. 2014) (limiting claim rulings to police chief and officer); *J.H. v. Nation*, 61 F.Supp.3d 1176, 317 Ed.Law Rep. 381 (D.N.M. 2015) (limiting claim rulings to sheriff's deputy and the county).

35 See, e.g., *C.L. v. Lucia Mar Unified Sch. Dist.*, 62 IDELR ¶ 202 (C.D. Cal. 2014) (focusing on IEP implementation and formulation under the IDEA, with no claim ruling concerning the incidental or background use of restraints); *Plainville Bd. of Educ. v. R.N.*, 58 IDELR ¶ 257 (D. Conn. 2012) (focusing on FAPE for the years subsequent to the private placement that had used restraints); *Tracy N. v. Dep't of Educ., State of Haw.*, 715 F.Supp.2d 1093, 261 Ed.Law Rep. 244 (D. Haw. 2010) (focusing on IDEA FAPE claims where restraint was relegated to incidental, background mention); *Jaccari v. Bd. of Educ. of City of Chicago*, 690 F.Supp.2d 687, 256 Ed.Law Rep. 785 (N.D. Ill. 2010) (focusing on various IDEA FAPE claims wherein use of restraints was seemingly secondary); cf. *M.M. v. Dist. 001 Lancaster Cnty. Sch.*, 702 F.3d 479, 288 Ed.Law Rep. 101 (3d Cir. 2012) (focusing on IDEA FAPE claims where restraint was the primary issue).

Rep. 35 (8th Cir. 2012) (upholding use of seclusion where alternative of physical restraint posed risks of injury). The exclusion of *Jaccari* was a close call.

36 See, e.g., *L.S. v. Bd. of Educ. of Lansing Sch. Dist.* 158, 65 IDELR ¶ 225 (N.D. Ill. 2015) (allowing plaintiff-parents restricted opportunity for additional evidence regarding private placement's policies and capabilities in relation to students for whom restraints are medically contraindicated).

37 See, e.g., *Doe v. Darien Bd. of Educ.* 66 IDELR 284 (D. Conn. 2015) (for plaintiffs); *Sagan v. Sumner Cnty. Bd. of Educ.*, 61 IDELR 10 (M.D. Tenn. 2013) (for defendants).

38 See, e.g., *Littleton v. State*, 954 N.E.2d 1070, 272 Ed. Law Rep. 639 (Ind. Ct. App. 2011) (dismissing criminal charges against teacher who authorized aide to implement mechanical restraint per agreed-upon protocol).

39 See, e.g., *Orth v. Ohio Dep't of Educ.*, 2014 WL 6852006 (Ohio Ct. App. Dec. 4, 2014) (upholding revocation of license of special education teacher who injured student upon restraining her).

40 See, e.g., *Bryant v. New York State Educ. Dep't*, 692 F.3d 202, 284 Ed. Law Rep. 1 (2d Cir. 2012), cert. denied, 133 S. Ct. 2022 (2013) (upholding claim rulings based on the IDEA, § 504, and Fourteenth Amendment due process and equal protection, in favor of the defendant's regulation prohibiting schools, including approved residential and out-of-state placements, from using aversive interventions); *cf. Reid v. Prince George's Cnty. Bd. of Educ.*, 64 IDELR ¶ 142 (D. Md. 2014) (limiting role of restraint to being insufficient); *J.D. v. Garfield Park Acad.*, 64 IDELR ¶ 217 (N.J. Super. Ct. App. Div. 2014) (including incidental claim of failure to apply a physical restraint on student whom police shot upon eloping from specialized private school).

41 See, e.g., *Colbey T. v. Mt. Diablo Unified Sch. Dist.*, 2012 WL 1595046 (C.D. Cal. May 4, 2012) (approving trust fund of almost \$29k); *A.M. v. Jackson Pub. Sch. Bd. of Tr.*, 114 LRP 51215 (S.D. Miss. Apr. 3, 2012) (approving various nonmonetary actions, including ban on use of fixed restraints).

42 See *supra* note 9. The search was by decision but the results, including the use of Westlaw's history feature, identified more than one final relevant decision for some cases. The subsequent data collection tabulated the outcomes for the claims adjudicated within each decision. As a result, most cases had multiple claim rulings, and in some cases these claim rulings on a final basis arose in different decisions. For the frequency of each of these successively smaller units of analysis, see *infra* text accompanying note 50.

43 Zirkel & Lyons, *supra* note 8, at 332–37. For example, the recorded outcome was for the most recent relevant ruling. Conversely, the tabulation excluded rulings that were superseded upon further proceedings; rulings that concerned interlocutory issues, such as whether the court would allow consolidation of individual cases; and rulings for clearly separable claims, such as retaliation, indemnification, FERPA, and unrelated IDEA FAPE claims.

44 Compare *Crawford v. San Marcos Consol. Indep. Sch. Dist.*, 64 IDELR ¶ 306 (W.D. Tex. 2015); *J.P.M. v. Palm Beach Cnty. Sch. Bd.*, 916 F.Supp.2d 1314, 294 Ed. Law Rep. 179 (S.D. Fla. 2013) (conflating dismissal of § 504 and ADA claims), with *D.C. v. Oakdale Joint Unified Sch. Dist.*, 58 IDELR ¶ 106 (E.D. Cal. 2012) (counting separately dismissal of ADA claim and denial of dismissal of § 504 claim).

45 In contrast with the exceptional instances of separable plaintiffs (*supra* note 29), the naming of multiple defendants was common, particularly but not exclusively among the individual as compared with institutional defendants. For an extreme example, the various decisions culminating in *McElroy v. Tracy Unified School District*, 53 IDELR ¶ 119 (E.D. Cal. 2009) included 16 defendants.

46 For the only decision within the period after Zirkel & Lyons, *supra* note 8, with differentiated plaintiff claim rulings, see *Vargas v. Special Educ. Serv., Inc.*, 62 IDELR ¶ 182 (Conn. Super. Ct. 2015) (granting dismissal of parent's claim but denying dismissal of student's claim of intentional infliction of emotional distress). The instances of differentiated defendant claim rulings, particularly among the multiple individual defendants, was relatively frequent. See, e.g., *A.B. v. Adams-Arapahoe 28J Sch. Dist.*, 831 F.Supp.2d 1226, 279 Ed. Law Rep. 913 (D. Colo. 2011) (different rulings in response to defendants' motion for summary judgment for Fourth Amendment seizure, Fourteenth Amendment procedural due process, and § 504/ADA claims but not for the various other claims); *Brittany O. v. Bentonville Sch. Dist.*, 64 IDELR ¶ 299 (E.D. Ark. 2015) (different rulings

in response to dismissal motion for Fourteenth Amendment equal protection and substantive due process claims but not for the other claims).

47 For the original outcomes scale, see *supra* note 7 (1=conclusively for plaintiff-parents; 2=inconclusively for plaintiff-parents; 3=inconclusively for both parties; 4=inconclusively for district defendants; 5=conclusively for district defendants). This five-category outcomes scale was originally based on a similar unit of analysis, termed “issue rulings.” See, e.g., Youssef Chouhou & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 368 (2008). However, the absence of any rulings in category 3, which was for denial of both parties' motions for summary judgment, and the variance within categories 2 and 4, as explained *infra* notes 85–87 and accompanying text, warranted conflation of these three categories into a single “inconclusive” category. For similar conflation based on the particular nature of the data, see, e.g., Linda K. Mayer & Perry A. Zirkel, *Principals' Challenges to Adverse Employment Actions: A Follow-up Empirical Analysis of the Case Law*, 308 Ed. Law Rep. 588, 592 (2014); Mark A. Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?* 300 Ed. Law Rep. 1, 4 (2014).

48 More specifically, the spreadsheet consists of the following columns: case citation (e.g., parties' names, court abbreviation, and decision date); student's classification(s) (e.g., autism or emotional disturbance); restraint type (i.e., physical, mechanical, and/or chemical) and any additional aversives (e.g., physical abuse and/or seclusion); claim rulings; outcomes; and clarifying comments.

49 See *supra* note 13

50 For an analysis limited to the 50 cases added to the coverage of Zirkel & Lyons, *supra* note 8, which ended five years earlier, see Perry A. Zirkel, *The Use of Restraints with Students with Disabilities: An Update of the Case Law*, 44 COMMUNIQUÉ (forthcoming March 2016). These 50 additional cases included two decisions that were prior to Zirkel and Lyons' June 30, 2010 ending date. One was a continuation of the case formerly included via a decision in *Doe v. Darien Board of Education*, 52 IDELR ¶ 44 (D. Conn. 2009); *Doe v. Wilson*, 2010 WL 598920 (D. Conn. Feb. 18, 2010). The other represented an entirely additional case: *J.G. v. Card*, 53 IDELR ¶ 118 (S.D.N.Y. 2009). Conversely, for that prior period the search identified an additional exclusion based on the lack of identified or asserted disability status: *Golden v. Anders*, 324 F.3d 650, 175 Ed. Law Rep. 66 (8th Cir. 2003) (rejecting Fourteenth Amendment substantive due process claim against principal who physically restrained a regular education sixth-grade student). The most difficult case-counting issue was determining how to deal with cases (and their sometimes multiple decisions) that arose in a cluster specific to a particular teacher as compared with the occasional case where the students of such a teacher sued jointly. Zirkel and Lyons' case coverage included the two clusters. One consisted of five cases, each counted separately, arising from the alleged actions of a special education teacher in Seminole County, Florida. See, e.g., *G.C. v. Sch. Bd. of Seminole Cnty.*, 639 F.Supp.2d 1295, 249 Ed. Law Rep. 204 (M.D. Fla. 2009); *M.S. v. Sch. Bd. of Seminole Cnty.*, 636 F.Supp.2d 1317, 248 Ed. Law Rep. 656 (M.D. Fla. 2009). The other comprised the seven cases (each consisting of more than one decision) that the court consolidated in *Vicky M. v. Northeastern Education Intermediate Unit 19*, 2010 WL 481244 (M.D. Pa. Feb. 2, 2010); they were counted separately because this consolidating decision did not contain any claim rulings. For the updated coverage, the single such cluster amounted to five decisions with different plaintiffs that were not only consolidated but adjudicated in *Sagan v. Sumner County Board of Education*, 501 Fed. Appx. 537, 291 Ed. Law Rep. 52 (6th Cir. 2012) plus the decisions in *Williams v. Sumner County Board of Education*, 55 IDELR ¶ 136 (M.D. Tenn. 2010) and *Decker v. Sumner County Board of Education*, 111 LRP 1733 (M.D. Tenn. Sept. 20, 2010) that the Sixth Circuit did not address in Sagan; this cluster was tabulated as three cases in light of the separate final claim rulings in *Sagan*, *Williams*, and *Decker*.

51 *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 149 Ed. Law Rep. 368 (10th Cir. 2000) and 25 P.3d 1176, 155 Ed. Law Rep. 869 (Colo. 2001); *D.C. v. Oakdale Joint Unified Sch. Dist.*, 58 IDELR ¶ 106 (E.D. Cal. 2012) and 138 Cal.Rptr.3d 421, 277 Ed. Law Rep. 415 (Ct. App. 2012).

52 This distribution is inexact due to the frequent combination of classifications and occasional use of non-IDEA diagnoses, leaving the unevenly designated classification of multiple disabilities a frequent default alternative, separately (i.e., when not in combination with autism, emotional disturbance, or intellectual disabilities) accounting for at least 15% of the cases. In addition, approximately 9% of the cases did not specify the child's classification.

53 The percentages are only approximate largely because some of the cases concerned more than one type of restraint.

54 The few cases of chemical restraints, based on pretrial allegations or discovery, were as follows: *Eason v. Clark Cnty. Sch. Dist.*, 303 F.3d 1137, 169 Ed. Law Rep. 116 (9th Cir. 2002) (noxious solutions on lips and vinegar in his food); *Atherton v. Norman Pub. Sch.*, 60 IDELR ¶ 37 (W.D. Okla. 2012) (pepper spray – by school resource officer); *JGS v. Titusville Area Sch. Dist.*, 737 F.Supp.2d 449, 263 Ed. Law Rep. 653 (W.D. Pa. 2010) (liquid sanitizer). The most common form of mechanical restraint was a Rifton other similar specialized chair with straps or other confining features. See, e.g., *Domingo v. Kowalski*, 64 IDELR ¶ 47 (N.D. Ohio 2014); *Deshotel v. W. Baton Rouge Parish Sch. Bd.*, 937 F.Supp.2d 826, 297 Ed. Law Rep. 319 (M.D. La. 2011); *D.D. v. Chilton Cnty. Bd. of Educ.*, 701 F.Supp.2d 1236, 258 Ed. Law Rep. 596 (M.D. Ala. 2010).

55 The limited exception is for the first interval, which covers the long period from the first decision in 1987 to the 1999–2003 interval. The reason is that the negligible number of cases and decisions during this early period makes differentiation in four-year intervals meaningless.

56 The “r” for the abbreviated final period is based on the actual, not projected, segments.

57 The projection is a straight-line extrapolation using a multiplier of 5.6 based on the imprecise ending date. See *supra* note 28.

58 Serving as polar exceptions, the first and last intervals are considerably more and less than four years, respectively.

59 For the outcomes scale, see *supra* note 47 and accompanying text.

60 For the variance within each party, see *supra* notes 29 and 31.

61 The limited length of the final interval, only amounting to approximately two-thirds of a year, renders its contours a notably tentative estimate. Inasmuch as the final bar represents approximately one sixth of the four-year units of the other bars, the ultimate “n” and the outcomes distribution for this final bar when the four-year period of 2015–18 will differ from the current, very limited data to an unknown extent.

62 The two exceptions in terms of conclusive rulings for the plaintiff–parents have qualifications. The first, *B.H. v. West Clermont School District*, 788 F.Supp.2d 682, 272 Ed. Law Rep. 445 (S.D. Ohio 2011), was—unlike most of the other rulings—not a liability claim in the usual sense of money damages, and the restraint was only part of the factual basis. More specifically, the court ruled in favor of the plaintiff–parents on their single, IDEA claim and awarded two years of compensatory education for the district's failure to provide appropriate behavior management services, which in turn was based in part on its ineffective restraints and in part on its point system. The second, which fit rather dramatically in the mainstream meaning of liability, arose at least slightly indirectly and incompletely as the culmination of three successive stages: (1) *Ebonie S. v. Pueblo Sch. Dist.*, 819 F.Supp.2d 1179, 277 Ed. Law Rep. 1011 (D. Colo. 2011) (denying the defendants' motion for summary judgment for the § 504/ADA claim against the school district, while granting their motion for the Fourteenth Amendment procedural due process claim and the § 504/ADA claim against the individual defendants); (2) *Ebonie S. v. Pueblo Sch. Dist.*, 695 F.3d 1051, 285 Ed. Law Rep. 21 (10th Cir. 2012), cert. denied, 133 S.Ct. 1583 (2013) (affirming a separately unreported granting of the defendants' motion for summary judgment for the Fourteenth Amendment equal protection and substantive due process claims and the Fourth Amendment seizure claim); and (3) *Ebonie S. v. Pueblo Sch. Dist.*, 65 IDELR ¶ 165 (D. Colo. 2015) (granting post–, not pre–, judgment interest for an intervening \$2.2 million jury verdict under § 504/ADA). As a possible fourth stage, the verdict is on appeal, with the court granting a stay of the final judgment upon the defendant–district's posting of a bond for \$2.2 million. *Ebonie S. v. Pueblo Sch. Dist.*, 2015 WL 4245831 (D. Colo. July 14, 2015).

63 These few rulings consisted of two claims that specified § 1983 without identifying a specific constitutional provision or other federal law and two claims that specified remotely relevant federal laws, such as the Bill of Rights for the Developmentally Disabled.

64 For these rulings the court referred generically to tort claims as contrasted with the even more general category separately designated in the Table as unspecified state law claims.

65 See *supra* note 62.

66 Even in cases where the court granted dismissal based on exhaustion (*supra* note 12), the outcome was inconclusive because it was without prejudice; the plaintiff could return after proceeding under the IDEA's administrative adjudication process.

67 *See supra* note 11. For state claim rulings in federal court subject to the defendants' motion for dismissal or summary judgment, the outcome was inconclusive not only upon the court's denying but also—because the disposition was without prejudice to having the claim(s) adjudicated in state court—upon the court's granting of the motion.

68 For the varying exceptions from state to state, see Peter J. Maher, Kelly Price & Perry A. Zirkel, *Governmental Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234 (2012).

69 Although unspecified state law claims accounted for 16 claim rulings, the lack of separate identification of such laws in the cases is likely attributable to the failure of most of these law, despite their otherwise expanding extent (*supra* note 3) to expressly provide for a right to sue. In light of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the courts are generally averse to inferring a private right of action.

70 *See supra* note 13 and text accompanying note 49.

71 For the two rulings, thus cases, in the conclusively—for-plaintiff category, see *supra* note 62.

72 This limitation is, at least in part, an artifact of the four-year intervals, which happened to start with the partial year of 2015. See *supra* note 61 and accompanying text.

73 An additional or interacting contributing factor is the particular propensity of the parents of students with autism. Perry Zirkel, *Autism Litigation under the IDEA: A New Meaning of "Disproportionality"?* 24 J. SPECIAL EDUC. LEADERSHIP 92 (2011).

74 As a result, the informant not infrequently was an aide or support specialist. See, e.g., *H.M. v. Bd. of Educ. of Kings Local Sch. Dist.*, 117 F.Supp.3d 992, 2015 WL 4624269 (S.D. Ohio 2015) (school librarian and aide); *Domingo v. Kowalski*, 64 IDELR ¶ 47 (N.D. Ohio 2014) (aide).

75 *See supra* note 50.

76 The federal claims had the added incentive of attorneys' fees for prevailing plaintiffs, whereas governmental immunity was an added disincentive for focusing primarily on the state judicial forum. Yet, sampling skew may also contribute to this seeming predominance of the federal forum. See *infra* note 84.

77 At the high end, *A.B. v. Adams-Arapahoe 28J School District*, 831 F.Supp.2d 1226, 279 Ed. Law Rep. 913 (D. Colo. 2011) encompassed, even with the increased conflation (*supra* text accompanying notes 35–46), 22 separate claim rulings.

78 Lyons & Zirkel, *supra* note 8, at 346 (noting the alternative metaphors of "kitchen sink" and "shotgun" pleadings).

79 *See supra* note 62.

80 *See supra* Table 2 (accounting for more than a two-thirds majority of the cases on a best—for-plaintiff ruling basis).

81 Exemplifying the leverage for settlement from an at least partially analogous context, see Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization?: Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 184–87 (2010) ("In the 14 percent of cases that remain active after the disposition of the motion for summary judgment, more than one-half .. settle before a trial outcome"); see also Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 306 (2005).

82 For the use of this metaphor, see, e.g., Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483, 486–88 (2012).

83 For those few settlements reported in the available decisions for the 111 cases, often without specific information as to the amounts, see *Crawford v. San Marcos Consol. Indep. Sch. Dist.*, 64 IDELR ¶ 306 (W.D. Tex. 2015); *S.D. v. Moreland Sch. Dist.*, 64 IDELR ¶ 205 (N.D. Cal. 2014) (70% of two years of private school tuition and 44% of \$136k attorney's fees); *D.C. v. Oakdale Joint Unified Sch. Dist.*, 2013 WL 275271 (E.D. Cal. Jan. 23, 2013) (\$51k, including \$30k trust fund for child); *T.B. v. Chico Unified Sch. Dist.*, 2010 WL 1032669 (E.D. Cal. Mar. 19, 2009) (\$40k, with attorney receiving 60%); *McElroy v. Tracy Unified Sch. Dist.*, 2008 WL 5045952 (E.D. Cal. Nov. 21, 2008); *Autism Soc'y of Mich. v. Fuller*, 2007 WL 2484983

(W.D. Mich. Aug. 29, 2007). Additionally, Zirkel & Lyons, *supra* note 8, at 350, identified two substantial settlements that they incidentally found reported in newspaper articles.

84 See, e.g., Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460 (2010) (consisting of binding precedent, horizontal precedent, and persuasive precedent).

85 For example, only three percent of federal district court dispositions are accompanied with an opinion. David A. Hoffman, Alan J. Izenman, & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2008). The proportion of publication is generally notably lower for state courts. See, e.g., Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 L. LIBR. J. 475, 479 (2004). The Westlaw access to the PACER system does not change this differential because the system is limited to federal courts. See, e.g., Retrieving Dockets on Westlaw, west.thomson.com/documentation/westlaw/wlawdoc/wlres/litwd06.pdf

86 Although the interpretation is in favor of the moving party, in most of the cases the moving party was the defendants, and those decided on appeal have the intervening factor of the standard of appellate review.

87 See, e.g., *H.M. v. Bd. of Educ. of Kings Local Sch. Dist.*, 117 F.Supp.3d 992, 2015 WL 4624269 (S.D. Ohio 2015) (allowing some of the claims to survive dismissal pending possible rejection at the subsequent stage of summary judgment after discovery); *A.P. v. Johnson*, 65 IDELR ¶ 102 (N.D. Iowa 2015) (allowing exhaustion claim to survive dismissal but warning it the summary judgment stage could have different result).

88 The differential considerations include not only the odds of judicial success but also various other public and private factors, such as the district's estimated transaction costs (e.g., attorneys' fees), the extent and nature of its insurance provisions, its concern with community relations, and the parents' resources, requested relief, and perseverance. See, e.g., Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Leandra Lederman, *Precedent Lost: Why Encourage Settlement and Why Permit Non-Party Involvement in Settlements?* 99 NOTRE DAME L. REV. 221 (1999).

89 See, e.g., *Smith v. Sch. Bd. of Brevard Cnty.*, 61 IDELR ¶ 160 (M.D. Fla. 2013); *Medley v. Rogers*, 2009 WL 50168 (Ky. Ct. App. Jan. 9, 2009). The standards, not just the proceedings, are different. See, e.g., *Domingo v. Kowalski*, 64 IDELR ¶ 47, at *12 (N.D. Ohio 2014) ("If in fact [the teacher] acted as [the aide] testified, she almost certainly engaged in child abuse. But a jury could not find her conduct shocks the conscience [under Fourteenth Amendment substantive due process]").

90 See, e.g., *Phipps v. Clark Cnty. Sch. Dist.*, 63 IDELR ¶ 100 (D. Nev. 2014); *G.C. v. Sch. Bd. of Seminole Cnty.*, 639 F.Supp.2d 1295, 249 Ed. Law Rep. 204 (M.D. Fla. 2009).

91 NANCY JONES & JODY FEDER, CONG. RESEARCH SERV., R40522, THE USE OF SECLUSION AND RESTRAINT IN PUBLIC SCHOOLS: THE LEGAL ISSUES i (2010), <http://opencrs.com/document/R40522/>. To the extent that the Jones & Feder report applied concomitantly to seclusion, Bon & Zirkel, *supra* note 24, provided the corresponding correction.

92 See *supra* note 80–84 and accompanying text.

93 Various other avenues, such as preservice and inservice training, the OCR and state complaint processes, and alternative dispute resolution procedures (e.g., IEP facilitation), remain as viable supplemental strategies to reduce the shortfall. Additionally, the prospect of including provision in the next set of amendments to the IDEA specific to restraints and seclusion has better odds than a separate federal statute, but the applicable remedy is largely limited to compensatory education and does not extend to money damages. See, e.g., *C.O. v. Portland Pub. Sch.*, 679 F.3d 1162, 280 Ed. Law Rep. 28 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 859 (2013); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 220 Ed. Law Rep. 502 (3d Cir. 2007); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 210 Ed. Law Rep. 544 (1st Cir. 2006); *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005).

94 See *supra* note 69. Interestingly a recent report by three disability rights organizations in Wisconsin, which reported continued over-use and abuse of restraints in the state, did not include this recommendation in their proposed revisions of the Wisconsin

law. SECLUSION & RESTRAINT IN WISCONSIN PUBLIC SCHOOLS 2013–14: MILES TO GO (Feb. 2016), <http://www.disabilityrightswi.org/wp-content/uploads/2016/02/SeclusionRestraint-Report-2013-2014.pdf>.

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