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*By Perry A. Zirkel*

The use of seclusion and restraints with students with disabilities has been a major legal issue in recent years. Congress has repeatedly considered bills to prohibit the use of seclusion and restrict the use of restraints in K–12 schools to emergency situations, but the chief proponent of federal legislation, Senator Tom Harkin, recently retired (C-SPAN, 2014), and the movement against such aversive procedures appears to have shifted to the state legislative level, with several states adding or strengthening laws restricting restraints in the wake of proposed federal legislation (Butler, 2015).

In light of the wide and inconsistent variance in professional and legal references to seclusionary practices, Bon and Zirkel's (2014) analysis of the case law used, as the framework, a continuum consisting of (a) inclusionary time-out (i.e., within the classroom); (b) exclusionary time-out (i.e., outside the classroom but with access to students or staff); (c) seclusionary time-out (i.e., in an isolated but not locked location); and (d) seclusion (isolated and locked location), with restraint as the next but separable and overlapping category. They identified 51 court cases concerning the use of one of more of these four categories of time-out and seclusion with students with disabilities published between 1980 and mid-2013. Their findings in terms of demographic case characteristics included that (a) the disability classifications that accounted for the majority (62%) of the cases were emotional disturbance and autism, each either alone or in combination with other classifications; (b) most of the cases were rather evenly but imprecisely distributed among the three more restrictive subcategories, with relatively few cases limited to inclusionary time-out or precisely one of the other three, more restrictive subcategories alone; (c) the frequency of the cases reflected an upward longitudinal trajectory, with the most recent 5-year period of 2008–2012 accounting for 22 cases; and (d) the claims per case presented an accompanying longitudinal trend, with the majority being federal claims aiming at monetary relief. This final trend, Bon and Zirkel (2014) observed, was similar to Zirkel and Lyons' (2011, p. 346) finding for restraint litigation–that the plaintiff-parents employed a “spaghetti strategy of throwing everything against the wall and hoping something sticks.” More specifically, Bon and Zirkel (2014) found that the most frequent claims, often in combination with various others, were Fourteenth Amendment substantive due process (SDP), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act with the Americans with Disabilities Act (§504/ADA). As a result, the 51 cases generated at least 251 claim rulings, depending on the extent of conflation among the various individual and institutional defendants. As for the outcomes, they found that the claims rulings were strongly skewed in favor of the defendants. Only one claim ruling, which was based on the IDEA and limited to compensatory education relief, was conclusively in favor of the plaintiff-parents, although approximately one third of the claims rulings were “inconclusive.” More specifically, because all of the decisions were in response to the pretrial motions of dismissal or summary judgment, the court's denial of either motion or its granting the motion for dismissal “without prejudice” preserved the claim for further possible proceedings. Thus, these claim rulings were inconclusive; they could ultimately end as a verdict in favor of either party or result, instead, in either settlement or withdrawal/abandonment. For example, a common preliminary disposition of various federal claims, such as those under Section 504 and/or the ADA, was to dismiss the case subject to “exhaustion” of a due process hearing under the IDEA. Similarly, a frequent disposition of ancillary state law claims in federal court in the wake of dismissal or summary judgment of the federal claims in favor of the defendant, was to decline jurisdiction, thus allowing the parent the option of refiling these claims in state court. When Bon and Zirkel (2014) reanalyzed the outcomes per case, using the claim ruling that was most favorable to the plaintiff-parent, the inconclusive category expanded to approximately 55%.

**Update of the Case Law**

As a companion to the recent update in *Communiqué* (Zirkel, 2016) of Zirkel and Lyons' (2011) case law analysis concerning restraints, the purpose of this article is to provide an update of Bon and Zirkel's (2014) case law analysis concerning time-out and seclusion. More specifically, this update is limited to court decisions found for the most recent 3-year period, which ended in mid-2016 upon the completion of the data collection. The methodology parallels Zirkel's (2016) use of Zirkel and Lyons (2011) model. Table 1 summarizes the results in terms of (a) the parties' names, court, and date of the most recent relevant decision; (b) the child's classification; (c) the challenged district's alleged aversive action(s), including which of the four aforementioned categories was or were at issue; and (d) the overall outcomes (D = conclusively in favor of the defendants; Inc. = inconclusive; and P = conclusively in favor of plaintiff) for three categories of claims: Const. = federal Constitution, such as SDP; Leg. = federal legislation, such as the IDEA or §504/ADA; and State = state statutes and common law, such as negligence or false imprisonment. The final column of Table 1, headed “Notes,” clarifies any asterisked entries in the preceding columns. The following subsections summarize and explain the findings, including information supplementary to the entries in Table 1.

**Table 1 Overview of the Court Decisions Since Bon and Zirkel's (2013) Analysis**

| **FINAL DECISION** | | | **CHILD** | **ALLEGED DISTRICT ACTIONS** | | **CLAIM RULINGSd** | | | **NOTESe** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Case Name** | **Date** | **Court** | **Clas'n.a** | **Typeb** | **Add'l Aversivesc** | **Const.** | **Fed. Leg.** | **State** |  |
| *J.G. v. Card*f | 9/17/09 | S.D.N.Y. | autism\* | S | R, PA, VA | Inc./D |  | Inc./D | \*multiple students |
| *J.D.P. v. Cherokee Cnty. SDf* | 8/8/10 | N.D. Ga.. | autism + | S | R |  | D | Inc. |  |
| *Sabaski v. Wilson Cnty. BOEf* | 12/17/10 | Tenn. Ct. App. | (unspec.) | ST | R, PA |  |  | Inc./D |  |
| *Sagan v. Sumner Cnty. BOEf* | 10/5/12 | 6th Cir. | ID\* | ST | R, PA, VA |  |  | D | \*multiple students |
| *Muskrat v. Deer Creek Pub. Sch.*g | 4/23/13 | 10th Cir. | DD | ET or ST\* | R, PA | D |  |  | \*unclear |
| *Vargas v. Special Educ. Serv.\** | 11/9/13 | Conn. App. Ct. | DD | ST | R |  | D | D | \*private school |
| *Rodriguez v. ISD of Boise City* | 3/28/14 | D. Idaho | autism | ST | PA |  | D |  |  |
| *K.S. v. Strongsville City SD* | 5/30/14 | N.D. Ohio | autism | ST\* |  |  | D |  | \*part of FAPE claim |
| *Motyka v. Howell Pub. SD* | 6/20/14 | E.D. Mich. | autism | ET or ST\* |  |  | Inc. |  | \*unclear |
| *C.P. v. Krum ISD* | 9/17/14 | E.D. Tex. | ED + | IT\* |  |  | D |  | \* 1/10 of FAPE claim |
| *Barnett v. Baldwin Cnty. SD* | 10/7/14 | S.D. Ala. | (unspec.)\* | ST, S |  | Inc. | Inc./D | D | \*5 of 7 w. IEPs |
| *J.D. v. Garfield Park Acad.* | 11/20/14 | N.J. App. Ct. | multiple | ST or S | PA\* |  |  | D | \*police shooting |
| *Schiffbauer v. Schmidt* | 3/25/15 | D. Md. | multiple | ST | R, PA | D |  |  |  |
| *GM v. Massapequa UFSD* | 7/2/15 | E.D.N.Y. | OHI | ST | Other\* | Inc. | Inc. | Inc. | \*e.g., detention |
| *H.M. v. Bd. of Educ.* | 8/3/15 | S.D. Ohio | multiple\* | ST | R, PA, VA | Inc. | Inc. | Inc./D | \*5 students |
| *Payne v. Peninsula SDg* | 8/3/15 | 9th Cir. | autism | ST or S |  | D |  |  |  |
| *Carroll v. Lawton ISD* | 11/10/15\* | 10th Cir. | autism | ST | PA | Inc. | Inc. | Inc. | \*also 3/26/14 |
| *J.A. v. Moorhead Pub. Sch. ISD* | 11/23/15\* | D. Minn. | ID | ST |  | Inc. | Inc. | Inc. | \*also 11/25/14 |
| *Domingo v. Kowalski* | 1/7/16\* | 6th Cir. | autism\*\* | ST | R, PA | D |  | Inc./D | \*also 8/29/14; \*\*3 students |
| *Crawford v. San Marcos CISD* | 2/2/16 | 5th Cir. | autism | ST | R |  | D |  |  |
| *Miller v. Monroe Sch. Dist.* | 2/3/16\* | W.D. Wash. | autism | IT, ST, S | R | D | Inc./D |  | \*also 3/5/15, 9/6/15 |
| *McCauley v. Francis Howell SD* | 3/1/16 | E.D. Mo. | (unspec.) | ST | R | Inc. | Inc. | Inc./D |  |
| *Brittany O. v. Bentonville SD* | 3/15/16\* | E.D. Ark. | multiple | S? | R, PA | D | D | Inc./D | \*also 1/22/15 |
| *Parrish v. Bentonville SD* | 4/28/16 | E.D. Ark. | autism\* | S? | R, PA | D | Inc. | D |  |
| a classifications: autism, developmental disabilities (DD), emotional disturbance (ED), intellectual disabilities (ID), other health impairment (OHI), specific learning disabilities (SLD);  b time-out/seclusion subcategories: inclusionary time-out (IT), exclusionary time-out (ET), seclusionary time-out (ST), and seclusion (S);  c other aversives: restraint (R), physical abuse (PA), and verbal abuse (VA);  d claim rulings: in favor of defendant (D), in favor of plaintiff (P), and inconclusive (Inc.);  e clarification of asterisked entry;  f supplementing Bon & Zirkel (2014);  g superseding Bon & Zirkel (2014). | | | | | | | | | |

***Case characteristics and overall outcomes***. The plaintiffs were the parents filing on behalf of their children and, in an occasional case, with additional claims premised on their own legal rights. The defendants were in most cases school districts and/or their individual personnel, but in a few cases they were intermediate or state education agencies and/or private schools.

Starting with four cases not identified in the Bon and Zirkel (2014) analysis and extending to two cases superseding decisions in their analysis, Table 1 reveals a total of 24 cases. These 24 cases represented 30 pertinent court decisions and 93 claims rulings. Of the 24 cases, only three arose in state court. For the remaining 21 cases, six were at the federal appellate level (i.e., at the federal circuit court of appeals, designated in the table as *Cir*.).

Table 2 presents the overall outcomes for the 93 claim rulings and, on a best-for-plaintiff basis, for the 24 cases. Examination of this outcomes overview reveals that for the conclusive category, the results were overwhelmingly in favor of the defendants, with none for the parents, but that the inconclusive category was far from inconsequential. Indeed, the inconclusive outcomes category accounted for half of the claim rulings and, upon the best-for-plaintiff basis of conflation to the larger unit of analysis, the clear majority (63%) of the cases.

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

|  | **CONCLUSIVELY FOR P** | **INCONCLUSIVE** | **CONCLUSIVELY FOR D** |
| --- | --- | --- | --- |
| **Claim Rulings** (n = 93) | 0% (n = 0) | 51% (n = 47) | 49% (n = 46) |
| **Cases** (n = 24) | 0% (n = 0) | 63% (n = 15) | 38% (n = 9) |

***Classifications and actions***. The predominant classification, accounting for the majority of the cases, was autism either alone or in combination with other classifications (designated in the table as “autism +”). The second most frequent classification, which was not clearly separable from autism +, was multiple disabilities. Additionally, in four of the cases, the plaintiff-parents filed suit on behalf of more than one student, including one case that included but was not limited to special education students (*Barnett v. Baldwin County School District*, 2014).

The most common category of the framework continuum was seclusionary time-out, but the categorization is imprecise due to the inconsistent terminology and often limited descriptions in the court opinions. Moreover, the one or more categories of time-out and seclusion often combined with and secondary to one or more other more invasive aversives, such as restraint and/or physical abuse. As a result, many of the cases were relatively marginal in relation to the focus of this investigation, and the boundaries with the excluded cases (e.g., *Roges v. Boston Public Schools*, 2015; *Zdrowski v. Rieck*, 2015) were less than clear-cut. Finally, even in the relatively few cases where the aversive action was limited to time-out and seclusion, the claims were more often than not a limited part of a larger legal challenge, such as multiple alleged violations of free appropriate public education (FAPE) under the IDEA.

***Category-by-category outcomes***. Most of the cases were based on multiple claim rulings within and/or among more than one of the three broad categories in the table. For the constitutional category, rulings were either inconclusive (typically based on the plaintiff-parents failure to exhaust an impartial hearing under the IDEA) or conclusively in favor of the defendants (either based on another defense or the plaintiffs' failure to establish a triable issue, with their allegations accepted as true for this limited purpose, based on the essential elements of the claim). For example, the most common constitutional claim was based on Fourteenth Amendment SDP. For district defendants, the threshold and frequently successful defense was either Eleventh Amendment immunity or lack of the requisite policy or custom. For individual defendants, the primary conclusive defense was qualified immunity, which requires clearly established precedents. For both defendants, the next and difficult hurdle for the plaintiffs was to establish that the challenged conduct, even if preponderantly proven, met the substantive standard of being shocking to the conscience of society. For instance, in *Muskrat v. Deer Creek Public Schools* (2013), the SDP claim against the principal was that, in the wake of repeated staff members' use of the time-out room in the rear of the classroom for a fourth grade child with severe developmental disabilities (contrary to his IEP), she grabbed and forced him into the time-out room against his will. More specifically, the allegations were that (a) the teacher had summoned the principal to calm the child down after he overturned a chair and knocked items from classroom tables, and (b) although the child was yelling, crying, and resistantly clinging to the door jamb, the principal pushed him into the time-out room, closed the door, placed a chair in front of it, kept him there for approximately four minutes while directing the teacher to continue teaching the rest of the class over the screaming. In response, the Tenth Circuit Court of Appeals ruled as follows:

Accepting the [parents'] view of events, as the [lower] court did, we agree with the [lower] court that this does not describe a conscience-shocking event. While we understand emotions can run high in maintaining classroom order, at the time of this incident the [parents] had not yet made [principal] aware of the medical consequences that they now attribute to [the] timeouts. Thus, although [the child] obviously did not want to be placed in the timeout room, this single incident lasting four minutes does not shock the conscience. The various details, such as placing a chair in front of the door, show at most a “careless or unwise excess of zeal” rather than a “brutal and inhumane abuse of official power.” (pp. 787–788)

The claim rulings based on federal legislation were similarly split approximately evenly between inconclusive rulings, typically based on the aforementioned exhaustion requirement, and rulings conclusively in favor of the defendants, based on the judicially established standards. The leading claims in this category were based on §504/ADA, which requires the relatively defendant-friendly standard of deliberate indifference or gross misjudgment, or the IDEA, which has not only similarly district-favorable standards for FAPE but also the distinctive unavailability of money damages.

Finally, the claim rulings based on state law were largely ancillary to the federal claims and either conclusively in favor of the defendants, typically based on governmental immunity, or inconclusively dismissed, with the possibility of refiling in state court. Conspicuously absent were state claims based on state legislation and regulations prohibiting or restricting seclusion, along with restraints, apparently attributable to these laws' failure to provide a right to sue. As a limited exception, the federal court in *C.P v. Krum Independent School District* (2014) rejected the parents' IDEA challenge to a behavior intervention plan that allowed removal of the child during behavioral outbursts to a separate “content mastery” classroom, concluding that this separate area did not meet the definition of “time-out” in the Texas law specific to such aversive procedures.

**Discussion**

***Overall case characteristics***. The overall case characteristics aligned closely with those of the more extensive prior period that Bon and Zirkel (2011) reported with one limited exception, which is a possible moderation in the upward trajectory of cases. More specifically, after readjustment of four additions to and, via superseding decisions in the present period, two deductions from the case total for the prior period, the revised totals amounted to 24 cases for the five-year period 2008–2012 and 20 for the 3.5-year 2013–2016.

The multiplicity of defendants and the overall ratios among cases, decisions, and claim rulings fit well with the previous pattern. Similarly, the strong skew in favor of districts in conclusive outcomes and the significant segment of inconclusive outcomes, especially on the best-for-plaintiff conflation from claim rulings to cases, does not differ notably from the distribution in the earlier case law. This continuing outcome trend may account for the moderation of the upward trend in case frequency.

In turn, the reasons for the overall steep slope that plaintiffs face include those identified in the U.S. Senate Health, Education, Labor, and Pensions Committee (2014) report: (a) adjudicative hurdles, such as the exhaustion requirement, the statute of limitations, and various institutional or individual immunities; (b) problems in proving compensable harm; (c) the “halo effect” (p. 28) that culturally favors school systems and their personnel; (d) the perceived code of silence among school employees; and (e) insufficient remedies not only in court but also via other legal avenues, such as state or federal agency investigations. The contributing factors, however, are more extensive and complex, including, for example, the following: (a) the nature of the judicial process that entails not only considerable costs but also the results of congestion, such as time-consuming final decision-making and, given the severity of the surviving cases more generally, rather callous sensitivity about the challenged conduct; (b) the doctrinal effect of stare decisis, or precedent, which builds upon the previous pattern of published case law, especially at the appellate level; (c) the overlapping effect of the institutional role of courts to apply rather than make law; and (d) the proof problem of obtaining evidence from the victim-child, who is in a disadvantageous position in terms of not only age and role but also, in many of these cases, severe and multiple cognition and/or communication disabilities.

However, serving as a significant intermediate segment, the inconclusive outcomes, particularly when the aforementioned “spaghetti” strategy is examined on a case-by-case basis for at least one strand provisionally sticking, are far from negligible. Upon conflation, more than half of the cases survive one of the two successive pretrial stages for further proceedings or the heightened alternative of settlement. One of the major factors for defendants, and especially their insurance companies, is the estimated amount of transaction costs, including fees for attorneys and expert witnesses, which increase upon the successive stages after denials of dismissal and summary judgment motions, respectively. Yet, depending on the number and nature of the inconclusive claim rulings within the case, the multifactored calculus that extends beyond economic considerations and that applies on both sides of the litigation table may lead to the plaintiffs' withdrawal or abandonment of their lawsuit. The settlement agreements, even more than trial decisions, are hidden parts of the litigation iceberg, because (a) they are not regularly reported even in the broad sense of “published” cases, and (b) they often contain nondisclosure provisions, which are largely though not entirely effective (e.g., Fossey, Sultanik, & Zirkel, 1990). Similarly, the parties and their attorneys are not generally amenable to reporting withdrawals and abandonments. Thus, the ultimate results of the inconclusive cases and, for those ending in settlement, the specific terms, are subject to speculation. In any event, inconclusive status does not translate into solid judicial precedent. In contrast, as the federal appellate decisions during the present period illustrate, those that were conclusive tended to reinforce the steep standards facing the plaintiff-parents (e.g., *Crawford v. San Marcos Consolidated Independent School District*, 2016; *Muskrat v. Deer Creek Public Schools*, 2013; *Payne v. Peninsula School District*, 2015).

Finally, the continuing gravitation to federal rather than state courts is largely attributable to their generally higher verdicts, the availability of attorneys' fees for most federal claims, and the aforementioned barriers of governmental and official immunity that persist in many states to common law claims, such as negligence. Although federal and state courts have overlapping jurisdiction, the general trend of K–12 education litigation is clearly in the direction of the federal courts (Zirkel & Johnson, 2011).

***Classifications and actions***. The predominance among the plaintiff-students of autism and multiple disabilities is also not unexpected in light of the previous pattern and their particular vulnerability. This vulnerability is attributable not only to the severity of their impairments and behaviors but also their tendency to be in segregated public or private placements. The absence of general education students and staff in terms of norms and the relatively homogenous difficulties of the student clientele may foster the aversive actions that include but are not limited to seclusion and time-out. Indeed, as evident in Bon and Zirkel (2014) and the corresponding case law analyses specific to restraints (e.g., Zirkel, 2016), a single special education teacher sometimes accounts for litigation on behalf of several students, whether in the form of a single suit or a cluster of suits. For example, the abusive conduct of a special education teacher accounted for seven separate decisions, with five of them subsequently consolidated in the appellate decision in *Sagan v. Sumner County Board of Education* (2012). This same case also illustrates other legal consequences of such conduct; she resigned in the face of termination proceedings and was indicted for child abuse. However, the role of seclusion/time-out in Sagan was notably marginal compared to restraints and other physical abuse.

This combination with and subordination to more blatantly physical aversives was even more evident than in Bon and Zirkel's (2014) more extensive period. Moreover, even in the minority of cases where the claims were limited to one or more categories of the seclusion and time-out continuum, the claims were often a limited part of a much broader FAPE challenge under the IDEA. Further contributing to the blurriness, the court opinions often either cryptically referred to “seclusion” or “time-out room” without definition or detail or referred to the labels that the parties used for the restricted spaces at issue, which were often storage areas, closets, or bathrooms. For example, the plaintiffs contributed such characterizations as “torture chamber” (*H.M. v. Board of Education*, 2015, p. 998) and “dark closet” (*Carroll v. Lawton Independent School District*, 2015, p.1228), whereas defendants used labels like “safe room” (*Payne v. Peninsula School District*, 2015, p. 848) or “relaxation room” (*J.D. v. Garfield Park Academy*, 2014, p. \*7). Thus, the precise contours of the seclusion/time-out issue in terms of both factual accuracy and specific legality–when considered alone rather than in combination with other aversives–remain largely as open questions in the light of this cumulative case law.

Category-by-category outcomes. The generally adverse results for the plaintiffs in their constitutional claims is attributable to the specific precedents in the prior pertinent case law and the general judicial resistance to “constitutionalize” relatively micro matters in governmental conduct, especially for Fourteenth Amendment SDP. Indeed, on remand from the Sixth Circuit's aforementioned Sagan decision, the lower court ordered the plaintiff-parents in one of the two consolidated cases in which time-out was part of the challenged district actions to pay a portion of the defendants' attorneys' fees because “the plaintiffs knew or should have known that their cases had become frivolous and unreasonable, at the latest, by the time discovery was concluded” (*Sagan v. Sumner County School District*, 2013, p. \*11).

The similar lack of conclusive rulings for the plaintiffs' federal statutory claims is largely attributable to the general trend of judicial deference to school authorities and the limitations of the two primary statutory avenues. For the IDEA, the major stumbling blocks for plaintiffs are the stringency of the exhaustion doctrine and the unavailability of money damages. For the paired sister statutes of § 504 and the ADA, the primary procedural and substantive hurdles are the exhaustion requirement and the deliberate indifference standard, respectively.

Finally, the claim rulings based on state law were remotely secondary in most of these cases. The primary interrelated reasons are that (a) the state bases are less fertile, largely due to the varying but still considerable barriers of governmental and official immunity and–unlike federal civil rights law–the unavailability of attorneys' fees for prevailing plaintiffs, and (b) the general trend in education litigation to federal courts, largely due to the primacy of federal civil rights laws and the potential for larger verdicts. Thus, these state law claim rulings add little to the general continuing frequency and outcome profile beyond maintaining these alternative strands for case preservation and settlement leverage. Moreover, the negligible effect of the general trend of state laws restricting or prohibiting seclusion and restraints may be surprising to parents and educators, although not to legally astute politicians and related attorneys.

**Conclusion**

The results and recommendations mirror, albeit with blurrier edges, those for the parallel analysis of the restraints case law (Zirkel, 2016). Although professional opinion has generally shifted rather markedly against the use of seclusion and time-out in common connection to, but imprecise differentiation from, restraints (e.g., Freeman & Sugai, 2013; Nishimura, 2015), district leaders do not share the same sense of restrictiveness (e.g., Pudelski, 2012). Although these conflicting views are reflected at the policy making level in terms of failed Congressional bills but increasingly restrictive state laws, the primary legal battleground has been in court. This systematic update of the case law shows that the previous pattern continues with only minor variations. The significant proportion of inconclusive outcomes, however, merits both more practical caution and more scholarly research. Finally, for school psychologists and other individuals concerned with effective education, the focus should be on informing and implementing evidence-based best practice as distinct from and well above the minimums established by court interpretations and applications of constitutional, statutory, and common law.

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