

1 of 1 DOCUMENT

Copyright (c) 2011 Connecticut Public Interest Law Journal
Connecticut Public Interest Law Journal

Spring / Summer, 2011

10 Conn. Pub. Int. L.J. 323

LENGTH: 14357 words**ARTICLE:** Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law**NAME:** Perry A. Zirkel and Caitlin A. Lyons+**BIO:**

+ Perry A. Zirkel is a university professor of Education and Law at Lehigh University. Caitlin A. Lyons is the middle school coordinator of Lehigh University's Centennial School.

LEXISNEXIS SUMMARY:

... Consider these examples from the more severe side of the cases and restricted to the alleged restraints alone: school employees placed a fifteen-year-old student with autism in a prolonged prone restraint even after he became non-responsive, resulting in his death three public school employees physically restrained, specifically with a "basket hold," a middle school child with autism thirty-three times on one school morning a private special education center locked a student with autism and other disabilities in boarded up, over-heated room, restraining him in a "thermally- insulated camouflage jumpsuit with the zipper pinned and duct taped shut to prevent him from escaping," causing him to be "drenched in sweat and reeking of feces and urine" a special education teacher used bungee cords, a Rifton chair, and duct tape for repeated restraints in her class for students with behavior disorders school personnel used a tether outside, and repeated crisis holds in, classroom on a student with multiple disabilities, breaking his elbow public school staff, at least three times, wrapped a kindergarten girl with bipolar disorder in a blanket taped to a cot an assistant principal taped a second-grade student with ADHD by his head, facing inward, to a tree when he misbehaved during recess public school staff frequently strapped a five-year-old child with autism to a chair by means of a vest-like device that they euphemistically called a "love bug" The problem is that in most of the cases, the summary disposition of the claims, whether conclusive in favor of either party, obviated a judicial determination of whether these allegations were-at least in terms of preponderant proof-factual. ... The federal Office of Special Education Programs (hereinafter "OSEP"), the administering agency of the IDEA, has consistently clarified that under the latest version of the IDEA, which went into effect on July 1, 2005, prohibiting the use of restraints and other aversive behavioral interventions on students with disabilities is a matter of state law. ... The most comprehensive coverage among these sources was limited to six court decisions and lacked an analysis of the plaintiff-parents' claims and the judicial outcomes. ... Designed as broad background for the proposed federal legislation, this report was not intended as a systematic and exhaustive canvassing of the court decisions concerning the use of restraints with students with disabilities, including claims decided under state law. ... The resulting cases often included restraint comingled with other aversives, such as seclusion and verbal abuse; however, claim rulings on clearly separable issues were not included in the tabulation. ... The types of restraint in the 61 cases warranted two analyses-one concerning frequency and the other concerning category.

TEXT:

[*323]

I. Introduction

Schools' use of restraints with students with disabilities is a subject of national concern. News stories across the country report the horrors of abuses of restraints, such as strapping students with disabilities to chairs with duct tape and bungee cords and using tape to tie them to other furniture.¹¹ Disability advocacy websites on the Internet further fuel this public perception. For example, the National Disability Rights Network report includes various stories, such as the

case of a teacher restraining a child with a disability by holding him down, after he told her he could not breathe, until he died.ⁿ² This National Disability Rights Network report lists the consequences to children such as oxygen deprivation, muscle injuries, broken necks, shoulder and other joint dislocations, and blunt head traumas.ⁿ³ What makes these stories even more alarming is that the typical target of restraints is a vulnerable population, students who, due to their disability, may not be able to communicate their injuries or report the incident.

These shocking reports of restraints, including incidents of students restrained face down to the floor for up to hours at a time, have garnered increasing attention from not only educators and the general public but also [*324] legislators and litigators.ⁿ⁴ The results include a Government Accountability Office (hereinafter "GAO") reportⁿ⁵ and pending legislation entitled "Keeping All Students Safe Act."ⁿ⁶ However, the corresponding canvassing of pertinent litigation has been largely lacking.

I. Relevant Literature

Although organizations and other sources offer varying definitions of restraints,ⁿ⁷ the following formulation serves as a useful basis here due to its breadth:

1. physical restraint - any method of one or more persons restricting another person's freedom of movement, physical activity, or normal access to his or her body (sometimes referred to as ambulatory restraint, manual restraint, physical intervention, or therapeutic holding). This category includes prone restraints, with the student face down, and supine restraints, with the student face up on the back.ⁿ⁸

2. mechanical restraint - the use of any device or object to limit an individual's body movement to prevent or manage out-of-control behavior.ⁿ⁹

3. chemical restraint - the use of medication to control behavior or to restrict a patient's freedom of movement.ⁿ¹⁰

[*325]

II. Actual Prevalence

Presently, both the national and state levels lack of a system for data collection regarding the frequency of use of these various forms of restraint within schools.ⁿ¹¹ The GAO report found hundreds of allegations of abuse,ⁿ¹² and other anecdotal sources suggest that the use of restraints has been increasing during the past decade.ⁿ¹³ However, the lack of centralized record-keeping or other objective research leaves the accuracy of such characterizations subject to question.

To the extent that the use of restraints within schools is escalating, the likely reasons are largely identifiable. One reason is the movement towards less restrictive settings and increased inclusion of students with difficult or severe behavioral needs in general education settings.ⁿ¹⁴ The techniques typically used in more restrictive settings (e.g., hospitals and residential centers) have accompanied these children in their move to the public schools.ⁿ¹⁵ Another reason is the shortage of teachers capable of working with students with severe behavioral needs and a lack of effective pre-service and in-service training to address these needs.ⁿ¹⁶

III. Professional Shift

During the last two decades, there has been an emerging shift in philosophy and policy for students with emotional and behavioral needs within school settings. The shift is primarily away from attempting to control these students' behavior via restraints and other such aversive techniques to teaching students appropriate replacement behaviors through positive supports.ⁿ¹⁷ Advocates and researchers for this emerging approach have pointed out that the previous literature in support of restraints arose mostly within institutional settings, such as hospitals, rather than public schools.ⁿ¹⁸

Similarly, while acknowledging the reasons for the use of restraints, [*326] including avoiding imminent harm to the child or others, preventing substantial damage to property, reducing disruption of programs, and decreasing stimulation of sensory needs, the proponents of positive behavior support have promoted teacher training and organizational change to effectively address these individual and institutional needs without aversives.ⁿ¹⁹ They have delineated research-based practices to reduce the use of restraints and teach appropriate replacement behavior. These practices include: a school-wide approach for positive behavior support; the alignment of the curriculum level to students' instructional levels; a system of positive reinforcement contingent upon appropriate behavior; the use of an effective token economy system; and the provision of social skills instruction and cognitive behavioral therapy techniques, such as anger management and problem solving.ⁿ²⁰ Their research-based components for teacher training and school-wide restructuring include: providing clear expectations for staff; supplying alternatives to restraint, and providing training on pre-

ventive, proactive-rather than reactive-measures, differential reinforcement, and positive redirection.ⁿ²¹ The advocates of a positive and proactive approach have developed a tiered model of prevention and intervention.ⁿ²²

IV. Legal Developments

In the wake of this shift in the education profession, the applicable sources of law are in flux. Specifically, pertinent state-level policies in the form of legislation and regulations are widely divergent and unclear. Some of these state policies focus solely on the use of restraint, while others less specifically address seclusion, corporal punishment, or aversive techniques [*327] generally.ⁿ²³ The provisions vary unsystematically with regard to training of staff members, reporting data to the state, obtaining parental consent prior to the use of restraints, and notifying them after such use,ⁿ²⁴ with only a few states-e.g., Colorado, Illinois, and Massachusetts-recognized for comprehensive policies.ⁿ²⁵ Moreover, nineteen states entirely lack legislation on or regulation of restraints.ⁿ²⁶ The gaps within and among state policies have contributed to the current movement toward federal legislation.ⁿ²⁷

The primary federal legislation concerning students with disabilities, the Individuals with Disabilities Education Act (IDEA), does not specifically address the use of restraints.ⁿ²⁸ Conversely, the IDEA does not come close to exclusive reliance on positive behavioral techniques, but instead only requires Individualized Education Plan (hereinafter "IEP") teams to "consider the use of positive behavioral interventions and supports, and other strategies" in the prescribed situation of "a child whose behavior impedes the child's learning or that of others."ⁿ²⁹ The federal Office of Special Education Programs (hereinafter "OSEP"), the administering agency of the IDEA, has consistently clarified that under the latest version of the IDEA, which went into effect on July 1, 2005, prohibiting the use of restraints and other aversive behavioral interventions on students with disabilities is a matter of state law.ⁿ³⁰ A series of notable developments ensued at the federal level.

In May 2009, the GAO issued a report and provided testimony on seclusion and restraint to the House of Representatives' Committee on Education and Labor.ⁿ³¹ The information included hundreds of allegations of death and abuse of children with disabilities nationwide from 1990 to 2009, pointing to inadequate relevant state legislation and regulations. The identified policy problems included: (a) the lack of a central comprehensive reporting entity and data management center; (b) the use of restraints predominantly for children with disabilities; (c) deaths from face-down restraints or those that blocked the child's airway; (d) the use of [*328] untrained staff employing the restraints; (e) their continuing employment after known abuse; and (f) the lack of federal law restricting the use of restraints.ⁿ³² While exploring in depth ten selected cases, the report lacked systematic citation, analysis, and synthesis of the relevant litigation.

In July 2009, the head of the U.S. Department of Education issued a memorandum to chief state school officers, urging them to develop, review, and/or revise state policies and guidelines to ensure that students within their jurisdictions would be protected from unnecessary and inappropriate restraint and seclusion.ⁿ³³ He also followed up with a letter to Congressional leaders with a list of principles for the upcoming legislative proposals, including: (a) prohibiting the use of restraint for punishment or discipline or in a manner that restricts breathing; (b) appropriate staff training; (c) prompt parental notification; and (d) regular monitoring and data collection.ⁿ³⁴

On March 3, 2010, as a result of the education and labor committee's hearings, the House of Representatives passed H.R. 4247, the "Keeping All Students Safe Act," which would require the Secretary of Education to promulgate regulations "in order to protect each student from physical or mental abuse, aversive behavioral interventions that compromise student health and safety, or any physical restraint or seclusion imposed solely for purposes of discipline or convenience"ⁿ³⁵ These regulations would apply to preschools and public or private schools that receive, or serve students that receive, federal education funding, and would establish minimum standards, including prohibition of mechanical restraints, chemical restraints, and physical restraints that restrict breathing.ⁿ³⁶ Other physical restraints would be narrowly restricted to a combination of five enumerated exceptions, such as imminent danger to self or others. Rather than being one of these exceptions, incorporating physical restraint into a child's IEP as a planned intervention would be expressly prohibited.ⁿ³⁷ The proposed legislation has various other provisions extending beyond restraints and would require state education agencies to establish and enforce state policies and procedures that conform to the minimum [*329] regulatory standards.ⁿ³⁸ Not providing an express private right of action, the proposed legislation's remedial scheme calls for the U.S. Department of Education to assure state enforcement via corrective action orders and possible removal or redirection of federal funding.ⁿ³⁹

On September 29, 2010, after the Senate failed to vote a bill similar to H.R. 4247 out of committee, Senators Dodd and Burr introduced another version, S. 3895.ⁿ⁴⁰ This bill differs from H.R. 4247 in various limited respects, but the major difference is that it would permit IEPs to incorporate the use of physical restraint or seclusion under three speci-

fied conditions, including a documented history of imminent danger and as part of a comprehensive functional behavioral assessment/behavior intervention plan.ⁿ⁴¹ While similarly lacking a private right of action, S. 3895 does not have a federal remedial provision beyond the state requirements, but provides local education reporting requirements, including: (a) prompt notification to the parents of each incident (and a debriefing session within five days, including the parents' opportunity for participation); and (b) prompt notification to the protection and advocacy system in cases of serious bodily injury or death.ⁿ⁴² Some advocates have argued that the Senate bill does not go far enough in protecting students with disabilities, citing not only this qualified allowance for physical restraint and seclusion, but also the lack of an express prohibition of corporal punishment.ⁿ⁴³

On April 6, 2011, S. 3895 did not succeed in the Senate, thus rendering its House counterpart not viable. As a result, Rep. George Miller reintroduced a bill similar to H.R. 4247 in an effort to reinstitute this legislative movement against the use of restraint and seclusion in the schools.ⁿ⁴⁴

[*330]

Early in these Congressional deliberations, specifically in March 2010, the Office for Civil Rights (hereinafter "OCR") revamped its data collection methodology to include the collection of information regarding restraint, seclusion, and other issues regarding discipline.ⁿ⁴⁵ Given the typical time for data collection and analysis, the results will not be available for at least another year or two.ⁿ⁴⁶

V. Case Law Research

In contrast, systematic attention to the pertinent litigation has been relatively limited. A few articles in the professional literature have provided a cursory examination of selected court decisions as a limited part of a broader treatment of legal and policy issues concerning the use of restraints and seclusion.ⁿ⁴⁷ The most comprehensive coverage among these sources was limited to six court decisions and lacked an analysis of the plaintiff-parents' claims and the judicial outcomes.ⁿ⁴⁸

A second cluster of studies was more, but not completely, thorough in case coverage; it targeted multiple disciplinary or aversive techniques rather than restraints specifically, and it lacked empirical analysis. In the first of this line of studies, Seiden & Zirkel included only one court decision specific to the use of restraints in special education due to the limited litigation at that time.ⁿ⁴⁹ Similarly, the updated study on the use of aversives with students from pre-K to grade twelve cited only one additional court decision specific to restraints for the intervening decade, although identifying various pertinent administrative adjudications-i.e., hearing or review officer decisions under the IDEA-that seemed to signal increased litigation activity.ⁿ⁵⁰ In his subsequent annotated compilations, [*331] Zirkel identified fifteen court decisions concerning the use of restraints,ⁿ⁵¹ but this coverage extended to non-disabled students and to teacher termination cases and lacked a systematic synthesis of claims and outcomes. Moreover, due to the broad-based focus on aversives, his coverage did not exhaustively extend to all of the restraint-related court decisions.ⁿ⁵² Finally, Zirkel's update included annotations for twenty-one court decisions specific to restraints but had the same limitations as its predecessor.ⁿ⁵³ For example, it did not cover all of the pertinent decisions.ⁿ⁵⁴

Finally, even those secondary sources specific to the legality of restraints provided limited coverage of the pertinent case law, while reaching the opposite recommendations for legislation or regulations. In the first, after canvassing various legal developments specific to restraints, including only two court decisions where the plaintiff-parents sought money damages, McAfee, Schwilk, and Mitruski concluded that relevant state regulations were sufficient.ⁿ⁵⁵

Conversely, a recent student-written law review article that was specific to the use of physical restraints on students with disabilities proposed an amendment to the IDEA.ⁿ⁵⁶ In doing so, the author cited only four court cases specific to this issue and missed pertinent subsequent decisions in two of them.ⁿ⁵⁷

The latest case law synthesis accompanied the recent Congressional movement toward pertinent legislation. Specifically, the Congressional Research Service's updated report of legal issues concerning the use of restraint and seclusion in public schools included only a relatively small sampling of court decisions under the Constitution and the IDEA, most of them concerning seclusion rather than restraint.ⁿ⁵⁸ Designed as broad background for the proposed federal legislation, this report was not intended as a systematic and exhaustive canvassing of the court decisions concerning the use of restraints with students with disabilities, including [*332] claims decided under state law.ⁿ⁵⁹

VI. Method

The purpose of this study is to provide a systematic synthesis of the case law concerning parental challenges to pre-K-to-twelve educational institutions' use of restraints on students with disabilities. Specifically, the questions of this study are as follows:

1. How many pertinent cases were there, and what were their selected significant characteristics (e.g., separate decisions, disability classification, and restraint types)?
2. How many claim rulings did the cases yield, and what were their distribution in terms of federal and state categories, or bases, of these claim rulings?
3. What was the longitudinal trend in the frequency of the court decisions?
4. What was the longitudinal trend in the outcomes of the claim rulings?
5. What was the frequency and outcomes of the claim rulings by category?
6. What was the longitudinal outcome trend in terms of the most plaintiff- favorable claim per case?

The pertinent case law consisted of published court decisions from January 1, 1980 until June 30, 2010 in which parents challenged a pre-K through grade twelve educational institution's use of restraints of their child with a disability. For thoroughness, the search included not only the standard Westlaw and Lexis databases but also the specialized LRP database, Special Ed Connection , which extends from hard-copy IDELR citations to digital-only LRP citations. In addition to the IDELR topical index (specifically "aversives") under the broader topic of "behavior management/modification," the search used various combinations of search terms such as "restraint," "special education," "student," "disability," and "aversives," followed by careful screening of the resulting court decisions. The following combination of selection criteria applied: (a) parental suit on behalf of a student with a disability; (b) an allegation of, and ruling on, any type of restraint (referred to herein as "claim ruling"); and (c) an education institution within the pre-K to grade twelve range (e.g., school district or private school) as at least one of the listed defendants. The resulting cases often included restraint comingled with [*333] other aversives, such as seclusion and verbal abuse; however, claim rulings on clearly separable issues were not included in the tabulation. The education defendants extended to state education agencies, but not to hospitals or other clearly medical or adult institutions.

As a result, the synthesis does not include: (a) hearing or review officer decisions, OCR rulings, or state complaint resolution process decisions; ⁿ⁶⁰ (b) claim rulings on behalf of nondisabled children; ⁿ⁶¹ (c) claim rulings on issues separable from the merits of the particular claim such as attorney's fees, punitive damages, or additional evidence; ⁿ⁶² (d) for cases that had mixed defendants, the claim rulings concerning the non-education provider; ⁿ⁶³ (e) court decisions limited to use of restraints at correctional facilities for juvenile offenders ⁿ⁶⁴ or other non-education agencies; ⁿ⁶⁵ (f) cases where school employees challenged terminations or demotions based on alleged use of restraints; ⁿ⁶⁶ (g) cases where parents sought institutional use, rather than prohibition, of restraints; ⁿ⁶⁷ (h) court decisions concerning restraints during the arrest of the student; ⁿ⁶⁸ (i) cases concerning access to restraint-related student records; ⁿ⁶⁹ (j) cases concerning the scope of child abuse statutes; ⁿ⁷⁰ (k) cases with final decisions after the ending date of June 30, 2010; ⁿ⁷¹ (l) court decisions where restraint was a peripheral or entirely [*334] indirect claim; ⁿ⁷² and (m) cases that-although a close call-appeared to fit instead under the broad adjoining category of corporal punishment. ⁿ⁷³

After training with a pilot sample of the resulting court decisions, the second Author coded the cases, with ongoing consultation with the primary Author for the various complicated ones to maximize accurate entries. The spreadsheet consisted of the following columns: case citation (e.g., parties' names, court abbreviation, and decision date); student's classification(s); restraint type and any additional aversives; claim rulings and outcomes; and clarifying comments. The rows of the spreadsheet yield three successively smaller units of analysis: (a) "cases," delineated in terms of particular plaintiff-parents and one or more education defendants; (b) "decisions," which in some cases were published opinions on different dates; and (c) "claim rulings," which-as shown below-were the various legal bases that the plaintiff-parents raised and the court resolved. For the various cases with more than one published decision for a particular claim, the outcome was the most recent relevant ruling. Conversely, the tabulation excluded decisions that were superseded upon further proceedings. It also excluded decisions that concerned interlocutory issues, such as whether particular evidence was admissible or whether the court would allow either joinder of additional defendants or consolidation of individual cases.

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 including but not limited to one or more instances of restraint. In contrast, we excluded rulings concerning clearly separable claims, such as retaliation, indemnifi-

cation, contractual claims between defendants, claims against non-education defendants, and unrelated Family Educational Rights and Privacy Act (FERPA) or IDEA free and appropriate public education (hereinafter "FAPE") claims.

The claim rulings fit into two broad jurisdictional bases: federal and [*335] state. The federal claim rulings were based on the U.S. Constitution or federal statutes, regardless of whether the plaintiff implicated § 1983, which serves as a connection to litigation to obtain a remedy for an alleged violation of the Constitution or other federal law. 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 following list provides primary examples of each group:

Federal	State
. Amendment IV (i.e., seizure)	. Assault & battery
. Amendment VIII (i.e., cruel and unusual punishment)	. Intentional infliction of emotional distress
. Amendment XIV (i.e., substantive due process, procedural due process, equal protection)	. Fraud
. IDEA	. Breach of contract
. Section 504 of the Americans with Disabilities Act (ADA)	. Negligence
	. Negligent infliction of emotional distress

The frequency analysis counted each claim ruling separately first in terms of the legal basis (e.g., Fourteenth Amendment substantive due process versus Fourteenth Amendment procedural due process) and further differentiated, to a limited extent, by defendant. More specifically, the frequency analysis distinguished the claim rulings arising under one legal basis when the outcome varied among the categories of defendants (e.g., individual teachers or aides, administrators, or school entities). For example, in *Muskrat v. Deer Creek Public Schools*, the court issued claim rulings under Fourteenth Amendment substantive due process with different outcomes for one group of individual defendants (i.e., supervisors), another group of individual defendants (i.e., teachers), and the institutional defendant (i.e., the school district), thereby leading to three separate entries.ⁿ⁷⁴ In contrast, in *Melissa S. v. School District of Pittsburgh*, the outcome for the Fourteenth Amendment substantive due process claim ruling was the same for all defendants, resulting in their aggregation into a single entry in the tabulation.ⁿ⁷⁵ This effort to reach useful units without over-fragmentation was not a bright-line process, but [*336] it yielded, on balance, conservative counts of all of the possible claim rulings- limited to the final one for claims subject to successive rulings. Finally, for the same reason of economy of analysis, the tabulation did not extend to subordinate or ancillary claims, such as punitive damages or attorneys' fees.

The basis for the outcomes coding was Chouhoud and Zirkel's five-category scale.ⁿ⁷⁶ More specifically, the entry for each claim ruling was one of the following outcome classifications:

- 1 = conclusively for the plaintiff (i.e., parent of child or the child)
- 2 = inconclusively for the plaintiff
- 3 = split between plaintiff and defendant
- 4 = inconclusively for defendant
- 5 = conclusively for the defendant (i.e., individual educators and/or the education institution)

The polar outcomes of "1" and "5" often were based on the court granting a pretrial motion, such as a "summary judgment," although occasionally based on the court's disposition after a full trial. For example, in *Melissa S. v. School District of Pittsburgh*, the Third Circuit upheld the trial court's summary judgment, i.e., decision without a trial, in favor of the defendants on all of the plaintiff-parents' various claims, thus amounting to a "5."ⁿ⁷⁷

Conversely, the pair of "2" and "4" is typically based on the court denying a pretrial motion, thus preserving the matter for a trial, which could be in favor of either party. Such an inconclusive ruling is in favor of the nonmoving party, i.e., the one opposing the motion for summary disposition. For example, in *A.B. v. Seminole County School Board*, the court denied the defendant-district's motion to dismiss the plaintiff's Fourteenth Amendment substantive due process claim, thus yielding an inconclusive ruling in favor of the plaintiff-parent (i.e., a "2").ⁿ⁷⁸ Conversely, an inconclusive outcome in the defendant's favor arises where the ruling does not foreclose the plaintiff from further proceedings on its claim. For instance, in *D.N. v. School Board of Seminole County*, regarding the plaintiff's negligence claim, the federal court declined supplemental jurisdiction, granting the defendant-district's motion for [*337] dismissal without preju-

dice.ⁿ⁷⁹ Thus, the outcome was a "4" for this claim ruling, as it was in favor of the defendants, but inconclusive by allowing the plaintiff's to re-file their claim in state court.

The analysis for addressing the successive questions of the study warranted careful differentiation. For the first question, cases were the unit of analysis with two limited variations: (a) the overall tabulation secondarily yielded the total number of decisions; and (b) the tabulation for disability classification required a frequency count of plaintiff-students for those relatively few cases that had more than one plaintiff-student. For the second question, the appropriate units of analysis were claim rulings. In contrast, for the third question, the longitudinal dimension warranted decisions being the unit of analysis because each one had a separate date. Similarly, both the fourth and fifth questions warranted claim rulings as the unit of analysis because each claim had its own outcome on the 1-to-5 scale. The sixth question required the unit of analysis of the claim ruling but selecting the most favorable plaintiff-parent claim per case.

VII. Results

The total number of pertinent cases was 61, which yielded 89 separate court decisions.ⁿ⁸⁰ For the 67 students in the 61 cases-because four cases had more than one plaintiff-student-the most frequent disability classifications were as follows: autism (alone or in combination) - 55 percent;ⁿ⁸¹ emotional disturbance (alone or in combination) - 12 percent;ⁿ⁸² [*338] and multiple disabilities (unspecified or other than those that include autism or emotional disturbance) - 8 percent.ⁿ⁸³ The remaining 23 percent consisted of a variety of other classifications and diagnoses, including intellectual disabilities, other health impairment, Landau Kleffner's Syndrome, cerebral palsy, and unspecified developmental disabilities.ⁿ⁸⁴

The types of restraint in the 61 cases warranted two analyses-one concerning frequency and the other concerning category. First, the distribution of the 61 cases as to frequency of restraint types was: [*339] challenge exclusive to one type of restraint - 25;ⁿ⁸⁵ challenge to two types of restraint - 3;ⁿ⁸⁶ and challenge to one or two types of restraint plus various other aversives - 33.ⁿ⁸⁷ Second, the distribution of the resulting larger total of challenged restraints-because some of the cases concerned more than one type-was: physical (including 3 cases of prone) restraint - 47;ⁿ⁸⁸ mechanical (e.g., use of a bus harness) - 23;ⁿ⁸⁹ and chemical (applying [*340] numbing or noxious solutions to the child's mouth) - 1.ⁿ⁹⁰

The 61 cases yielded 458 claim rulings, consisting of 439 in federal courts and 19 in the state courts. Because many of the cases in federal courts included claims based on not only federal, but also state legal bases, we categorized the 458 claim rulings in terms of basis rather than forum. The resulting distribution was 241 federal claim rulings and 217 state claim rulings. Regarding court forums for the adjudicated cases, the majority of cases were within federal courts, with a scant four cases adjudicated at the state level.

Figure 1 summarizes the frequency of the eighty-nine federal and state decisions within four-year increments for the entire period.

Figure 1

Review of Figure 1 reveals that the volume of court decisions concerning restraints was negligible from the issuance of the first one in 1987 until the late 1990s, and that thereafter the first two four-year [*341] intervals remained level at approximately 15 decisions each and the most recent interval increased almost fourfold to an adjusted total of approximately 62.

Figure 2 presents the total outcome distribution of the claim rulings in four-year increments using the five-category outcome scale. There were no evenly split outcomes; thus, the coding key does not include a box, and the bars do not include a shaded segment for a "3."

Figure 2

As an overall matter, Figure 2 illustrates that the claim rulings tended in favor of the school defendants. More specifically, for the period of most of the activity, which started in 1999, on average at least half of the claim rulings were conclusively or inconclusively in favor of the school defendants (i.e., outcome of "5" or "4") while the plaintiff-parents did not win any claim conclusively (i.e., outcome of "1").ⁿ⁹¹ Conversely, the proportion of inconclusive claim rulings in favor of the plaintiff-parents increased to approximately 43% of the claim rulings during the most recent four-year period, serving-in combination with the increased proportion of inconclusive decisions for the defendants-as the spring-board for either further litigation or settlements.ⁿ⁹²

[*342]

Table 1 shows the percentage of the federal and state claim rulings on the five- category outcome scale and the corresponding total frequency

	Outcomes<a>					Total No.
	Parent 1	2	3	District 4	5	
Federal Claim Rulings:						
Am. XIV substantive due process	0%	43%	0%	3%	55%	75
ADA/ § 504	0%	29%	0%	11%	60%	63
IDEA	0%	31%	0%	13%	56%	48
Am. XIV equal protection	0%	56%	0%	6%	38%	16
Am. XIV procedural due process	0%	14%	0%	0%	86%	13
Am. IV seizure	0%	33%	0%	0%	67%	12
Miscellaneous federal claims	0%	17%	0%	0%	83%	6
Am. VIII cruel/unusual punishment	0%	25%	0%	0%	75%	4
§ 1981	0%	0%	0%	0%	100%	4
State Claim Rulings:						
Negligence	0%	33%	0%	11%	56%	61
Intentional infliction of emotional distress	0%	60%	0%	9%	32%	47
Assault/battery	0%	58%	0%	13%	29%	31
Miscellaneous state claims	0%	56%	0%	11%	33%	18
Civil conspiracy	0%	29%	0%	0%	71%	14
False imprisonment	0%	43%	0%	7%	50%	14
Breach of fiduciary duty	0%	67%	0%	8%	25%	12
Negligent infliction of emotional distress	0%	29%	0%	0%	71%	11
Fraud	0%	20%	0%	0%	80%	5
Defamation	0%	25%	0%	0%	75%	4

a 1 = conclusively for plaintiff (i.e., parent); 2 = inconclusively for

	Outcomes<a>					Total No.
	Parent 1	2	3	District 4 5		
plaintiff; 3 = split for plaintiff and defendant; 4 = inconclusively for defendant(s); 5 = conclusively for the defendants (i.e., individual educators and/or their institution).						

b Includes both simple and gross negligence.

tabulation of the claim rulings in descending order of frequency.

The overall pattern of claim rulings predominating heavily in favor of the district defendants was without exception and particularly for the [*343] federal claims; the plaintiff did not obtain a conclusively favorable ruling in any claim category. For the federal claims, the only ones where the plaintiff's side of the scale amounted to more than 50 percent were those based on Fourteenth Amendment equal protection.ⁿ⁹³ Yet, that 56 percent was limited to inconclusively favorable decisions as compared to 38 percent outright wins for the district, and the frequency was only a limited level.ⁿ⁹⁴ For the state claims, four of the five most frequent claim rulings were the most favorable to the plaintiffs-breach of fiduciary duty (67 percent inconclusive),ⁿ⁹⁵ intentional infliction of emotional distress (60 percent inconclusive),ⁿ⁹⁶ and assault & battery (58 percent inconclusive),ⁿ⁹⁷ but the fourth was a catchall of a wide range of miscellaneous state claim rulings (56 percent inconclusive).ⁿ⁹⁸ However, because the plaintiffs in [*344] most of the cases obtained a ruling on more than one claim, including those that were inconclusive (i.e., surviving the defendant's motion for dismissal or summary judgment), the data in this Table warrant further analysis.

As a result, Figure 3 reanalyzed the outcomes based on the case as the unit of analysis rather than each of the various claim rulings. More specifically, the distribution here is in terms of the single most plaintiff-favorable claim ruling within each case. For example, if a case had six claim rulings, with four 5s and two 2s, the case-based outcome for this reanalysis would be a 2. Again, as in Figure 2, there was no entry for a split outcome, i.e., a 3.

Figure 3

In comparison to Figure 2, the reanalysis in Figure 3 moderated the proportion of complete conclusive outcomes for districts, with a decline in proportions for the active period of the three most recent, successive, four-year intervals. Specifically, the descending range from 65 percent to 48 percent in Figure 2 was, in contrast, from 50 percent to 26 percent for the corresponding active period in Figure 3. Conversely, the proportion of inconclusive outcomes in favor of parents during this active period from 1999 to 2010 successively increased to a slight majority in the most-recent [*345] four-year interval. This tempering of the heavy balance in favor of districts increased the plaintiffs' prospects for not only settlements but also attorneys' fees, although the absence of conclusive rulings in their favor still left them short of favorable precedents and prevailing status.

VIII. Discussion

The nature of the cases was not surprising in terms of the predominance of: (a) autism often in combination with other diagnoses or classifications; and (b) allegations of physical restraint, usually in combination with other aversives, such as corporal punishment or seclusion. Autism, (at least at the severe side of the spectrum, and when compounded with other impairments) tends to be associated with the relative vulnerability of self-contained classes, challenging behaviors, and inadequate self-advocacy-all contributing factors to victimization.ⁿ⁹⁹ Moreover, parents of children with autism have a much higher propensity for litigation than parents of children with other disabilities.ⁿ¹⁰⁰ In turn, physical restraints fit with other classroom aversives-often under the guise of behavior modification-particularly in the foregoing cluster of contributing conditions, and the line separating teacher behaviors that may be considered corporal punishment (such as grabbing, pushing, slapping, and choking) is far from a bright one.ⁿ¹⁰¹

However, the number-a total of 61 cases concerning parental challenges to the use of restraints with children with disabilitiesⁿ¹⁰²-was unexpectedly high in light of the much lower numbers in previous compilations, although their coverage was broader and less exhaustive.ⁿ¹⁰³ The related findings that these 61 cases generated 89 pertinent court decisions (not counting those that were superseded by subsequent [*346] decisions in the same case or those that concerned other issues, such as evidentiary issues and attorneys' fees) and 458 claim rulings (again a conservative figure due to the aggregation and exclusion procedure described in the Method section) were even more notable. In comparison to the bulk of special education litigation, which is based almost exclusively on the IDEA with occasional Section 504 claims, the restraint allegation cases are much more complex. Often based on perceived grave and reprehensible injury of a physical or psychological dimension that goes beyond the "free appropriate public education" in the "least restrictive

environment" entitlement of IDEA cases, and often seeking money damages instead of, or in addition, to injunctive relief, the plaintiff-parents in most of these cases employ the spaghetti strategy of throwing everything against the wall and hoping something sticks.ⁿ¹⁰⁴

Not only the number but also the wide variety of claims, with almost half under state law, further attested to this spaghetti strategy. As shown in Table 1, the federal claims varied widely across both the Constitution and federal legislation. The miscellaneous category included conspiracy and Title IX. In addition, plaintiffs threw everything they had into their claims. For example, in one case, the parents premised the child's Fourteenth Amendment substantive due process claim on not only the abuse he received but also the psychological and emotional injuries of witnessing the teacher's alleged abuse of his classmates.ⁿ¹⁰⁵ As the same Table recounts, the state claims also covered the proverbial waterfront, including breach of fiduciary duty, negligent confinement, and false imprisonment. The miscellaneous category extended to state disability discrimination, civil rights, positive behavior support regulations, and child abuse reporting statutes. For example, in one federal case, the plaintiff-parents sued a private contractor for the school district for the following state claims: "assault . . . ; fraud by non-disclosure; conspiracy; negligence and gross negligence; breach of contract; intentional infliction of emotional distress; deceptive trade practices; respondeat superior; ratification; and . . . attorney fees."ⁿ¹⁰⁶

The third manifestation of the spaghetti strategy was the wide variety of defendants for whom the plaintiffs obtained court rulings. The defendants included individual teachers and administrators, school [*347] districts, private providers, and even state education agencies. In one case, for example, the plaintiffs named sixteen different defendants.ⁿ¹⁰⁷ As a result of the multiple defendants and claims, even with the aforementioned aggregation and exclusion procedure further restricting the tabulation, the average was nine claim rulings per case. The example of *Doe v. State of Hawaii Department of Education* was at the high end with twenty-six separate claim rulings.ⁿ¹⁰⁸ Moreover, in a few cases, the parent filed claims distinct from their child's, further adding to the spaghetti strands. For example, in *D.L. v. Waukee Community Schools*, alleging that they had witnessed the restraint of their child live and on videotape, the parents filed and the court ruled on-in addition to the claims on the child's behalf-§ 1983 claims based on not only Fourteenth Amendment due process and equal protection but also state tort "bystander" claims of negligence and intentional infliction of emotional distress.ⁿ¹⁰⁹

On the other hand, partially mitigating the overall frequency and variety is the occasional clustering of cases based on the conduct of a single teacher. Specifically, the alleged conduct of one special education teacher, who worked for an intermediate unit in Pennsylvania, accounted for seven separate but largely parallel federal cases.ⁿ¹¹⁰ Similarly, another cluster of seven separate cases were attributable to a teacher who worked for the school district in Seminole County, Florida.ⁿ¹¹¹ However, partially counterbalancing the dispersal effect of these two clusters on the case-classroom ratio, a few of the single cases represented more than one student plaintiff, thus tending to be another aggregating factor on case claims. More specifically, although counted as one in the overall total and, thus, duly representing the alleged actions in a single classroom, each of the following cases represented more than one student: two allegedly abused by a teacher and her aide in *D.K. v. Solano County Office of [*348] Education*; ⁿ¹¹² four allegedly abused by a pair of aides in *Doe v. Darien Board of Education*; ⁿ¹¹³ two students in *Meers v. Medley*; ⁿ¹¹⁴ and two more in *Eason v. Clark County School District*.ⁿ¹¹⁵

As Figure 2 reveals, the plaintiff-parents have not fared well, with not one conclusive claim ruling in their favor since the first court decision in 1987. Even extending the analysis to the marginally excluded cases fails to yield a parent- favorable conclusive decision. In general, student cases under the IDEA,ⁿ¹¹⁶ and those more generally in the K-12 education context,ⁿ¹¹⁷ have, on balance, favored district defendants, but to a lesser extent. In the restraint cases, parents have faced not only the general judicial deference to school authorities but also the lack of leverage in the IDEA. More specifically, the IDEA not only does not expressly address restraints, but also- according to consistent judicial interpretations-does not provide for money damages.ⁿ¹¹⁸ Similarly, for the other most frequent claims, the "bad faith" standard for Section 504 and ADA liability, the similarly "shockingly" high standards for substantive due process and intentional infliction of emotional distress, and the governmental/immunity defenses for negligence have contributed to a steep slope against plaintiff-parents.ⁿ¹¹⁹ Moreover, the relatively few state special education laws that restrict restraints played a negligible role in the claims rulings to date. The paucity of conclusive rulings in favor of the plaintiffs, however, is not unusual in comparison to the outcomes pattern for other student litigation premised primarily or exclusively on money damages, such as procedural due process challenges to student suspensionsⁿ¹²⁰ or negligence claims on behalf of injured students.ⁿ¹²¹

[*349]

Despite these generally unfavorable outcomes, the plaintiff-parents, as Figure 1 reveals, have resorted to litigation at an increasing rate, particularly within the last four-year interval, from 2007 to 2010. One reason for this increase in parent litigation may be the overall rising tide of special education litigation during this overall periodⁿ¹²² in addition to the aforementioned disproportionality of autism litigation.ⁿ¹²³ Pending the result of direct incidence research,ⁿ¹²⁴ the upward slope of Figure 1 does not reliably represent increasing use of restraints, due to these contributing litigation trends, the imprecision of the case numbers in terms of student-victims or employee-perpetrators, and the non-confirming (at least inconclusive) nature of the Figure 2 outcomes.

However, Figure 3 provides a reanalysis that reveals a more complex outcomes picture. This Figure shows that plaintiff-parents have been increasingly successful when considering the case as the unit of analysis, albeit only in terms of inconclusive rulings lowering the conclusive case outcomes for the defendants. This trend contributes to the defendants' cost-benefit analysis moving toward opting for a settlement, indirectly increasing the parents' leverage for attorney's fees as part of the package.

Although the scope of our analysis did not directly extend to this possible eventual outcome, it incidentally yielded some evidence that plaintiffs may be succeeding in their inferable goal of spaghetti-like "sticking" in terms of settlement and attorneys' fees as the plan B for a conclusive and, thus, potentially precedential, decision. For example, after the federal court granted the plaintiffs' motion for consolidation of the seven separate cases in *Vicky M. v. Northeastern Educational Intermediate Unit 19*,ⁿ¹²⁵ the defendant education agency agreed to, and the judge approved, a settlement for \$ 5 million,ⁿ¹²⁶ which included attorney's fees.ⁿ¹²⁷ The cluster attributable to the one Florida special education teacher apparently extended to other, largely unreported decisions, including at least one not directly based on restraints;ⁿ¹²⁸ the attorney for Seminole [*350] County School Board reportedly tallied fourteen suits by fifteen students resulting in total settlements of \$ 3.4 million.ⁿ¹²⁹ In another case, after the guardian ad litem attempted repudiation, the court ordered enforcement of a \$ 50,000 settlement, which included \$ 23,500 for attorneys' fees.ⁿ¹³⁰ Although more incidental and without a specific amount, other court opinions also indicate that the plaintiffs obtained settlements in wholeⁿ¹³¹ or in part.ⁿ¹³² Separate from their litigation against the intermediate unit, school district, and a private provider, the parents reportedly obtained a \$ 3.15 million dollar judgment against the bus company after their child died of strangulation in a bus harness.ⁿ¹³³

Further evidencing the complexity of the litigation, defendants responded with an equally wide host of technical defenses, such as exhaustion, standing, statute of limitations, and various forms of governmental and individual immunity. As another example, in one case where the parents filed a prior suit in state court, the defendants sought a stay, having the court address four different types of abstention.ⁿ¹³⁴ Various evidentiary issues also were the basis for separate decisions in addition to those included in the tabulation of decisions and claim rulings. For example, one of the cases had three subsequent decisions that were only evidentiary rulings.ⁿ¹³⁵ Even when limited to the decisions with pertinent claim rulings that were not superseded at subsequent steps in the litigation, the average was 1.5 decisions per case. As an example of the high side, one case had six separate decisions that were part of the tabulation.ⁿ¹³⁶

[*351]

Perhaps the most dramatic but anticlimactic finding was the lack of a definitive determination for or against the factual basis for the allegations. Several of the cases alleged clear abuses, including but often not limited to restraints. Consider these examples from the more severe side of the cases and restricted to the alleged restraints alone:

school employees placed a fifteen-year-old student with autism in a prolonged prone restraint even after he became non-responsive, resulting in his deathⁿ¹³⁷

three public school employees physically restrained, specifically with a "basket hold," a middle school child with autism thirty-three times on one school morningⁿ¹³⁸

a private special education center locked a student with autism and other disabilities in boarded up, over-heated room, restraining him in a "thermally- insulated camouflage jumpsuit with the zipper pinned and duct taped shut to prevent him from escaping," causing him to be "drenched in sweat and reeking of feces and urine"ⁿ¹³⁹

a special education teacher used bungee cords, a Rifton chair, and duct tape for repeated restraints in her class for students with behavior disordersⁿ¹⁴⁰

school personnel used a tether outside, and repeated crisis holds in, classroom on a student with multiple disabilities, breaking his elbowⁿ¹⁴¹

public school staff, at least three times, wrapped a kindergarten girl with bipolar disorder in a blanket taped to a cotⁿ¹⁴²

[*352]

an assistant principal taped a second-grade student with ADHD by his head, facing inward, to a tree when he misbehaved during recessⁿ¹⁴³

public school staff frequently strapped a five-year-old child with autism to a chair by means of a vest-like device that they euphemistically called a "love bug"ⁿ¹⁴⁴

The problem is that in most of the cases, the summary disposition of the claims, whether conclusive in favor of either party, obviated a judicial determination of whether these allegations were—at least in terms of preponderant proof—factual. Moreover, although an occasional court opinion mentioned arrest and/or criminal proceedings against the defendant teacher,ⁿ¹⁴⁵ the only one that revealed a confirming outcome was the teacher's conviction for one of four counts of child abuse in the Florida case cluster;ⁿ¹⁴⁶ the teacher in the Pennsylvania case cluster reportedly entered a nolo contendere plea for reckless endangerment, which is not an admission or finding of guilt.ⁿ¹⁴⁷ In the Muskrat case, the teacher entered an Alford plea (which similarly does not admit guilt), and it was for another action—slapping the student.ⁿ¹⁴⁸

On the other side of the balance, the students in some of these cases allegedly exhibited behavior dangerous to self or others, such as assaults on school staff.ⁿ¹⁴⁹ Moreover, in various cases, the parents' challenge was to the misuse, not the use, of restraints. For example, parents had requested or approved of the use of a mechanical restraint—specifically a chest harness—subsequently suing based on its alleged improper implementation.ⁿ¹⁵⁰

[*353]

In sum, the case law concerning the use of restraints with students with disabilities is more extensive and complicated than the previous literature revealed. Moreover, the trend in frequency is upward but the trend in outcomes, although shifting toward the plaintiffs for purposes of further proceedings or settlement, remains bleak in terms of conclusive precedents. For the proposed federal legislation, this more focused and complete research supplements 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."ⁿ¹⁵¹ There are more than "some" cases, and their rulings make rather clear that schools have rather wide, but not at all unlimited, latitude in using restraints for students with disabilities. On the other hand, the litigation does not sufficiently reveal the extent of the use and the misuse of this technique, including whether the horror stories that the mass media and the advocacy organizations recount, are true. The clustering of cases, with the aforementionedⁿ¹⁵² extreme example of seven attributable to a single felonious special education teacher, is especially problematic in terms of the generalized nature of legislative policy making.

In any event, the ultimate decision on whether to pass the proposed legislation or its final form should include special attention to its remedial provisions. For example, given the current jurisprudence concerning other federal legislation, such as FERPAⁿ¹⁵³ and the No Child Left Behind Act,ⁿ¹⁵⁴ it is unlikely that the courts would interpret H.R. 4247 as implying a right of action to sue for damages under § 1983.

Although the alternative of state laws is another recognized federal consideration, the number and nature of court decisions also suggests other factors for Congressional policy making. First, the reporting provisions of S. 3895 are likely to increase litigation, which Congress may consider as either beneficial or burdensome. Second, both the House and Senate proposals' establishment of minimum standards, including prohibitions of certain restraints and restrictions on others, are likely to play an indirect role in the analysis the courts use for relevant rulings, including the most frequent federal and state claims—substantive due process and negligence. Finally, inasmuch as most of the litigation to date has concerned students with disabilities, Congress should consider incorporating any such legislation into the upcoming reauthorization of the IDEA. Such provisions need not be limited to students with disabilities, as exemplified **[*354]** by the IDEA provision prohibiting mandatory medication, which applies to students generally.ⁿ¹⁵⁵ Moreover, these provisions need to be carefully orchestrated with the interrelated IDEA rules for functional behavioral assessments, behavior intervention plans, IEPs, and discipline.

Thus, in terms of restraints, schools, courts, and federal policy makers should approach the use of restraints with a carefully-considered and well-balanced plan, with due consideration for the competing concerns of the involved parties and other legislative provisions. Although leaving the question for such careful policy making, this systematic and impartial review of the case law contributes to an informed answer as to whether school personnel have misused or abused physical and other restraints at a level that the courts have insufficiently remedied.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Voting Rights General Overview Education Law Discrimination Individuals With Disabilities Education Act Remedies Public Health & Welfare Law Social Services Disabled & Elderly Persons Education & Training Individuals With Disabilities Education Act

FOOTNOTES:

n1 Danny Hakim, A Disabled Boy's Death, and a System in Disarray, N.Y. Times, June 5, 2011, [http://www.nytimes.com/2011/06/06/nyregion/boys-death-highlights-crisis-in-homes-for-disabled.html? r=1\[hp\]](http://www.nytimes.com/2011/06/06/nyregion/boys-death-highlights-crisis-in-homes-for-disabled.html? r=1[hp]) Tom Infield, \$ 5 Million Settlement in Alleged Abuse of Autistic Students, Philadelphia Inquirer, May 29, 2010, [n2 National Disability Rights Network, School is Not supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools 14 \(2009\), available at <http://www.napas.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf>. For a more recent advocacy report, see The American Association for the Severely Handicapped, The Cost of Waiting \(2011\), available at <http://tash.org/the-cost-of-waiting/>.](http://docs.newsbank.com/s/InfoWeb/agdocs/NewsBank/1300366D30F0DEA0/0D1CCB0EABC8FD75?p multi=PHIB&s lang=en-US; Jennifer Haberkorn, GAO Details Abuse Cases in Schools, Wash. Times, May 20, 2009, http://www.washingtontimes.com/news/2009/may/20/gao-details-abuse-cases-in-schools/; Emmallee Abel, Mom Says Teacher Tied Up Her Child, Courthouse News, May 4, 2009, http://www.courthousenews.com/2010/05/04/26945.htm; Robert Frahm, Parents Criticize Restraints In Schools: At Hearing, They Seek Changes in State Law, Hartford Courant, Dec. 16, 2006, at A1; Maria Glod & Michael Bimbaum, Report Prompts Call for Rules on Restraining Students, Wash. Post, May 21, 2009, at B4/.</p>
</div>
<div data-bbox=)

n3 *Id.* at 13-14.

n4 Greg Toppo, Restraint Can Dispirit and Hurt Special-Ed Students, USA Today, May 18, 2009, <http://www.usatoday.com/news/education/2009-05-18-restraint-special-ed N.htm>.

n5 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) (statement of Gregory D. Kuntz before the Committee on Education and Labor, House of Representatives), available at <http://www.gao.gov/new.items/d09719t.pdf>.

n6 H.R. 4247, 111th Cong. (1st Sess. 2009).

n7 E.g., Office for Civil Rights, U.S. Dep't of Educ., OMB No. 1875-0240, 2009-10 Civil Rights Data Collection: Part 1 and Part 2, available at <http://www.crdc2009.org/downloads/2009-10%20CRDC%20Table%20Layouts.pdf>; U.S. Gov't Accountability Office, *supra* note 5, at 1; CCBD's Position Summary on the Use of Physical Restraint Procedures in School Settings, 34 *Behav. Disorders* 223, 223-24 (2009) [hereinafter CCBD's Position Summary]; Joseph B. Ryan et al., Reducing Seclusion Timeout and Restraint Procedures with At-Risk Youth, 13 *J. At-Risk Issues* 7, 7 (2007).

n8 CCBD's Position Summary, *supra* note 7, at 229.

n9 *Id.* at 223.

n10 *Id.* at 224.

n11 *Id.* at 233.

n12 U.S. Gov't Accountability Office, *supra* note 5.

n13 CCBD's Position Summary, *supra* note 7, at 224; Gadi Dechter & Greg Garland, Bowling Brook's Growing Pains: Ex-workers Blame Enrollment Surge, *Baltimore Sun*, Mar. 18, 2007, <http://www.baltimoresun.com/news/maryland/balte.md.bowlingbrook18mar18,0,1657191.story>.

n14 CCBD's Position Summary, *supra* note 7, at 226.

n15 Benedict Carey, *Calm Down or Else*, *N.Y. Times*, July 15, 2008, <http://www.nytimes.com/2008/07/15/health/15iht-15restraint.14494697.html>.

n16 CCBD's Position Summary, *supra* note 7, at 226; Dechter & Garland, *supra* note 13.

n17 See, e.g., Julie Fogt & Christine Piripavel, Positive School-Wide Interventions for Eliminating Physical Restraint and Exclusion, 10 *Reclaiming Child. & Youth* 227, 228-31 (2002).

n18 William A. Fisher, Restraint and Seclusions: A Review of the Literature, 151 *Am. J. of Psychiatry*, 1584, 1584-91 (1994).

n19 Patricia A. Amos, New Considerations in the Prevention of Aversives, Restraint, and Seclusion: Incorporating the Role of Relationships into an Ecological Perspective, 29 *Res. & Prac. for Persons with Severe Disabilities* 263, 267-69 (2004); David N. Miller et al., Establishing and Sustaining Research-Based Practices at Centennial School: A Descriptive Case Study of Systemic Change, 42 *Psychol. Sch.* 553, 553-60 (2005); Ryan, et al., *supra* note 7, at 7-11.

n20 Angela J. Dean et al., Behavioral Management Leads to Reduction in Aggression in a Child and Adolescent Psychiatric Inpatient Unit, 46 *J. Am. Acad. Child Adolescent Psychiatry* 711, 712-19 (2007); Miller, *supra* note 19, at 553-58.

n21 Michael Hass et al., Reducing Aversive Interactions with Troubled Students, 8 *Reclaiming Child. & Youth* 94, 94-96 (1999); Janice LeBel et al., Child and Adolescent Inpatient Restraint Reduction: A State Initiative to Promote Strength-Based Care, 43 *J. Am. Acad. Child Adolescent Psychiatry* 37, 37-40 (2004); Miller et al., *supra* note 19, at 553-61; Ryan et al., *supra* note 7, at 8-12.

n22 Glen Dunlap et al., Technical Assistance Center on Social Emotional Intervention for Young Children, Preventing the Use of Restraint and Seclusion with Young Children: The Role of Effective Practices, 2-4 (2010), available at http://www.challengingbehavior.org/do/resources/documents/brief_preventing.pdf.

n23 U.S. Gov't Accountability Office, *supra* note 5, at 4.

n24 Id.

n25 James McAfee et al., Public Policy on Physical Restraint of Children with Disabilities in Public Schools, 29 *Educ. & Treatment of Child*, 711, 719, 723 (2006).

n26 U.S. Gov't Accountability Office, *supra* note 5, at 4.

n27 See *id.* at 1.

n28 *Id.* at 3.

n29 20 U.S.C. § 1414(d)(3)(B)(i) (2006).

n30 Letter to Anonymous, 50 IDELR P 228, 1019 (OSEP Mar. 17, 2008); Letter to Trader, 48 IDELR P 47,220 (OSEP Oct. 19, 2006).

n31 U.S. Gov't Accountability Office, *supra* note 5, at 1.

n32 *Id.* at 1-7.

n33 Letter to Chief State School Officers, 54 IDELR P 101,436, at 437 (July 31, 2009).

n34 Letter to Dodd, 55 IDELR P 20,186 (USDE Dec. 8, 2009); Letter to Weiss, 55 IDELR P 173,855, at 855-57 (USDE Jan. 26, 2010).

n35 Preventing Harmful Restraint and Seclusion in Schools Act, H.R. 4247, 111th Cong. § 5 (1st Sess. 2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4247ih/pdf/BILLS-111hr4247ih.pdf>.

n36 *Id.*

n37 *Id.* at § 5(a)(4).

n38 *Id.* at § 6(a)(1).

n39 *Id.* at § 2(1)(A).

n40 Keeping All Students Safe Act, S. 3895, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s3895is/pdf/BILLS-111s3895is.pdf>. In recognition of the importance of the issue but lack of applicable federal legislation and regulations, the U.S. Department of Education recently announced plans to issue guidance to school districts later this year on the use of restraints and seclusion with students with disabilities. Michelle Diamant, *Feds to Offer Schools Guidance on Restraint, Seclusion*, DisabilityScoop (May 19, 2011), <http://www.disabilityscoop.com/2011/05/19/feds-guidance-restraint/13123/>.

n41 *Id.* at § 102(a).

n42 *Id.* at § 102(a)(7).

n43 Christina Samuels, *Disability-Rights Groups Spar Over Special Ed. Restraints*, Education Week (Nov. 9, 2010), <http://edweek.org/ew/articles/2010/11/10/11.h30.html>; Valerie Strauss, "Safe Students Act" Doesn't Keep Kids Safe: Paddling Still Allowed, Wash. Post Online (Mar. 5, 2010, 12:18 PM), http://www.washingtonpost.com/blogs/answer-sheet/post/safe-students-act-doesnt-keep-kids-safe-paddling-still-allowed/2010/12/20/ABQdduF_blog.html.

n44 Michelle Diamant, *School Restraint, Seclusion Bill Resurfaces in Congress*, DisabilityScoop, Apr. 7, 2011, <http://www.disabilityscoop.com/2011/04/07/restraint-seclusion-resurfaces/12847/>.

n45 Press Release, U.S. Department of Education, Office for Civil Rights, Office for Civil Rights Revamps Civil Rights Data Collection, Unveils New Web Site for Survey Data, Mar. 16, 2010, available at <http://www2.ed.gov/news/pressreleases/2010/03/03162010.html>.

n46 This Authors' estimate is inexact, based on the usual time lag in having such Department of Education Reports available for the public. For example, the USDE data for the IDEA enrollments for 2008-09 became available in early 2011. .

n47 See generally Justin J. Farrell, *Protecting the Legal Interests of Children When Shocking, Restraining, and Secluding are the Means to an Educational End*, 83 St. John's L. Rev 395 (2009); Michael Rozalski et al., *Using Seclusion Timeout and Physical Restraint*, 19 J. Special Educ. Leadership 13 (2006); Joseph Ryan & Recce Peterson, *Physical Restraint in School*, 29 Behav. Disorders 154 (2004), available at www.ode.state.or.us/initiatives/elearning/nasdse/physicalrestraint.pdf.

n48 See generally Rozalski et al., *supra* note 47, at 13-28.

n49 Stacy Seiden & Perry Zirkel, *Aversive Therapy for Handicapped Students*, 48 Educ. L. Rep. 1029, 1039 (1989).

n50 See generally Sharon Lohrmann-O'Rourke & Perry Zirkel, *The Case Law on Aversive Interventions for Students with Disabilities*, 65 Exceptional Child. 101 (1998).

n51 Perry **Zirkel**, *Discipline of Students with Disabilities*, 174 Educ. L. Rep. 43-54 (2003).

n52 E.g., *Susavage v. Bucks Cnty. Sch. Intermediate Unit No. 22*, 36 IDELR P 32,126, at 127 (E.D. Pa. 2002); *O.F. v. Chester Upland Sch. Dist.*, 32 IDELR P 114,365, at 366 (E.D. Pa. 2000).

n53 Zirkel, *supra* note 51.

n54 E.g., *Brown v. Napa Valley Unified Sch. Dist.*, 48 IDELR P 129,551, at 552 (N.D. Cal. 2007); *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 486 F. Supp. 2d 437, 445 (M.D. Pa. 2007).

n55 See McAfee et al., *supra* note 25, at 725.

n56 Sarah Marquez, Note, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 *Syracuse L. Rev.* 617, 619 (2010).

n57 *Id.* at 629-30.

n58 See generally Nancy Jones & Jody Feder, Cong. Research Serv., R40522, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues* (2010), <http://openocrs.com/document/R40522/>.

n59 *Id.*

n60 E.g., *S. Lyon (MI) Cmty. Sch.*, 55 IDELR P 108,539, at 540 (M.D. Mich. 2010).

n61 E.g., *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, at 304 (5th Cir. 1987); *Banks v. Fritsch*, 39 S.W.3d 474 (Ky. Ct. App. 2001); cf. *Wallace v. Batavia Sch. Dist.* 101, 68 F.3d 1010 (7th Cir. 1995) (arguably corporal punishment).

n62 E.g., *B.R. v. Lake Placid Cent. Sch. Dist.*, 52 IDELR P 74,372, at 373 (N.D.N.Y. 2009).

n63 E.g., the private hospital co-defendant in *O.F. v. Chester Upland Sch. Dist.*, 32 IDELR P 114,364, at 365, further proceedings, 32 IDELR P 167,527, at 528 (E.D. Pa. 2000), further proceedings sub nom. *O.F. v. Pennsylvania Dep't of Educ.*, No. 00-cv-779 2000 U.S. Dist. LEXIS 16384 (E.D. Pa. Nov. 9, 2000).

n64 E.g., *Alexander S. v. Boyd*, 113 F.3d 1373, 1376-77 (4th Cir. 1997).

n65 E.g., *M.K. v. Sergi*, 578 F. Supp. 2d 425, 429-30 (D. Conn. 2008).

n66 E.g., *Sylvester v. Cancienne*, 664 So. 2d 1259, 1260 (La. Ct. App. 1995) (challenging demotion of tenured principal to classroom teacher); *Richard v. Lafayette Parish Sch. Bd.*, 984 So.2d 218, 219 (La. Ct App. 2008), cert. denied, 992 So. 2d 1014 (La. 2008) (suspending teacher with pay after the use of restraints).

n67 E.g., *Alleyn v. New York State Educ. Dep't*, 691 F. Supp. 2d 322, 327 (N.D.N.Y. 2010); *Bryant v. New York State Educ. Dep't*, 55 IDELR P 38,172, at 172 (N.D.N.Y. 2010).

n68 E.g., *C.B. v. Sonora Sch. Dist.*, 691 F. Supp. 2d 1123, 1126 (E.D. Cal. 2009), further proceedings, 691 F. Supp. 2d 1170, 1174 (E.D. Cal. 2010); *Hayenga v. Nampa Sch. Dist.* No. 131, 123 F. App'x 783,784 (9th Cir. 2005).

n69 E.g., *Disability Law Ctr. v. Discovery Acad.*, 53 IDELR P 282,1385, at 1386 (D. Utah 2010).

n70 E.g., *Lyons v. Ill. Dep't of Children & Family Servs.*, 858 N.E.2d 542, 545 (Ill Ct. App. 2006).

n71 E.g., *J.D.P. v. Cherokee Cnty. Sch. Dist.*, 735 F. Supp. 2d 1348 (N.D. Ga. 2010); *JGS v. Titusville Area Sch. Dist.*, 737 F. Supp. 2d 449 (W.D. Pa. 2010); *Sagan v. Sumner Cnty. Bd. of Educ.*, 54 IDELR P 280,1336, at 1336 (M.D. Tenn. 2010), further proceedings, 55 IDELR P 276,1385, at 1385 (M.D. Tenn. 2011); *W.A. v. Patterson Joint Unified Sch. Dist.*, 55 IDELR P 227,1120, at 1121 (E.D. Cal. 2010).

n72 E.g., *Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1246 (10th Cir. 2008); *J.A. v. Seminole Cnty. Sch. Bd.*, 44 IDELR P 182,990, at 991 (M.D. Fla. 2005), further proceedings, 2006 No. 6:05cv975 Or131 (DAB), 2006 U.S. Dist. LEXIS 74224, at *3 (M.D. Fla. Oct. 12, 2006); *J.G. v. Card*, 53 IDELR 118 (S.D.N.Y. 2009); *Jaccari J. v. Bd. of Educ. of City of Chicago Dist. No. 299*, 690 F. Supp. 2d 687, 704 (N.D. Ill. 2010).

n73 E.g. *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1273 (9th Cir. 1999); *C.A. v. Morgan Cnty Bd. of Educ.* 577 F. Supp. 2d 886, 888-89 (E.D. Ky. 2008); *W.E.T. v. Mitchell*, 49 IDELR P 130,610, at 611 (M.D.N.C. 2008); *Doe v. Clark Cnty. Bd. of Educ.*, 48 IDELR P 183,788, at 789 (D. Nev. 2007), further proceedings sub nom. *Doe v. Nevada*, 50 IDELR P 65,290, at 290 (D. Nev. April 30, 2008); *Farrell v. Transylvania Cnty. Bd. of Educ.*, 625 S.E.2d 128, 130 (N.C. Ct. App. 2006); *Roe v. Nevada*, 621 F. Supp. 2d 1039 (D. Nev. 2007); *Cole v. Greenfield- Cent. Cmty. Sch.*, 657 F. Supp. 56, 57 (S.D. Ind. 1986).

n74 *Musktrat v. Deer Creek Pub. Sch.*, 54 IDELR P 23,89, at 90 (W.D. Okla. 2010).

n75 *Melissa S. v. Sch. Dist. of Pittsburgh*, 183 F. App'x 184, 189-90 (3d Cir. 2006).

n76 *Youssef Chouhoud & Perry A. Zirkel, The Goss Progeny: An Empirical Analysis*, 45 *San Diego L. Rev.* 353, 368 (2008).

n77 *Melissa S.*, 183 F. App'x at 186, 190.

n78 *A.B. v. Seminole Cnty Sch. Bd.*, 44 IDELR P 245,1240, at 1245 (M.D. Fla. 2005).

n79 *D.N. v. Sch. Bd. of Seminole Cnty.*, 52 IDELR P 282,1440, at 1444 (M.D. Fla. 2009).

n80 The one exceptional instance in counting cases as the unit of analysis was seen in the *Padilla* litigation, because the same underlying facts led to separate cases in state and federal courts. See *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1178 (Colo. 2001); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000). Because one of the analyses was for each court forum separately, we counted the state and federal decisions in *Padilla* separately.

n81 T.W. v. Sch. Bd. of Seminole Cnty., 610 F.3d 588, 592-93 (11th Cir. 2010); C.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 3476, 591 F.3d 624 (8th Cir. 2010); P.T. v. Jefferson Cnty. Bd. of Educ., 189 F. App'x 858, 859 (11th Cir. 2006); Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1140 (9th Cir. 2002); D.D. v. Chilton Cnty. Bd. of Educ., 701 F. Supp. 2d 1236, 1238 (M.D. Ala. 2010); I.K. v. Sylvan Union Sch. Dist., 681 F. Supp. 2d 1179, 1182 (E.D. Cal. 2010); D.N. v. Sch. Bd. of Seminole Cnty., No. 6:07-cv-1494-Orl-28KRS, 2009 WL 2178898, at *1 (M.D. Fla. July 21, 2009); G.C. v. Sch. Bd. of Seminole Cnty., 639 F. Supp. 2d 1295, 1298 (M.D. Fla. 2009); J.M. v. Allegany-Limestone Cent. Sch. Dist., No. 07-cv-539 C, 2009 WL 3191442, at *2 (W.D.N.Y. Sept. 30, 2009); M.S. v. Seminole Cnty. Sch. Bd., 636 F. Supp. 2d 1317, 1318-19 (M.D. Fla. 2009); P.R. v. Cent. Tex. Autism Ctr., Inc., No. A-08-CA-821 LY, 2009 WL 1393291, at *1 (W.D. Tex. May 15, 2009); R.K. v. Y.A.L.E. Sch., Inc., No. 07- 5918, 2009 WL 1066125, at *1 (D.N.J. Apr. 20, 2009); T.B. v. Chico Unified Sch. Dist., No. CIV S-07-0926-GEB-CMK, 2009 WL 837468, at *1 (E.D. Cal. Mar. 26, 2009); T.M. v. Allegany-Limestone Cent. Sch. Dist., No. 07-cv-539 C, 2009 WL 3191442, at *2 (W.D.N.Y. Sept. 30, 2009); D.L. v. Waukeo Cmty. Sch. Dist., 578 F. Supp. 2d 1178 (S.D. Iowa 2008); Koehler v. Juniata Cnty. Sch. Dist., No. 1:07-cv-0117, 2008 WL 1787632, at *1 (M.D. Pa. Apr. 17, 2008); Thomas R. v. Ne. Educ. Intermediate Unit 19, 2008 WL 318355 (E.D. Pa. Feb. 1, 2008); O.H. v. Volusia Cnty. Sch. Bd., 50 IDELR P 255,1147, at 1147 (M.D. Fla. July 23, 2008); Brett K. v. Momenca Cmty. Unit Sch. Dist. No. 1, No. 06 C 3353, 2007 WL 1022004, at *1 (N.D. Ill. Mar. 30, 2007); Brown v. Napa Valley Unified Sch. Dist., No. C 06-5610 MEJ, 2007 WL 2028201, at *1 (N.D. Cal. July 10, 2007); Eva L. v. Ne. Educ. Intermediate Unit 19, No. 3:06-cv- 01899, 2007 WL 1450366, at *2 (M.D. Pa. Sept. 28, 2007); John G. v. Ne. Educ. Intermediate Unit 19, 490 F. Supp. 2d 565, 570 (M.D. Pa. 2007); Joseph M. v. Ne. Educ. Intermediate Unit 19, 516 F. Supp. 2d 424, 430 (M.D. Pa. 2007); J.V. v. Seminole Cnty. Sch. Bd., No. 6:04-cv-1889- Orl-28JGG, 2007 WL 7261470, at *1 (M.D. Fla. Mar. 21, 2007); Kimberly F. v. Ne. Educ. Intermediate Unit 19, No. 3:06-cv- 01901, 2007 WL 1450364, at *2 (M.D. Pa. May 15, 2007); Sanford D. v. Ne. Educ. Intermediate Unit 19, No. 3:06-cv-01904, 2007 WL 1450310, at *2 (M.D. Pa. May 15, 2007); Vicky M. v. Ne. Educ. Intermediate Unit, 486 F. Supp. 2d 437, 445 (M.D. Pa. 2007); Autism Soc'y of Mich. v. Fuller, No. 05:05-cv-73, 2006 WL 1519966, at *1 (W.D. Mich. May 26, 2006); DeKalb Cnty. Sch. Dist. v. J.W.M., 445 F. Supp. 2d 1371, 1378 (N.D. Ga. 2006); A.B. v. Seminole Cnty. Sch. Bd., No. 6:05cv802 ORL31KRS, 2005 WL 2105961, at *1 (M.D. Fla. Aug. 31, 2005); Alex G. v. Bd. of Trs. of Davis Joint Unified Sch. Dist., 387 F. Supp. 2d 1119, 1121 (E.D. Cal. 2005); Albert v. Harford Cnty. Pub. Sch., 38 IDELR P 38,171, at 172 (D. Md. 2002); Brown v. Ramsey, 121 F. Supp. 2d 911, 912 (E.D. Va. 2000); Garland Indep. Sch. Dist. v. Wilks, 657 F. Supp. 1163, 1165 (N.D. Tex. 1987); Meers v. Medley, 168 S.W.3d 406 (Ky. Ct. App. 2004); Lofton v. Detroit Bd. of Educ., No. 276449, 2008 WL 4414225, at *1 (Mich. App. Sept. 30, 2008); Pigford v. Jackson Pub. Sch. Dist., 910 So. 2d 575, 576 (Miss. App. 2005); Ronnie Lee S. v. Mingo Cnty. Bd. of Educ., 500 S.E. 2d 292, 292 (W. Va. 1997).

n82 Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243, 1246 (10th Cir. 2008); CJN v. Minneapolis Pub. Sch., 323 F.3d 630, 638, 646 (8th Cir. 2003); Eason, 303 F.3d at 1139 (9th Cir. 2002); Tallman v. Barnegat Bd. of Educ., 43 F. App'x 490, 492 (3rd Cir. 2002); Damian J. v. Sch. Dist. of Philadelphia, No. 06- 3866, 2008 WL 191176, at *1 (E.D. Pa. Jan. 22, 2008); Colon v. Colonial Intermediate Unit 20, 443 F. Supp. 2d 659, 662 (M.D. Pa. 2006); O.F. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409, 415 (E.D. Pa. 2002); Doe v. S & S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274, 277 (E.D. Tex. 2001).

n83 C.N., 591 F.3d at 627; H.H. v. Moffett, 335 F. App'x 306, 308 (4th Cir. 2009); Heidemann v. Rother, 84 F.3d 1021, 1025 (8th Cir. 1996); D.K. v. Solano Cnty. Office of Educ., 667 F. Supp. 2d 1184, 1187 (E.D. Cal. 2009); A.D. v. Nelson, No. 2:07-cv-116- PRC, 2007 WL 2446729, at *1 (N.D. Ind. Aug. 20, 2007); Susavage v. Bucks Cnty Sch. Intermediate Unit No. 22, No. Civ.A. 00-6217, 2002 WL 1340326, at *1 (E.D. Pa. June 18, 2002); James S. v. Fond Du Lac Sch. Dist., 35 IDELR P 251,1038 at 1039 (E.D. Wis. Nov. 30, 2001).

n84 Muskrat v. Deer Creek Pub. Sch., No. CIV-08-1103-L, 2010 WL 356659, at *1 (W.D. Okla. Jan. 27, 2010); Melissa S. v. Sch. Dist. of Pittsburgh, 183 F. App'x 184, 186 (3rd Cir. 2006); Padilla, 233 F.3d at 1273; M.D.F. v. Indep. Sch. Dist. No. 50 of Osage Cnty., Okla., No. 09-cv-548- GKF-PJC, 2010 WL 2326260, at *1 (N.D. Okla. June 3, 2010); Doe v. Darien Bd. of Educ., No. 3:05-cv-482 (WWE), 2009 WL 369918, at *1 (D. Conn. Feb. 11, 2009); McElroy v. Tracy Unified Sch. Dist., No. 2:07-cv-00086- MCE-EFB, 2009 WL 3050903, at *1 (E.D. Cal. Sept. 18, 2009); R.M. v. Waukeo Cmty. Sch. Dist., 589 F. Supp. 2d 1141, 1143-44 (S.D. Iowa 2008); Mallory v. Knox Cnty. Sch. Dist., No. 3:06-cv-122, 2006 WL 3484015, *2 (E.D. Tenn. Nov. 30, 2006); Doe v. State of Haw. Dep't of Educ., 351 F. Supp. 2d 998 (D. Haw. 2004); M.H. v. Bristol Bd. of Educ., No. 3:98-cv-867 AVC, 2002 WL 33802431, *1 (D. Conn. Jan. 9, 2002); Padilla, 25 P.3d at 1178; Meers v. Medley, 52 IDELR P 200 (Ky. Ct. App. 2009).

n85 P.T., 189 F. App'x at 859; Tallman, 43 F. App'x at 493; Padilla, 233 F.3d at 1273; Heidemann, 84 F.3d at 1026; D.D., 655 F. Supp. 2d at 1192; M.D.F., 2010 WL 2326260, at *1; Darien Bd. of Educ., 2009 WL 369918, at *6; J.M., 2009 WL 3191442, at *2; P.R., 2009 WL 1393291, at *1; R.K., 2009 WL 1066125, at *1; O.H., 50 IDELR P 255 at 1147; Brett K., 2007 WL 1022004, at *2; Napa Valley, 2007 WL 2028201, at *1; Mallory, 2006 WL 3484015, at *3; Autism Soc'y of Mich., 2006 WL 1519966, at *1; Alex G., 387 F. Supp. 2d at 1124-25; State of Haw. Dep't of Educ., 351 F. Supp. 2d at 1002-03; O.F., 246 F. Supp. 2d at 415-16, 420; Susavage, 2002 WL 1340326 at *1; Brown, 121 F. Supp. 2d at 912; Garland Indep. Sch. Dist., 657 F. Supp. at 1169; Lofton, 2008 WL 4414255, at *1, *4; Pigford, 910 So.2d at 576-77; Padilla, 25 P.3d at 1178-79; Ronnie Lee S., 500 S.E.2d at 294.

n86 Koehler, 2008 WL 1787632, at *13; M.H., 2002 WL 33802431, at *2; James S., 35 IDELR at 1040.

n87 T.W., 610 F.3d at 595-96; C.N., 591 F.3d at 627-28; H.H., 335 F. App'x at 308; Couture, 535 F.3d at 1246; Melissa S., 183 F. App'x at 186; CJN, 323 F.3d at 638; Eason, 303 F.3d at 1139; Padilla, 233 F.3d at 1273; I.K., 681 F. Supp. 2d at 1183-85; D.N. v. Sch. Bd. of Seminole Cnty., No. 6:07-cv-1494- Orl-28KRS, 2009 WL 2178898, at *1 (M.D. Fla. July 21, 2009); Muskrat, 54 IDELR at 90; D.K., 667 F. Supp. 2d at 1187-88; G.C., 639 F. Supp. 2d at 1298; Darien Bd. of Educ., 2009 WL 369918, at *1; M.S., 636 F. Supp. 2d at 1319-20, 1325; T.B. v. Chico Unified Sch. Dist., No. 2:07-cv-926- GEB-CMK, 2008 WL 3835731, *1 (E.D. Cal. Aug. 14, 2008); McElroy, 2009 WL 3050903, at *1; R.M., 589 F. Supp. 2d at 1144; D.L., 578 F. Supp. 2d at 1181; Damian J., 2008 WL 191176, at *1; Koehler, 2008 WL 1787632 at, *1; A.D., 2007 WL 2446729, at *1; Eva L., 2007 WL 2844583, at *3; John G., 490 F. Supp. 2d at 571; Joseph M., 516 F. Supp. 2d at 431; J.V., 2007 WL 7261470, at *1-2; Kimberly F., 2007 WL 1450364, at *3; Sanford, 2007 WL 1450310, at *3; Vicky M., 486 F. Supp. 2d at 447; DeKalb Cnty. Sch. Dist. v. J.W.M., 445 F. Supp. 2d 1371, 1376 (N.D. Ga. 2006); Colon, 443 F. Supp. 2d at 663; A.B., 2005 WL 2105961, at *1; Albert, 38 IDELR at 172; Doe, 149 F. Supp. 2d at 274; Medley, 168 S.W.3d at 408; Padilla, 25 P.3d at 1178.

n88 T.W., 610 F.3d at 592; C.N., 591 F.3d at 627; Couture, 535 F.3d at 1246; Melissa S., 183 F. App'x at 186; CJN, F.3d at 638; Eason, 303 F.3d at 1140; Tallman, 43 F. App'x at 491; I.K., 681 F. Supp. 2d at 1181; M.D.F., 2010 WL 2326260; Muskrat, 52 IDELR at 1449-50; D.N., 2009 WL 2178898, at *1; G.C., 639 F. Supp. 2d at 1298; Darien Bd. of Educ., 2009 WL 369918 at, *1; M.S., 636 F. Supp. 2d at 1318; P.R., 2009 WL 1393291, at *1; R.K., 2009 WL 1066125, at *1; T.B., 2008 WL 3835731, at *1; T.M. v. Allegany-Limestone Cent. Sch. Dist., No. 07-cv-539 C, 2009 WL 3191442, at *2 (W.D.N.Y. Sept. 30, 2009); ; McElroy, 2009 WL 3050903, at *1; R.M., 589 F. Supp. 2d at 1144; D.L., 578 F. Supp. 2d at 1178; John G., 490 F. Supp. 2d at 571-72; Damian J., 2008 WL 191176, at *1; Koehler, 2008 WL 1787632 at, *1; Napa Valley, 2007 WL 2028201, at *1; J.V., 2007 WL 7261470, at *1; Eva L., 2007 WL 2844583; Joseph M., 516 F. Supp. 2d at 431; Kimberly F., 2007 WL 1450364; Sanford D., 2007 WL 1450310, at *3; Vicky M., 486 F. Supp. 2d at 447; Thomas R. v. Northeastern Educational Intermediate Unit 19, No. 3:06-cv-01902, 2007 WL 1450352 (M.D. Pa. 2007); Autism Soc'y of Mich., 2006 WL 1519966, at *1; DeKalb Cnty. Sch. Dist., 445 F. Supp. 2d at 1374; Colon, 443 F. Supp. 2d at 662; Mallory, 2006 WL 3484015, at *2; A.B., 2005 WL 2105961, at *2; Alex G., 387 F. Supp. 2d at 1121; Albert, 38 IDELR P 38; Doe, 149 F. Supp. 2d at 415; M.H., 2002 WL 33802431, at *2; Doe v. S & S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274 (E.D. Tex. 2001); James S., 35 IDELR at 1039-40; Brown, 121 F. Supp. 2d at 912; Garland Indep. Sch. Dist., 657 F. Supp. at 1165; Medley, 168 S.W.3d at 408; Pigford, 910 So. 2d at 577.

n89 H.H., 335 F. App'x at 307-08; P.T., 189 F. App'x at 859; Heidemann, 84 F.3d at 1026; D.D. v. Chilton Cnty. Bd. of Educ., 701 F. Supp. 2d 1236, 1239 (M.D. Ala. 2010); D.K., 667 F. Supp. 2d at 1188; Koehler, 2008 WL 1787632, at *3; O.H., 50 IDELR P 255, 1147, at 1147; Brett K., 2007 WL 1022004, at *1; A.D. 2007 WL 2446729, at *1; Eva L., 2007 WL 1450366, at *3; Joseph M., 516 F. Supp. 2d at 431; Kimberly F., 2007 WL 1450364, at *3; Sanford D., 2007 WL 1450310, at *3; Vicky M., 486 F. Supp. 2d at 447; Thomas R., 2007 WL 1450352, at *13, *17; Doe v. State of Haw. Dep't of Educ., 334 F.3d 906, 907 (9th Cir. 2002); Susavage, 2002 WL 1340326, at *1; M.H., 2002 WL 33802431, at *2; Doe, 149 F. Supp. 2d at 277; James S., 35 IDELR at 1039; Lofton, 2008 WL 4414225, at *1; Padilla, 25 P.3d at 1178; Ronnie Lee S, 500 S.E.2d at 294.

n90 Eason, 303 F.3d at 1140.

n91 This characterization is based on visual inspection of Figure 2. A spreadsheet listing all of the cases, decisions, claim rulings, and outcomes is available from the second Author (cal207@lehigh.edu) upon request.

n92 See H.H., 335 F. App'x at 306; I.K., 681 F. Supp. 2d at 1205; Muskrat 54 IDELR 91-92; D.K., 667 F. Supp. 2d at 1199; Darien Bd. of Educ., 2009 WL 369918, at 213; M.S., 636 F. Supp. 2d at 1326; P.R., 2009 WL 1393291, at *7; R.K., 2009 WL 1066125, at *6; T.B., 2008 WL 3835731, at *5; McElroy, 2009 WL 3050903, at *9-10; D.L., 578 F. Supp. 2d at 1194-95; Koehler, 2008 WL 1787632 at, *15; O.H., 50 IDELR at 1149; Joseph M., 516 F. Supp. 2d at 449 (M.D. Pa. 2007); J.V., 2007 WL 7261470, at *11; S Sanford D., 2007 WL 1450310 at*3; Vicky M., 486 F. Supp. 2d at 741; Medley, 168 S.W.3d at 408.

n93 T.W., 610 F.3d at 593; C.N., 591 F.3d at 629; H.H., 335 F. App'x at 309; Couture, 535 F.3d at 1246; Melissa S., 183 F. App'x at 186; Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1273 (10th Cir. 2000); G.C., 639 F. Supp. at 1298; M.S., 636 F. Supp. 2d at 1323; Darien Bd. of Educ., 2009 WL 369918, at *1 (D. Conn. Feb. 11, 2009); A.D., 2007 WL 2446729, at *4; D.L., 578 F. Supp. 2d at 1186; Napa Valley, 2007 WL 2028201, at *1; J.V., 2007 WL 7261470, at *7; Autism Soc'y of Mich, 45 IDELR at P 275 (discussing Autism Soc'y of Mich. v. Fuller, No. 05:05-cv-73, 2006 WL 1519966 (W.D. Mich. May 26, 2006), motion to vacate denied, No. 05:05-cv-73, 2007 WL 2484983, at *3 (W.D. Mich. Aug. 29, 2007)); DeKalb Cnty., 445 F. Supp. 2d at 1374; A.B., 44 IDELR at P 245; State of Haw. Dep't of Educ., 351 F. Supp. 2d at 1003; Susavage, 2002 WL 1340326, at *1; M.H., 2002 WL 33802431, at *2; Ramsey, 121 F. Supp. 2d at 917.

n94 Cases in which the Fourteenth Amendment Claim was inconclusively favorable for the plaintiff are: H.H., 335 F. App'x. at 315; M.S., 636 F. Supp. at 1323; D.L., 578 F. Supp. 2d at 1195; J.V., 2007 WL 7261470, at *1-2; A.B., 44 IDELR at P 245; Susavage, 2002 WL

1340326, at *5. Cases in which the Fourteenth Amendment Claim was an outright win for the defendant district are: T.W., 54 IDELR; C.N., 591 F.3d at 635; Couture, 535 F.3d at 1258; Melissa S., 183 F. App'x at 190; G.C., 639 F. Supp. 2d at 1307; Darien Bd. of Educ., 2009 WL 369918, at *10; A.D., 2007 WL 2446729, at *8; Napa Valley, 2007 WL 2028201, at *1; Autism Soc'y of Mich, 45 IDELR at P 275; DeKalb Cnty., 445 F. Supp. 2d at 1379; State of Haw. Dep't of Educ., 351 F. Supp. 2d at 1020; M.H., 2002 WL 33802431, at *6; Ramsey, 121 F. Supp. 2d at 925; Padilla, 233 F.3d at 1274.

n95 Eva L., 2007 WL 1450366, at *13-14, 17; John G., 490 F. Supp. 2d at 583-87; Joseph M., 516 F. Supp. 2d at 447; Vicky M., 486 F. Supp. 2d at 463; Kimberly F., 2007 WL 2844934, at *11; Sanford D., 2007 WL 2844941, at *11-14; Thomas R., 2007 WL 1450352, at *13, *17.

n96 M.S., 636 F. Supp. 2d at 1326; P.R., 2009 WL 1393291, at *6-7; R.K., 2009 WL 1066125, at *7; Koehler, 2008 WL 1787632, at *13-14; Napa Valley, 2007 WL 2028201, at *4; Eva L., 2007 WL 1450366, at *15; John G., 490 F. Supp. 2d at 582-83; Joseph M., 516 F. Supp. 2d at 442; J.V., 2007 WL 7261470, at *10-11; Kimberly F., 2007 WL 2844934, at *15; Sanford, 2007 WL 1450310, at *15; Vicky M., 689 F. Supp. 2d at 739; Thomas R., 2007 WL 1450352, at *15; Meers, 168 S.W.3d at 408-11 (Ky. Ct. App. 2004); Ronnie Lee, 500 S.E.2d at 295.

n97 C.N., 2008 WL 3896205, at *7; D.K., 667 F. Supp. 2d at 1199; Darien Bd. of Educ., 2009 WL 369918, at *5; McElroy, 2009 WL 3050903, at *4; D.L., 578 F. Supp. 2d at 1192; Napa Valley, 2007 WL 2028201, at *4; Eva L., 2007 WL 2844583, at *15; John G., 490 F. Supp. 2d at 582; Joseph M., 516 F. Supp. 2d at 442; Vicky M., 689 F. Supp. 2d at 738-39; Thomas R., 2007 WL 1450352, at *15; State of Haw. Dep't of Educ., 351 F. Supp. 2d at 1021.

n98 Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1145 (9th Cir. 2002); Muskrat, 2010 WL 356659, at *4, n. 5; D.K., 667 F. Supp. 2d at 1197; Darien Bd. of Educ., 2009 WL 369918, at *1; P.R., 2009 WL 1393291, at *2, *7; R.K., 2009 WL 1066125, at *6; T.B., 2008 WL 3835731, at *2-5; D.L., 578 F. Supp. 2d at 1191-92; Koehler, 2008 WL 1787632, at *13-14; Eva L., 2007 WL 1450366, at *20; John G., 490 F. Supp. 2d at 588; Joseph M., 516 F. Supp. 2d at 447; Kimberly F., 2007 WL 1450364, at *14; Sanford, 2007 WL 1450310, at *20; Vicky M., 486 F. Supp. 2d at 463; Thomas R., 2007 WL 1450352, at *22; Albert, 38 IDELR at 174; James S., 35 IDELR at 1042; Meers, 168 S.W.3d at 408-11; Ronnie Lee S., 500 S.E.2d at 300.

n99 34 C.F.R. § 300.8(c)(1) (2009).

n100 Perry Zirkel, *Autism Litigation under the IDEA: A New Meaning of "Disproportionality"?* J. Special Educ. Leadership (forthcoming 2011).

n101 E.g., *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1273 (9th Cir. 1999).

n102 Although the Westlaw and IDELR databases extend well beyond officially reported court decisions, this study's scope did not extend to the pertinent unpublished decisions, which are in the below-the-surface segment of the litigation iceberg. See, e.g., Robert A. Mead, "Unpublished" Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals, 93 L. Libr. J. 589 (2001) (providing limited and indirect evidence of possible differences in category distribution and outcomes between published and unpublished Eighth and Tenth Circuit decisions for the first six months of 2000); Peter Siegelman & John Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & Soc'y Rev. 1133 (1990) (finding some significant differences in the characteristics and outcomes between published and unpublished employment discrimination decisions in seven selected district court jurisdictions for the period 1972-1987).

n103 See, e.g., Perry Zirkel, *Discipline of Students with Disabilities: A Judicial Update*, 235 Educ. L. Rep. 1, 1-2, 5-8 (2008).

n104 In other special education contexts, some courts have disapprovingly characterized this type of litigation strategy under the alternative metaphor of "kitchen sink" or "shotgun" pleadings. See, e.g., *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1091-92 (D. Minn. 2009);

10 Conn. Pub. Int. L.J. 323, *

Larson v. Indep. Sch. Dist. No. 361, No. Civ.02-3611 (DWF/RLE), 2004 WL 432218, at *20 (D. Minn. Mar. 2, 2004); Norris v. Bd. of Educ. of Greenwood Cmty. Sch. Corp., 797 F. Supp. 1452, 1458 n.2(S.D. Ind. 1992).

n105 G.C. v. Sch. Bd. of Seminole Cnty., 639 F. Supp. 2d 1295, 1298 (M.D. Fla. 2009).

n106 P.R. v. Cent. Tex. Autism Ctr., Inc., 52 IDELR P 222, 1112, at 1113 (W.D. Tex. 2009).

n107 McElroy v. Tracy Unified Sch. Dist., 51 IDELR P 184,939 at 939 (E.D. Cal. 2008).

n108 Doe v. State of Haw. Dep't of Educ., 351 F. Supp. 2d 998, 1022 (D. Haw. 2004).

n109 D.L. v. Waukee Cmty. Sch., 578 F. Supp. 2d 1178, 1182 (D. Iowa 2008).

n110 See, e.g., John G. v. Ne. Educ. Intermediate Unit 19, 490 F. Supp. 2d 565, 569 (E.D. Pa. 2007); Joseph M. v. Ne. Educ. Intermediate Unit 19, 516 F. Supp.2d 424, 429 (M.D. Pa. 2007); Eva L. v. Ne. Educ. Intermediate Unit 19, No. 3:06- cv-01899, 2007 WL 1450366, at *1, 3, 4-5 (M.D. Pa. May 15, 2007); Sanford D. v. Ne. Educ. Intermediate Unit 19, No. 3:06-cv-01904, 2007 WL 1450310, at *1, 3 (M.D. Pa. May 15, 2007); Kimberly F. v. Ne. Educ. Intermediate Unit 19, No. 3:06-cv-01901, 2007 WL 2844934 (M.D. Pa. Sept. 26, 2007); see also Vicky M. v. Ne. Educ. Intermediate Unit 19, 689 F. Supp. 2d 721, 728 (M.D. Pa. 2009) (noting the consolidation of these cases).

n111 T.W. v. Sch. Bd. of Seminole Cnty., 610 F.3d 588, 592 (11th Cir. 2010); D.N. v. Sch. Bd., 52 IDELR P 282,1440, at 1441 (M.D. Fla. 2009); G.C. v. Sch. Bd., 639 F. Supp. 2d 1295, 1298 (M.D. Fla. 2009); M.S. v. Seminole Cnty. Sch. Bd., 636 F. Supp. 2d 1317, 1318 (M.D. Fla. 2009); J.V. v. Seminole Cnty. Sch. Bd., No. 6:04-cv-1889- Orl-28JGG, 2007 WL 7261470, at *1 (M.D. Fla. Mar. 21, 2007); J.A. v. Seminole Cnty. Sch. Bd., 44 IDELR P 182, 990, at 991 (M.D. Fla. 2006); A.B. v. Seminole Cnty. Sch. Bd., 44 IDELR P 245,1240, at 1240 (M.D. Fla. 2005).

n112 D.K. v. Solano Cnty. Office of Educ., 51 IDELR P 178,909, at 910 (E.D. Cal. 2008).

n113 Doe v. Darien Bd. of Educ., 52 IDELR P 44,212, at 213 (D. Conn. 2009).

n114 Meers v. Medley, 168 S.W.3d 406, 408 (Ky. Ct. App. 2004).

n115 Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1139 (9th Cir. 2002).

n116 E.g., Perry Zirkel & Anastasia D'Angelo, Special Education Case Law: An Empirical Trends Analysis, 161 Educ. L. Rep. 731, 731-53 (2002).

n117 E.g., Anastasia D'Angelo & Perry Zirkel, An Outcomes Analysis of Student-Initiated Litigation, 226 Educ. L. Rep. 539, 539 (2008).

n118 E.g., A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 803 (3d Cir. 2007); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 19 (1st Cir. 2006).

n119 E.g., *Heidemann v. Rother*, 84 F.3d 1021, 1032 (8th Cir. 1996) (rejecting § 504 liability); *G.C. v. Sch. Bd. of Seminole Cnty.*, 639 F. Supp. 2d 129 5, 1305 (M.D. Fla. 2009) (rejecting substantive due process liability); *T.B. v. Harford Cnty. Pub. Sch.*, 38 IDELR P 38 (D. Md. 2002) (rejecting intentional infliction of emotional distress); Peter Maher, et al., *Governmental Immunity for School Districts and their Employees: Alive and Well?*, 19 Kan. J.L. & Pub. Pol'y 234, 236 (2010) (canvassing negligence immunity).

n120 E.g., Chouhoud & **Zirkel**, *supra* note 76, at 358-59.

n121 E.g., Perry **Zirkel** & John H. Clark, *School Negligence Case Law Trends*, 32 S. Ill. U. L.J. 345, 359 (2008).

n122 Perry **Zirkel** & Brent L. Johnson, *The "Explosion" of Education Litigation: An Updated Analysis*, 265 Educ. L. Rep. 1-10 (2011); Perry **Zirkel** & Anastasia D'Angelo, *supra* note 116, at 731-53.

n123 See generally, **Zirkel**, *supra* note 100.

n124 See *supra* notes 45-46 and accompanying text.

n125 *Vicky M. v. Ne. Educ. Intermediate Unit 19*, 689 F. Supp. 2d 721 (M.D. Pa. 2009).

n126 *Autistic Children Abused in Pa Classroom to Get \$ 5 Million to Settle Federal Lawsuit*, FoxNews.com (May 28, 2010), <http://www.foxnews.com/us/2010/05/28/autistic-children-abused-pa-classroom-million-settle-federal-lawsuit/>.

n127 Erin L. Nissley, *Judge Approves \$ 5M Settlement in Abuse Case*, The Times-Tribune, May 28, 2010, at A7, available at http://docs.newsbank.com/s/InfoWeb/aggdocs/NewsBank/130047BC25EB5620/0D1CCB0EABC8FD75?p_mult=SRTB&s_lang=en-US.

n128 *J.A. v. Seminole Cnty. Sch. Bd.*, 44 IDELR P 182,990, at 991 (M.D. Fla. Nov. 18, 2005).

n129 *Lawsuits Surface Against Special Ed Teacher*, WFTV.com (Aug. 10, 2010), <http://www.wftv.com/news/24583171/detail.html>.

n130 *T.B. v. Chico Unified Sch. Dist.*, No. 2:07-cv-00926- GEB-CMK, 2010 WL 1032669, at *2 (E.D. Cal. Mar. 19, 2010); *T.B. v. Chico Unified Sch. Dist.*, 50 IDELR P 243,1093, at 1096 (E.D. Cal. Aug. 14, 2008).

n131 *Autism Soc'y of Mich. v. Fuller*, No. 5:05-cv-73, 2007 WL 2484983, at *1 (W.D. Mich. Aug. 29, 2007).

n132 *McElroy v. Tracy Unified Sch. Dist.*, No. 2:07-cv-00086- MCE-EFB, 2008 WL 5045952, at *3 (E.D. Cal. Nov. 21, 2008); see also *McElroy v. Tracy Unified Sch. Dist.*, No. 2:07-cv-00086- MCE-EFB, 2009 WL 1324952, at *1 (E.D. Cal. May 12, 2009); *McElroy v. Tracy Unified Sch. Dist.*, No. 2:07-cv-00086- MCE-EFB , 2009 WL 3050903, at *2 (E.D. Cal. Sept. 18, 2009).

n133 Elliot Grossman, Parties Settle School Bus Strangulation Case, *The Morning Call* (Aug. 19, 2003), http://articles.mcall.com/2003-08-19/news/3488281_1_school-bus-bus-driver-girl-s-death.

n134 I.K. v. Sylvan Union Sch. Dist., 681 F. Supp. 2d 1179-90 (E.D. Cal. 2010).

n135 A.B. v. Seminole Cnty. Sch. Bd., 44 IDELR P 245,1240, at 1245 (M.D. Cal. Aug. 31, 2005) (discussing A.B. v. Seminole Cnty. Sch. Bd., No. 6:05-cv- 802-0rl-31 KRS, 2005 WL 2105961, at *9 (M.D. Fla. Aug. 31, 2005) and A.B. v. Seminole Cnty. Sch. Bd., No. 6:05-cv-802-0rl-31 KRS, 2007 WL 10104, at *4 (M.D. Fla. Jan. 2, 2007)).

n136 McElroy v. Tracy Unified Sch. Dist., 51 IDELR P 184, 939, at 946 (E.D. Cal. Nov. 21, 2008) (discussing McElroy v. Tracy Unified Sch. Dist., No. 2:07-cv-00086- MCE-EFB, 2008 WL 5045952, at*10 (E.D. Cal. Nov. 21, 2008)). See also McElroy v. Tracy Unified Sch. Dist., 52 IDELR P 187,923, at 929 (E.D. Cal. May 12, 2009) (discussing McElroy v. Tracy Unified Sch. Dist., No. 2:07-cv-00086- MCE-EFB, 2009 WL 1324952, at *7 (E.D. Cal. May 12, 2009) and McElroy v. Tracy Unified Sch. Dist., 53 IDELR P 119,608, at 610 (E.D. Cal. Sept. 17, 2009) (discussing McElroy v. Tracy Unified Sch. Dist., No. 2:07-cv-00086- MCE-EFB, 2009 WL 3050903, at *3 (E.D. Cal. Sept. 18, 2009) for further proceedings).

n137 Autism Soc'y of Mich. v. Fuller, 45 IDELR P 275,1204, at 1205 (W.D. Mich. May 26, 2006), motion to vacate denied, No. 5:05-cv-73 2007, WL 2484983, at *3 (W.D. Mich. August 29, 2007).

n138 Albert v. Harford Cnty. Pub. Sch., 38 IDELR P 38,171, at 172 (D. Md. Nov. 7, 2002).

n139 Koehler v. Juniata Cnty. Sch. Dist., 50 IDELR P 71,316, at 318 (M.D. Pa. Apr. 17, 2008).

n140 Vicky M. v. Ne. Educ. Intermediate Unit 19, 486 F. Supp. 2d 437,447 (M.D. Pa. May 15, 2007), motion for reconsideration granted, No. 3:06-cv-01898, 2007 WL 2844428 (M.D. Pa. Sept. 26, 2007).

n141 James S. v. Fond du Lac Sch. Dist., 35 IDELR P 221,1038, at 1041 (E.D. Wis. Nov. 30, 2001).

n142 Doe v. S&S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274, 278-80 (E.D. Tex. June 26, 2001), *aff'd mem.*, 309 F.3d 307 (5th Cir. Oct. 7, 2002).

n143 Doe v. State of Haw. Dep't of Educ., 351 F. Supp. 2d 998, 1002-03 (D. Haw. Feb. 23, 2004).

n144 Ronnie Lee v. Mingo Cnty. Bd. of Educ., 500 S.E.2d 292, 294 (W. Va. Dec. 15, 1997).

n145 E.g., Muskrat v. Deer Creek Pub. Sch., 54 IDELR P 23,89, at 90 (W.D. Okla. Jan. 27, 2010).

n146 M.S. v. Seminole Cnty. Sch. Bd., 52 IDELR P 286,1453, at 1455 (M.D. Fla. July 10, 2009).

n147 Autistic Children Abused in Pa. Classroom to get \$ 5 Million to Settle Federal Lawsuit, FoxNews.com, May 28, 2010, <http://www.foxnews.com/us/2010/05/28/autistic-children-abused-pa-classroom-million-settle-federal-lawsuit>.

n148 Mark Schlachtenhaufen, Deer Creek Parents Sue District, Edmond Sun, Feb. 7, 2009, <http://www.edmondsun.com/local/x519239768/Deer-Creek-parents-sue-district>.

n149 E.g., *Albert v. Harford Cnty. Pub. Sch.*, 38 IDELR P 38,171, at 172 (D. Md. Nov. 7, 2002); *Doe v. S&S Consol. Indep. Sch. Dist.*, 149 F. Supp. 2d 274, 279 (E.D. Tex. June 26, 2001), *aff'd mem.*, 309 F.3d 307 (5th Cir. Oct. 7, 2002); *James S. v. Fond du Lac Sch. Dist.*, 35 IDELR P 221,1038, at 1039 (E.D. Wis. Nov. 30, 2001).

n150 E.g., *Lofton v. Detroit Bd. of Educ.*, 51 IDELR P 107,566, at 567 (Mich. Ct. App. Sept. 30, 2008); *Brett K. v. Momence Cmty. Unit Sch. Dist. No. 1*, 47 IDELR P 257,1183, at 1184 (N.D. Ill. Mar. 30, 2007); *Susavage v. Bucks Cnty. Sch. Intermediate Unit No. 22*, 36 IDELR P 32,126, at 127 (E.D. Pa. Jan. 22, 2002).

n151 *Jones & Feder*, *supra* note 58, summary.

n152 See *supra* text accompanying note 126-28.

n153 *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002).

n154 E.g., *Blakely v. Wells*, 380 F. App'x 6 (2d Cir. 2010); *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 205 (3d Cir. 2008).

n155 20 U.S.C. § 1412(a)(25)(A) (2006).