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TIME-OUT AND SECLUSION LITIGATION: A LIABILITY NIGHTMARE?

Introduction

HIGH-profile media reports of K-12 schools subjecting children with disabilities to severe forms of seclusion [1] reveal the controversial nature of aversive interventions. For example, a national television station reported the claims of several parents in a Connecticut school district that their children's elementary school uses a "scream room" to address behavioral problems. [2] Although one parent of a child with autism perceived the benefits of such a time-out mechanism for her child's need for a quiet space to calm down, other parents expressed outrage at this aversive, isolation treatment. [3]

Other mass-media reports include litigation or legislation in tandem with such incidents. [4] For instance, parents of a seven-year-old child who wet himself while secluded in the school's designated "cool down room," which-- according to them--resembled a padded prison cell, reportedly filed a lawsuit seeking monetary damages for emotional and physical injuries to their child. [5] However, the same source did not provide any details about the theories and outcome of the ***506** reported suit. [6] Another high-profile case resulted in not only a reported lawsuit, but also proposed state legislation. [7] In this case, an Indianapolis public school placed a 12-year-old special education student in a seclusion room in response to her self-mutilating behavior, and she lost the tip of her finger upon attempting to escape this isolation. [8] The parents filed a liability suit, and--in response to this report and other publicized incidents--the state legislature initiated new legal restrictions. [9] More generally, hyper-focused media attention has stimulated not only increased legislation and regulation at the state level, but also congressional action. [10] Federal legislative efforts thus far have been unsuccessful, [11] but renewed efforts are currently underway in the House. [12] The media, congressional, and advocacy reports are frequently cited as evidence of the tragic results of restraint and seclusion of students with disabilities, yet all of these reports fail to include reviews of the case law and court rulings. [13]

Helping to fill the gap, this Article provides an overview of the case law on time-out and seclusion, with emphasis on the legal theories that the parent-plaintiffs have advanced and the resulting rulings that the courts have issued. More specifically, Part I offers a brief review of federal and state legislative efforts. Part II defines time-out and seclusion as a framework continuum. Part ***507** III provides a corresponding framework of the legal theories of the claims advanced by the parent-plaintiffs and adjudicated by the courts to date. Part IV provides an analysis of the frequency and outcomes of these court cases in terms of these respective federal and state claims. Part V provides recommendations for schools and parents based on the lessons learned from the litigation to date.

I. Federal and State Efforts

The congressional efforts to enact restrictions on seclusion and restraint of children with disabilities have been credited for influencing many states to adopt stricter reporting and parental notification statutes and regulations. [14] While seclusion and restraint are the primary focus in terms of definition as well as regulation, the nuanced distinctions among the three forms of time-out interventions are absent from the federal bills and from the state laws, regulations, and non-binding guidelines. [15] In the wake of failed federal initiatives, the number of state statutes, regulations, or guidelines that restrict seclusion or regulate time-out in schools increased from 23 in 2010 [16] to 32 in 2013. [17] The scope of the definition and the extent of the restrictions vary among these state laws, [18] just as they do between the House and Senate bills to date. [19] Moreover, the proposed federal legislation applied to students with and students without disabilities, [20] whereas only a few of the state laws extend to students without disabilities. [21] Similarly, although the Senate bill sought an outright ban ***508** on seclusion, few states have opted to go that far. [22] Instead, the majority of the state laws to date have a broad exception for threats to safety or risk of physical harm. [23] Finally, the proposed Senate and House bills were concordant in their definitions of seclusion and time-out, but the state laws have varied extensively both in their terminology and definitions for these aversive interventions. [24]

Thus far, the legislative initiatives at both the federal and state levels have garnered extensive interest from the disability and advocacy communities. [25] In turn, many of the advocacy positions are premised on unsubstantiated anecdotal claims, media reports, and a negligible review of actual court cases. [26] Similarly, the law review articles are largely limited to advocacy positions in favor of legislation prohibiting or restricting the use of seclusion and restraint in schools and rely solely on anecdotal reports; without comprehensively canvassing the case law according to a uniform framework. [27] The exception is the Zirkel and Lyons analysis of the case law specific to the use of restraint. [28]

II. Time-Out and Seclusion Framework

This Article uses a uniform definition of time-out and seclusion as a framework for its case law analysis. Much like the least restrictive environment (LRE) mandate under the Individuals with Disabilities Education Act (IDEA), ***509** time-out and seclusion are part of a continuum of ascending restrictiveness. [29] Time-out is a behavior management technique that separates the student from the group, in a non-locked setting, for the purpose of calming or behavior management. [30] As described in greater detail below, time-out encompasses three successively more restrictive forms of intervention. [31] Seclusion, on the other hand, is when a child is isolated and locked in a separate space or room, thus fitting as the next adjacent segment of the continuum. [32]

For the purpose of consistency, comprehensiveness, and coherence, this Article uses the terminology "a continuum of ascending restrictiveness," derived from the applied behavior analysis (ABA) literature, to define and distinguish time-out and seclusion. [33] The successively more restrictive segments of this continuum are based on the location and, thus, extent of the isolation as follows: [34]

- Inclusion time-out - where the student is in the classroom and, thus, continues to have the ability to see and hear what is going on in the classroom;

- Exclusion time-out - where the student is in an area outside the classroom but with access to students or staff in another location (e.g., another classroom, the principal's office, a detention room, or the hallway);

• Isolation time-out - where the student is alone without immediate access to others but not locked in the designated location;

• Seclusion - where the student is confined alone in a locked area. This continuum shows the successive gradations of time-out and the related but distinct position of seclusion. Nevertheless, the boundaries are inevitably not bright lines due to the continuously adjoining, rather than exclusively separate, nature of the successive segments and the lack of nuanced uniformity in not only the laws and debate but also the court decisions to date. The following section examines the framework of legal theories used by parents and schools embroiled in liability litigation over the use of time-out and seclusion practices with students with disabilities. [35]

*510 III. Framework of the Legal Theories

Parents have initiated lawsuits against school districts and educators relying on a variety of federal bases, such as the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), the Americans with Disabilities Act (ADA), the Fourteenth Amendment, and the Fourth Amendment. [36] Often ancillary to these federal theories, parents have also filed claims pursuant to a wide range of state bases, such as state statutes, regulations, and common law torts. The common law torts included, for example, intentional infliction of emotional distress (IIED), negligence, assault and battery, and false imprisonment. [37]

A. Federal Claims

1. Individuals with Disabilities Education Act (IDEA)

Beginning with its 1975 passage under its former name, the Education for All Handicapped Children Act, the IDEA provides specific educational rights for students with disabilities. [38] The IDEA guarantees children with disabilities a free appropriate public education (FAPE) in the least restrictive environment. [39] In order to achieve the FAPE guarantee, schools must provide eligible students, i.e., those who meet the IDEA definition of disability, appropriate special education services through an individualized education program (IEP). [40]

The IDEA provides a panoply of procedural rights intended to fulfill the guarantee of FAPE in the LRE. These procedural safeguards include an adjudicative dispute resolution mechanism starting with an impartial administrative hearing and ending in concurrent jurisdiction of state and federal courts for judicial review. [41] Moreover, although the IDEA provides specific requirements for disciplinary changes in placement, it does not address time-out and seclusion. [42] Instead, the parents' IDEA challenge to such aversives is by claiming denial of FAPE.

*511 Aptly characterized as "the central pillar of the IDEA statutory structure[,]" FAPE has both procedural and substantive facets. [43] More specifically, in its landmark decision of Board of Education of Hendrick Hudson Central School District v. Rowley, [44] the Supreme Court interpreted FAPE as have two components--procedural compliance and, as the accompanying substantive standard, that the IEP be reasonably calculated to yield educational benefits. [45] In more than a quarter century of litigation since Rowley, lower courts have maintained this substantive standard while affixing a second-step gloss to the procedural side. [46] More specifically, as Congress codified in its most recent

amendments to the IDEA, by limiting denials of FAPE to procedural violations that result in substantive harm, e.g., loss of educational benefit. [47]

Courts have established that money damages are unavailable under the IDEA. However, remedies for denial of FAPE are equitable, including tuition reimbursement and compensatory education. [48] The added and significant threshold hurdle for FAPE claims is, with very limited exceptions, the requirement of exhausting the IDEA's available administrative remedies, [49] i.e., the impartial hearing process. [50]

2. Section 504/ADA

Due to their close interrelationship and their coterminous coverage as applied to public schools, [51] Section 504 and the ADA are treated jointly herein. In order to establish a prima facie case of discrimination under Section 504 or Title II of the ADA, plaintiffs must demonstrate that they:

> ***512** (1) qualify as individuals with a disability;
>
> (2) were excluded from participation in or denied the benefits of public services, programs, or activities, or were otherwise discriminated against by the public entity; and
>
> (3) this discrimination was by reason of their disability. [52]

Although both of these statutory avenues allow suits for money damages, courts have required a high standard to establish a claim for recovery, such as deliberate indifference, [53] and have interpreted the proper defendants for this purpose is the school district, not its individual employees. [54] Moreover, the aforementioned exhaustion requirement in the IDEA also applies to Section 504/ADA suits. [55]

3. Fourteenth Amendment Claims: Substantive Due Process, Procedural Due Process, and Equal Protection

The Fourteenth Amendment's Due Process and Equal Protection Clauses serve, via Section 1983, as the primary constitutional avenues of parents' judicial challenges to the use of time-out and seclusion. However, even after the exhaustion requirement, these claims face high hurdles that often lead to grants of motions to dismiss or summary judgment in favor of the school district. For example, substantive due process claims face a high standard of liability, such as whether the district's use of time-out or seclusion was conscience-shocking. [56] Finally, to succeed pursuant to an equal protection claim, a plaintiff must be a member of a suspect class who was denied a fundamental interest, which notably does not include education. [57] In the absence of a fundamental interest and ***513** suspect classification, the district's action only need be rationally related to a legitimate purpose. [58]

4. Fourth Amendment

The Fourth Amendment applies to public school students. [59] To the extent that time-out or seclusion constitutes a seizure, the plaintiff in a Section 1983 challenge must prove that an action was unreasonable in light of the circumstances, [60] considering the responsibility and need of teachers' and administrators' to control students' movements

and activities. [61] In light of the importance of the state's recognized interest of a safe and orderly learning environment [62] and the court's longstanding deference to educators' authority and expertise, [63] parents also face an uphill slope in taking this avenue to challenge time-out and seclusion.

B. State Law Claims

State claims amount to a broad welter of avenues, with variations on two themes--those based on state statutes and regulations, such as human relations acts and special education regulations, and those based on common law. For the purpose of this overview, the primary common law theories were state statutes/regulations and common law torts, such as IIED, assault/battery, false imprisonment, negligent infliction of emotional distress (NIED), and negligence. [64]

*514 IV. Case Law Trends in the Courts

This part canvasses illustrative case law under each of the foregoing federal and state theories. Most of the pertinent cases include multiple claims; thus, some cases appear more than once in this synthesis. [65]

A. Federal Claim Trends

The federal claims outnumbered the state claims by more than two-to-one for the court decisions where parents challenged K-12 school district use of time-out or seclusion for students with disabilities. The most frequent legal theory was the IDEA. [66]

1. IDEA

Parents frequently asserted that the use of behavioral interventions, specifically time-out or seclusion, resulted in a denial of FAPE under the IDEA. The courts granted the defendant district's motions for summary judgment in all but one of the identified cases. [67] In a representative case, the court rejected the parents' denial of a FAPE claim, ruling that the district offered an appropriate behavior intervention plan (BIP) that included the use of a time-out room. [68] The lack of implementation of the plan was attributable to the parents' refusal to accept the time-out room. Yet, the court concluded that this procedure was necessary in light of the child's disruptive and harmful outbursts. [69] Specifically, the child's problematic behavior included eloping, aggression (e.g., hitting, kicking, biting, and spitting), throwing or pushing objects, refusing to follow directions or engage in tasks (e.g., laying on the floor or locking herself in the bathroom). [70]

In these district-favorable rulings, the courts focused on the participation of parents in developing the IEP and BIPs. For example, in Robert H. v. Nixa R-2 School District, the court noted that the parents had consented to the time-out room, thus nullifying their claim that this intervention violated FAPE. [71] Thus, where parents and school officials work collaboratively to identify children's educational needs, with the IEP including time-out or other such interventions to address these needs, the courts are reluctant to conclude that their use constituted ***515** a denial of FAPE. [72] Likewise, courts generally defer to school officials who are able to demonstrate a good faith effort to help the student achieve behavior-related IEP goals, even where educators used a behavioral intervention that differed from the method recommended by an outside expert or preferred by a parent. In one leading example, the district failed to fully adopt the behavioral plan recommendations of an outside expert, instead using a calming room. [73]

Similarly in the district-favorable rulings, the courts focused on the appropriateness of using the time-out intervention. [74] For example, the United States Court of Appeal for the Eighth Circuit concluded that the district's use of a calming room

was appropriate and did not prevent the child from receiving educational benefit, and thus did not constitute a denial of FAPE. As long as the school district demonstrates it made a good faith effort to help the student progress behaviorally, parental preference for one behavioral intervention method over another is irrelevant. [75]

The only exception to this district-friendly FAPE trend was Waukee Community Unit School District v. Isabel L., in which the federal district court in Iowa ruled that the teacher's use of excessive time-outs was not reasonably calculated to adequately address her behavioral problems. [76] Although the parents had agreed to the use of time-out interventions in the IEP, they relied on the district officials' assurance that duration of the time-outs would be limited to one-minute for each year of the child's age, which they claimed to be an accepted ratio. [77] Yet, as the district's own records revealed, some of the time-outs for this eight-year-old child with multiple disabilities amounted to isolation for several hours. [78]

Exhaustion was at issue for many of the IDEA claims as a prerequisite to a ruling on the merits of the FAPE claim. In most of them, the courts dismissed the parent-plaintiff's IDEA claims without prejudice because they had not adjudicated their claims first via the Act's impartial hearing mechanism. [79] For ***516** example, in Hayes v. Unified School District No. 377, the United States Court of Appeal for the Tenth Circuit reaffirmed the clear preference of Congress that parents exhaust administrative remedies prior to seeking judicial review under the IDEA. [80] Similarly, a New Jersey district court explained that Congress envisioned the procedural protections, including the IDEA's administrative adjudication process, to be a mechanism for parents and the local education agency to work together to address the needs of children with disabilities. [81] As the United States Court of Appeal for the Third Circuit further reasoned in another of these cases, permitting parents to immediately resort to federal court would make the IDEA's procedural mechanism, including its exercise of expertise, superfluous. [82] Moreover, the courts relatively strictly interpreted the exceptions to the exhaustion requirement, rejecting their applications in these cases. [83] In addition, the court refused to grant an exception to the exhaustion mandate where the student requested a due process hearing after enrolling in another school district. [84] Despite the parent's claim that an immediate transfer was necessary for the psychological and physical safety of her child, the court dismissed her IDEA claim and granted summary judgment to the school. [85]

In contrast, for a few of the IDEA claims, the courts ruled that one or more of the exceptions to the IDEA administrative exhaustion requirement--e.g., futility, inadequacy, or policy contrary to the IDEA [86] --applied. [87] In a leading example, the Eighth Circuit found the futility exception applicable. [88] In this case, the defendant district allegedly had locked a child with intellectual and emotional ***517** disabilities in a room, sometimes without lunch or bathroom breaks. [89] Given the unique circumstances of this case, the court ruled that money damages were the only remedy capable of redressing plaintiff's previously suffered injuries. [90]

Alternatively, some of the IDEA claims that escaped exhaustion were filed via Section 1983. [91] In these cases, the courts noted that administrative remedies available under the IDEA are primarily educational in nature and wholly unsuited to remedying the severe physical and non-educational injuries suffered by students. [92]

2. Section 504/ADA

Quite frequently, parents pursued Section 504 and ADA claims simultaneously due to these federal laws' closely overlapping coverage and requirements. Few of the claims resulted in successful judicial rulings for the parent-plaintiffs for several reasons. First, not surprisingly in light of their respective applicability to recipients of federal funds and public entities, the courts dismissed all Section 504 and ADA parental claims against individual defendants, such as teachers or school administrators. [93]

Second, courts also denied plaintiff-parents' Section 504/ADA claims for failure to establish a prima facie case of disability discrimination--i.e., (1) disability, (2) discrimination, and (3) causation. [94] The second and third elements have proven the undoing of most of these claims. Exemplifying the sometimes fatal effect of the second and third elements, in Rasmus v. Arizona the court assumed that the student qualified as an individual with a disability but concluded that the 10-minute time-out from the classroom was not sufficient to constitute the requisite denial of services, programs, or benefits and, in any event, its sole cause was the student's misbehavior, not his disability. [95]

Third, after the prima facie case, the plaintiff must survive the ultimate requirement of showing the equivalent of intentional discrimination. For example, although a federal district court in Pennsylvania denied summarily rejecting the parents' Section 504 and ADA claims on the basis that they ***518** duplicated their surviving IDEA claim, [96] the United States Court of Appeal for the Third Circuit granted the district's motion for summary judgment in another case because the parent had not shown that the alleged discrimination was intentional. [97]

At the outset, however, the aforementioned exhaustion prerequisite has derailed, at least temporarily, most Section 504 and ADA claims that had not been adjudicated first at the administrative level of the IDEA process, similar to the disposition of the parallel IDEA claims. [98] More specifically, the courts rather vigorously applied the IDEA exhaustion mandate to Section 504 and ADA claims, [99] including those initiated via Section 1983, [100] particularly for educational injuries that could be remedied under the IDEA. [101]

On the other hand, one court failed to address the exhaustion of IDEA administrative remedies in a case where it was not legitimately at issue; and several other courts failed to require exhaustion where plaintiffs sought compensatory damages. [102] In a Northern California district court case before the court for purposes of protecting the child's best interests and approving a parent and school settlement agreement, neither party mentioned the exhaustion mandate. [103] In this case, the child suffered a broken collarbone and was subjected to bullying while he was placed in a time-out room with another disabled child. [104] His parents sought and were awarded financial compensation for their child's physical as well as emotional injuries, which was affirmed by the ***519** court's formal approval of the settlement agreement. [105] Furthermore, where parents sought compensatory damages pursuant to Section 504 and ADA claims, initiated via Section 1983, in at least two decisions, the courts deferred to the Third Circuit's refusal to require plaintiffs to adhere to the IDEA's administrative exhaustion mandate in a claim for compensatory damages. [106] Thus, in these cases, the courts refused defendants' requests for summary judgment in reliance on the exhaustion mandate, permitting the plaintiff-parents to bypass the exhaustion requirement given that their Section 504 and ADA claims were for monetary damages for physical abuse and injury. [107]

3. Constitutional Claims

Constitutional claims, especially those tying Section 1983 to the Fourteenth Amendment due process clause, were also frequent, appearing in almost half of the time-out and seclusion cases. [108] Not surprisingly, these claims yielded limited judicial success in light of the established daunting standards of liability. For example, in Ashford v. Edmond Public School District, the parent sought compensatory and punitive damages from the school district and several of its employees via Section 1983 claims of denial of substantive due process and equal protections. [109] More specifically, she alleged that placing her child in a time-out or quiet room for more than 15 minutes during the school day implicated a liberty or property interest under the Fourteenth Amendment. [110] The federal district court in Oklahoma granted the defendants' motion for dismissal of these claims, concluding that the parent's conclusory assertions were vague and failed to establish a constitutional violation. [111]

***520** Conversely, for a few Fourteenth Amendment claims of extreme use of time-out or seclusion or its combination with other aversives, parent-plaintiffs achieved inconclusive success when courts denied school districts' motions for dismissal or summary judgment. [112] For example, a federal district court in Pennsylvania preserved for further proceedings an alleged substantive due process violation. [113] Despite the school's argument that time-out and seclusion are commonplace methods to manage aggressive student behavior, the court ruled that additional facts were necessary in this case to determine whether their combined use met the conscience-shocking test. [114]

Alternatively or additionally, parents connected Section 1983 to the Fourth Amendment. The outcomes of these cases varied between summary disposition in favor of the district defendants [115] and denial of such disposition, thus inconclusively preserving the issue for further proceedings. [116] Predominantly, parents failed to provide sufficient evidence to support claims that the schools violated their children's rights to be free from unreasonable search and seizure under the Fourth Amendment. [117] For example, the Fifth Circuit affirmed a federal district court's ruling that the school official's decision to place a raging and disruptive child in a time-out room is neither unreasonable nor sufficient to implicate any further detailed Fourth Amendment analysis. [118] Finally, another court noted that the child's IEP contained a provision permitting seclusion as a behavior management technique, thus such methods, unless excessive or punitive, did not offend the child's Fourth Amendment rights. [119]

***521** 4. State Law Claims

i. Statutes and Regulations

One seeming avenue in this category consists of the increasing number of state statutes or regulations limiting the use of time-out or restraint. [120] For example, a Washington state law generally prohibits the use of aversive interventions, which specifically include seclusion and restraint, but permits the use of reasonable actions to prevent one of three specific dangers. [121] In a suit relying on this state statute, the New Jersey district court affirmed the administrative law judge's (ALJ) ruling that placing the student in a time-out or quiet room, without using physical restraint or staff intervention, did not violate the state law. [122]

More commonly, such claims under state statutes or regulations rely on more general state civil rights laws. The courts disposed most of these cases on threshold adjudicative grounds, [123] with only an occasional claim surviving ***522** inconclusively for further judicial proceedings. [124] Other, less frequent and even less successful lines of claims pursuant to state laws focused on child abuse reporting requirements [125] and on providing immunity from personal liability for school employees who act within the scope of employment. [126]

ii. Common Law Torts

Quite frequently and often ancillary to their federal claims in federal court, plaintiff-parents sought relief under a variety of common law tort claims, typically defeated by a threshold defense. [127] In a leading example, the parent of a child subjected to inclusion time-out sought compensatory and punitive damages under alternative claims of IIED, assault and battery, false arrest and imprisonment, and gross negligence. [128] The court granted the motion to dismiss all of these claims for failure to adhere to the applicable IDEA exhaustion requirement. [129] Similarly, another court did not reach the merits of the various tort claims on behalf of a 13-year-old student with autism allegedly physically restrained over 33 times in one morning, concluding that the parents failed to adequately plead their state law claims, which included malice, negligence, defamation, IIED, fraud, and misrepresentation. [130]

V. Implications and Future Challenges

Parents, advocacy organizations, federal agencies, and state and federal legislators have sought to address the reported abuse of students with disabilities in terms of time-out, seclusion, and other such aversives. The recent results have been limited thus far to an expansion of state laws that restrict the use of such ***523** procedures in K-12 public schools. [131] However, other than sensationalized media reports, the frequency and outcomes of lawsuits have received negligible attention to date. This relatively systematic and objective synthesis reveals that the case law has been relatively high in frequency but unfavorable to plaintiff-parents in outcomes. [132] The claim rulings are instructive in terms of showing the prevalent legal theories, defenses, and the trend of judicial outcomes upon the intersection of these claims and defenses.

Additionally, several lessons emerge from the litigation to date for both the parent and district sides and for the various other stakeholders, including policymakers and adjudicators. First, the litigation, like the legislation, reflects inconsistency in terms of the use and meaning of terminology describing time-out and seclusion. Second, the expanding state laws specific to time-out and seclusion have played only a negligible role in the case law thus far. [133] In particular, state immunity laws do not create a private right of action, but instead protect school employees from personal liability. [134] At least one court preserved a plaintiff's tort claims, however, where the court lacked sufficient information to determine whether an employee acted in the reasonable course of employment, which would then preserve the teacher's affirmative liability defense. [135]

Third, the IEP may play a key role in showing either parental consent or district denial of FAPE, depending on the nature of the provisions specific to time-out and seclusion. [136] For example, in Couture v. Board of Education of Albuquerque Public Schools, the United States Court of Appeal for the Tenth Circuit reasoned that educators would be in precarious positions if courts refused ***524** to recognize "a plan specifically approved by the student's parents and which they are statutorily required to follow." [137] Yet, even when parents agree to the use of time-out in the IEP, a federal district court in Iowa ruled that the teacher's use of excessive time-outs was not reasonably calculated to adequately address her behavioral problems. [138] Collectively, the aforementioned cases reaffirm the significance of parents and educators working together as an IEP team to identify appropriate behavioral management practices and interventions. In order to be full partners in the process, parents must be informed of their rights to participate in the IEP process; and also provided with sufficient information to make informed decisions to benefit their children.

Fourth, the prevalence of judicial deference to school officials is in line with K-12 student litigation generally [139] as well as special education specifically. [140] The lesson derived from this integral part of the outcome trend in the case law to date depends on the eyes of the beholder. From a parental perspective, it may seem to suggest a bias against plaintiffs. [141] From the defendant-educator's perspective, however, it may mean a sanguine counterbalance to not only fear of liability but also threats of injury. As the court observed in Vernon v. Bethel School District, "the record shows that [the student] had become physically abusive; had caused numerous repeated injuries to [d]istrict teachers and staff; and had engaged in highly disruptive behaviors, such as taking off his clothes . . .." [142] The student's parent claimed the school district's conduct--locking him in the classroom and leaving him alone while he acted out--was extreme, atrocious, and utterly intolerable in a civilized community. [143] The court concluded, however, that under the circumstances, installing a lock on the student's classroom door and leaving him alone while he acted out were not extreme district responses. [144] Yet, the district responses were viewed by the parent as unreasonable and injurious to her child, which likely contributed to a break-down of the parent-school relationship.

***525** Issues of best practice will continue to emerge and rightly could be addressed in the courts. The courts generally defer to the IEP for purposes of determining whether or not it is reasonable to use time-out or seclusion; as long as the IEP is designed to benefit the child educationally while also addressing behavioral challenges. Nonetheless, the time-out or seclusion practices portrayed in the media [145] are often far more severe than the intervention practices that served as the basis for litigation in the cases reviewed. [146] While school officials may be relieved to discover that the liability nightmare may be only mildly scary, they should exercise caution when adopting time-out and seclusion interventions. Winning a time-out or seclusion liability case is a hollow victory when a child is harmed during an intervention, yet as these cases reveal it is often disagreement over methods rather than actual harm that leads to litigation. Additionally, given the increasing numbers of cases premised on a seemingly inexhaustible list of legal claims, education leaders and educators are fatigued by the litigation even when the district succeeds in the case. [147] Given the popular media's portrayal of all intervention practices as abusive, harmful, or fatal methods, parents are likely to continue to initiate claims against school districts and employees over the use of these methods to manage the behavior challenges of children with disabilities. Furthermore, the use, and especially misuse, of aversive interventions promotes a level of distrust between parents and schools, which is unlikely to diminish even when courts determine that the time-out and seclusion practices were appropriate and legal.

Footnotes

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1 See, e.g., Laura Hibbard, Parents Outraged Over School 'Scream Rooms' at Farm Hill Elementary School in Connecticut, Huffington Post (Jan. 11, 2012, 4:21 PM), http://www.huffingtonpost.com/2012/01/11/school-scream-rooms-middletown-conn-farm-hill-elementary-school_n_1199558.html; Brian Ross et al., Death at School: Parents Protest Dangerous Discipline for Autistic, Disabled Kids, ABC News (Nov. 29, 2012), http://abcnews.go.com/Blotter/death-school-parents-protest-dangerous-discipline-autistic-disabled/story?id=17702216.

2 School Puts Troubled Kids in 'Scream Room', NBC News (Jan. 11, 2012, 5:47 AM), http://usnews.nbcnews.com/_news/2012/01/11/10113042-school-puts-troubled-kids-in-scream-room.

3 Id.

4 See, e.g., Jennifer Smith Richards & Molly Bloom, Education: Isolation Chambers, The Columbus Dispatch (Aug. 5, 2012, 6:20 AM), http:// www.dispatch.com/content/stories/local/2012/08/05/seclusion-rooms-art-gg5ig0vc-1.html.

5 Carey Pena, Elementary School Faces Lawsuit Over Padded Seclusion Room, azfamily.com (Sept. 19, 2012, 9:30 PM), http://www.azfamily.com/news/Elementary-school-faces-lawsuit-over-padded-seclusion-room-170441246.html.

6 Id.

7 Kevin Rader, Lost Finger Prompts Lawsuit, New Bill to Address School Seclusion Rooms, 13 WTHR Indianapolis (Apr. 11, 2013, 4:10 PM), http:// www.wthr.com/story/21946439/school-seclusion-rooms-are-focus-of-indiana-bill.

8 Id.

9 Id.

10 See, e.g., Nancy Lee Jones & Jody Feder, Cong. Research Serv., R40522, The Use of Seclusion and Restraint in Pub. Schools: The Legal Issues (2010), available at http://www.fas.org/sgp/crs/misc/R40522.pdf; Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private School and Treatment Ctr.: Hearing on H.R. 4247 Before the H. Comm. on Educ.

& Labor, 111th Cong. (2009) (statement of Gregory D. Kutz, Managing Dir., Forensic Audits and Spec. Investigations), available at http:// www.gao.gov/new.items/d09719t.pdf.

11 Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2010), available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr4247eh/pdf/BILLS-111hr4247eh.pdf; Keeping All Students Safe Act, S. 2020, 112th Cong. (2011), available at https://www.govtrack.us/congress/bills/112/s2020/text; Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011), available at https:// www.govtrack.us/congress/bills/112/hr1381/text. The congressional efforts to respond to escalating concerns about restraint and seclusion have thus far amounted to bills in both chambers that have succeeded at best in only the House. Keeping All Students Safe Act, H.R. 1893, 113th Cong. (2013), available at http://www.gpo.gov/fdsys/pkg/BILLS-113hr1893ih/pdf/BILLS-113hr1893ih.pdf. In spite of past failures, on May 8, 2013, Rep. George Miller (D-Cal.) reintroduced the Keeping All Students Safe Act.

12 Keeping All Students Safe Act, H.R. 1893.

13 See, e.g., Nat'l Disability Rights Network, School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools 13-26 (Jan. 2009), available at http:// www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf; Nat'l Disability Rights Network, School Is Not Supposed to Hurt: The U.S. Department of Education Must Do More to Protect School Children from Restraint and Seclusion 9-16 (Mar. 2012), available at http:// www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_ Supposed_to_Hurt_3_v7.pdf; TASH Shows 'The Cost of Waiting' to End Restraint & Seclusion, TASH (May 24, 2012), tash.org/tash-shows-'the-cost-of-waiting'-to-end-restraint-seclusion/.

14 See, e.g., Jessica Butler, How Safe is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies 39 (updated Jan. 20, 2014), http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf; Letter from Arne Duncan, U.S. Sec'y of Educ., to Chief State School Officers (July 31, 2009), available at www2.ed.gov/policy/elsec/guid/secletter/090731.html.

15 Butler, supra note 14, at 18. See also sources cited supra notes 10-12.

16 U.S. Dep't of Educ., Summary of Seclusion and Restraint Statutes, Regulations, Policies and Guidance, by State and Territory: Information as Reported to the Regional Comprehensive Centers and Gathered from Other Sources 3-9 (2010), available at http://www2.ed.gov/policy/seclusion/summary-by-state.pdf.

17 Butler, supra note 14, at 8; Daniel Stewart, How Do the States Regulate Restraint and Seclusion in Public Schools?: A Survey of the Strengths and Weaknesses in State Laws, 34 Hamline L. Rev. 531, 535 (2011).

18 Stewart, supra note 17, at 551. For example, there is no specific definition of seclusion in some of the state laws.

19 The House bill proposed to restrict the use of seclusion in schools, while the Senate version proposed to ban it. Compare Keeping All Students Safe Act, H.R. 4247, 111th Cong. §5(a)(2) (2010), with Keeping All Students Safe Act, S. 2020, 112th Cong. §4(1)(A) (2011). Similarly, the 2013 House bill proposes to limit the use of seclusion to circumstances in which "a student's behavior poses an imminent danger of physical injury to the student, school personnel, or others" and to prohibit the mention of seclusion as a planned intervention in Individualized Education Program (IEP). Keeping All Students Safe Act, H.R. 1893, 113th Cong. §3(4) (2013).

20 Keeping All Students Safe Act, H.R. 1893; Keeping All Students Safe Act, S. 2036, 113th Cong. §2(14)(A) (2014), available at https:// www.govtrack.us/congress/bills/113/s2036/text.

21 Butler, supra note 14, at 8.

22 Id. Five states ban seclusion--Georgia for all students, while Maine, Nevada, Pennsylvania, and Texas only for students with disabilities--and define it as a locked or obstructed room that prevents the child from exiting. Id. at 19 (citing Ga. Comp. R. & Regs. 160-5-1-.35 (2010); Me. Code R. § 05-071 (LexisNexis 2012); Nev. Rev. Stat. §§ 388.521-.5317 (Westlaw through 2013 77th Reg. Sess. and 27th Spec. Sess. (2013)); 22 Pa. Code § 14.133 (Westlaw through 44 Pa. Bull. 18 (May 3, 2014)); Tex. Educ. Code § 37.0021 (Westlaw through 2013 Third Called Sess. of 83d Leg.); 19 Tex. Admin. Code §89.1053 (Westlaw through 39 Tex. Reg. No. 3512 (Apr. 25, 2014)).

23 Id. at 12. Many state laws and regulations, similar to the House bill, permit the use of seclusion in emergency situations posing harm of significant physical danger. Id. at 19.

24 Id. at 18.

25 See, e.g., Council of Parent Attorneys and Advocates (COPAA), COPAA Declaration of Principles Opposing the Use of Restraints, Seclusion, and Other Aversive Interventions upon Children with Disabilities (updated Mar. 2011), http://c.ymcdn.com/sites/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/COPAA_Declaration_of_Principles3-2011.pdf; The Cost of Waiting, TASH (2011), http://tash.org/wp-content/uploads/2011/04/TASH_The-Cost-of-Waiting_April-2011.pdf.

26 Rader, supra note 7.

27 See, e.g., 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, 414 (2009) (asserting that Congress should amend the IDEA to include specific regulations and protections from the use of aversive interventions with students with disabilities); Laura C. Hoffman, A Federal Solution that Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities, 37 J. Legis. 39, 74 (2011) (arguing to include a prohibition on corporal punishment in the Keeping All Students Safe Act).

28 Perry A. Zirkel & Caitlin A. Lyons, Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law, 10 Conn. Pub. Int. L.J. 323, 330-32 (2011).

29 See, e.g., Tera L. Wolf et al., Time-Out Interventions and Strategies: A Brief Review and Recommendations, 21 Int'l J. Special Educ. 22, 22-23 (2006); Joseph B. Ryan et al., State Policies Concerning the Use of Seclusion Timeout in Schools, 30 Educ. & Treatment of Children 215, 216 (2007).

30 Id. See also Gregory E. Everett, Time-Out in Special Education Settings: The Parameters of Previous Implementation, 12 N. Am. J. Psychol. 159, 159 (2010).

31 See generally Everett, supra note 30.

32 Id.

33 Wolf et al., supra note 29, at 22.

34 F. Charles Mace & Meredith Heller, A Comparison of Exclusion Time-Out and Contingent Observation for Reducing Severe Disruptive Behavior in a 7-Year Old Boy, 12 Child & Fam. Behav. Therapy 57 (Issue 1, 1990); Joseph B. Ryan et al., Reducing Seclusion Timeout and Restraint Procedures with At-Risk Youth, J. At-Risk Issues, Winter 2007, at 7.

35 For this article, liability is herein defined broadly to encompass legal responsibility, generally, which obligates a party by law or justice to do or pay something in order to make amends. See, e.g., What is LIABILITY?, The Law Dictionary, thelawdictionary.org/liability/ (last visited Mar. 15, 2014).

36 See infra Part III.A.

37 See infra Part III.B.

38 20 U.S.C. § 1400 (2012). Congress provided the title IDEA as part of its 1990 reauthorization of the Act.

39 20 U.S.C. § 1414(d) (2012).

40 Id.

41 20 U.S.C. § 1415(f) (2012). See also 34 C.F.R. § 300.510 (current through May 8, 2014 issue of Fed. Reg.). For more detail on the contours of this adjudicative avenue, including the option of a second administrative tier and differences among states, see, e.g., Perry A. Zirkel & Gina Scala, Due Process Hearing Systems under the IDEA: A State-by-State Survey, 21 J. Disability Pol'y Stud. 3, 5 (2010).

42 See, e.g., Letter to Anonymous, 50 Individuals with Disabilities Educ. L. Rep. (IDELR) P 228, 1019 (OSEP Mar. 17, 2008); Letter to Trader, 48 IDELR P 47, 220 (OSEP Oct. 19, 2006).

43 Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1312 (10th Cir. 2008).

44 See generally Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

45 Id.

46 See, e.g., Perry A. Zirkel, Is It Time for Elevating the Substantive Standard for FAPE?, 79 Exceptional Child. 497, 497-98 (2013).

47 20 U.S.C. § 1415(f)(3)(E) (2012).

48 See, e.g., Perry A. Zirkel, The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update, 31 J. Nat'l Ass'n Admin. L. Judiciary 1, 4-5 (2011) [hereinafter Zirkel, The Remedial Authority].

49 20 U.S.C. § 1415(l). This provision is not exclusive to the IDEA, allowing claims under alternate avenues but requiring that "the procedures [for impartial hearings in this section] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." For analyses of this provision, see, e.g., Zirkel, The Remedial Authority, supra note 48; Lewis Wasserman, Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act, 29 J. Nat'l Ass'n Admin. L. Judiciary 349, 386 (2009) (exceptions and other judicial interpretations and applications). For the latest major judicial interpretation, including the related issue of whether the exhaustion requirement is jurisdictional or an affirmative defense, see, e.g., Payne v. Peninsula Sch. Dist., 653 F.3d 863, 870 (9th Cir. 2011), cert. denied, 132 S. Ct. 1450 (2012) (ruling that IDEA's exhaustion requirement was non-jurisdictional).

50 Zirkel & Scala, supra note 41, at 6-7. This exhaustion requirement also applies to review officer proceedings in the relatively few states that have opted for a second administrative adjudicative tier under the IDEA. Currently, approximately 10 states have this second tier. Id.

51 See, e.g., Perry A. Zirkel, A Comprehensive Comparison of the IDEA and Section 504/ADA, 282 Educ. L. Rep. 767, 767-68 (2012).

52 29 U.S.C. § 794 (2012); 42 U.S.C. § 12132 (2012). See also Rasmus ex rel. Rasmus v. Arizona, 939 F. Supp. 709, 718 (D. Ariz. 1996).

53 See, e.g., S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 262 (3d Cir. 2013); Mark H. v. Hamamoto, 620 F.3d 1090, 1096 (9th Cir. 2010).

54 See, e.g., A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3d Cir. 2007); A.M. ex rel. J.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660 (E.D.N.Y. 2012), aff'd sub nom. Moody v. New York City Dep't of Educ., 513 F. App'x 95 (2d Cir. 2013).

55 See Wasserman, supra note 49, at 363. For the application of this requirement to students covered only by Section 504, not the IDEA definition of disability, see Peter J. Maher, Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA But Not by the IDEA, 44 Conn. L. Rev. 259, 259 (2011).

56 See, e.g., Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 172-73 (3d Cir. 2001) (applying a four-part test, including whether the purpose was malicious and the injury serious); Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 530 (4th Cir. 1998) (applying shocks-the-conscience test).

57 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (ruling that education is not a fundamental right).

58 See, e.g., Cole v. Greenfield-Cent. Cmty. Schs., 657 F. Supp. 56, 63 (S.D. Ind. 1986) (explaining that courts defer to educators' disciplinary decisions; "school cannot be subjugated by the tyrannical behavior of a nine-year-old child").

59 New Jersey v. T.L.O., 469 U.S. 325, 333 (1985).

60 See, e.g., Hawkins v. City of Farmington, 189 F.3d 695, 702 (8th Cir. 1999) (ruling that a plaintiff must establish that an unreasonable seizure occurred in order to prove a violation of the Fourth Amendment under § 1983).

61 See, e.g., Doe ex rel. Doe v. Renfrow, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979) (explaining that a school official's regulation of a student's movement does not deny a constitutionally guaranteed right).

62 See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (permitting state limits on free speech only where student conduct materially and substantially interferes with the operation of the school); Goss, 419 U.S. at 580 (recognizing the state's interest in maintaining discipline in school setting).

63 See, e.g., Wood v. Strickland, 420 U.S. 308, 326 (1975).

64 Other state law claims in this context include defamation, malicious prosecution, and breach of fiduciary duty.

65 See, e.g., A.C. ex rel. M.C. v. Indep. Sch. Dist. No. 152, No. 06-3099, 2006 WL 3227768, at *8-12 (D. Minn. Nov. 7, 2006) (encompassing nine different claims, including the IDEA, Fourth Amendment, Fourteenth Amendment, negligence, and Minnesota statutes).

66 See infra Part IV.A.

67 See Waukee Cmty. Unit Sch. Dist. v. Douglas L. ex rel. I.L., No. 4:07-cv-00278-REL-CFB, 2008 WL 9374268, at *12 (S.D. Iowa Aug. 7, 2008) (ruling that the teacher's use of excessive time-outs may have violated FAPE).

68 L. ex rel. F. v. N. Haven Bd. of Educ., 624 F. Supp. 2d 163, 183 (D. Conn. 2009).

69 Id. at 181.

70 Id. at 172.

71 Robert H. v. Nixa R-2 Sch. Dist., 26 IDELR 564 (W.D. Mo. 1997).

72 See, e.g., Couture ex rel. M.C. v. Bd. of Educ., 535 F.3d 1243, 1253 (10th Cir. 2008).

73 M.M. v. Dist. 0001 Lancaster Cnty. Sch., 702 F.3d 479, 488-89 (8th Cir. 2012).

74 See B.D. ex rel. C.D. v. Puyallup Sch. Dist. No. 31, 456 F. App'x 644, 645 (9th Cir. 2011) (finding that the use of a quiet room is not an aversive intervention and did not deny the student's right to a FAPE); Clark ex rel. J.J. v. Special Sch. Dist., No. 4:10CV2128SNLJ, 2012 WL 592423, at *1 (E.D. Mo. Feb. 23, 2012) (ruling that the IEP included detailed behavioral interventions to support academic and behavioral conduct goals and was substantively appropriate); Melissa S. ex rel. Karen S. v. Sch. Dist., 183 F. App'x 184, 188 (3d Cir. 2006) (finding that the use of a time-out area to control serious behavior problems is a normal tactic for dealing with children who endanger themselves or others and, thus, does not deny FAPE under the IDEA); Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1011-12 (8th Cir. 2006) (concluding that the IDEA does not require a written behavior intervention plan and that the use of a special room for the student to calm down is not a denial of FAPE).

75 CJN ex rel. SKN v. Minneapolis Pub. Sch., 323 F.3d 630, 639 (8th Cir. 2003).

76 Waukee Cmty. Unit Sch. Dist. v. Douglas L. ex rel. I.L., No. 4:07-cv-00278-REL-CFB, 2008 WL 9374268, at *12 (S.D. Iowa Aug. 7, 2008).

77 Id.

78 Id.

79 A.C. ex rel. M.C. v. Indep. Sch. Dist. No. 152, No. 06-3099, 2006 WL 3227768, at *1 (D. Minn. Nov. 7, 2006); Ashford ex rel. N.A. v. Edmond Pub. Sch. Dist., 822 F. Supp. 2d 1189, 1197 (W.D. Okla. 2011); J.P. ex rel. Pope v. Cherokee Cnty. Bd.

of Educ., 218 F. App'x 911, 913-14 (11th Cir. 2007); M.G. ex rel. L.G. v. Caldwell Bd. of Educ., 804 F. Supp. 2d 305, 320 (D.N.J. 2011); Sabin v. Greenville Pub. Sch., 31 IDELR P 161 (W.D. Mich. 1999).

80 Hayes ex rel. Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 814 (10th Cir. 1989) (noting two exceptions to the exhaustion requirement which were the availability of adequate relief and the futility of pursuing such relief).

81 Caldwell Bd. of Educ., 804 F. Supp. 2d at 313.

82 See, e.g., Woodruff ex rel. B.W. v. Hamilton Twp. Pub. Sch., 305 F. App'x 833, 837 (3d Cir. 2009) (citing McKart v. United States, 395 U.S. 185, 194-95 (1969)).

83 See, e.g., Indep. Sch. Dist. No. 152, 2006 WL 3227768, at *1; Ashford, 822 F. Supp. 2d at 1197; Caldwell Bd. of Educ., 804 F. Supp. 2d at 315.

84 Caldwell Bd. of Educ., 804 F. Supp. 2d at 315.

85 C.N. ex rel. J.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 347, 591 F. 3d 624, 632 (8th Cir. 2010). See also Thompson ex. rel. Buckhanon v. Bd. of the Special Sch. Dist. No. 1, 144 F.3d 574, 581 (8th Cir. 1998).

86 See, e.g., Wasserman, supra note 49, at 386, 407.

87 See Colon ex rel. Disen-Colon v. Colonial Intermediate Unit No. 20, 443 F. Supp. 2d 659, 676 (M.D. Pa. 2006) (ruling that the exhaustion requirement is unnecessary because plaintiffs sought monetary damages and exhaustion under the IDEA would be futile); Padilla ex rel. Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1274-75 (10th Cir. 2000) (finding that the child suffered physical injuries, a fractured skull, while unsupervised in a windowless closet; and the IDEA is inadequate to remedy such injuries); Witte ex rel. Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275-76 (9th Cir. 1999) (holding that child was physically abused by his teachers because of his disability and exhaustion was unnecessary).

88 Covington ex rel. Covington v. Knox Cnty. Bd. of Educ., 205 F.3d 912, 917-18 (8th Cir. 2000).

89 Id. at 913-14.

90 Id. at 917.

91 Plainville Bd. of Educ. v. R.N. ex rel. H., No. 3:09-CV-241 RNC, 2012 WL 1094640, at *1 (D. Conn. Mar. 31, 2012); Padilla, 233 F.3d at 1270.

92 Cf. A.W. v. Jersey City Pub. Schs. 486 F.3d 791, 803 (3d Cir. 2007) (holding that § 1983 does not provide a remedy for alleged IDEA violations).

93 A.B. ex rel. Baez v. Seminole Cnty. Sch. Bd., No. 6:05-CV-802ORL31KRS, 2005 WL 2105961, at *9 (M.D. Fla. Aug. 31 2005); Albert v. Harford Cnty. Pub Sch., 38 IDELR P 38 (D. Md. 2002); C.N. ex rel. J.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 347, 591 F.3d 624, 635 (8th Cir. 2010); McElroy ex rel. McElroy v. Tracy Unified Sch. Dist., No. 2:07-cv-00086-MCE-EFB, 2009 WL 3050903, at *1 (E.D. Cal. Sept. 18, 2009).

94 29 U.S.C. § 794 (2012); 42 U.S.C. § 12132 (2012). See also Rasmus ex rel. Rasmus v. Arizona, 939 F. Supp. 709, 720 (D. Ariz. 1996).

95 Rasmus, 939 F. Supp. at 718-19.

96 Colon ex rel. Disen-Colon v. Colonial Intermediate Unit No. 20, 443 F. Supp. 2d 659, 685 (M.D. Pa. 2006).

97 S.H ex rel. Durrell v. Lower Merion Sch. Dist. 729 F.3d 248, 261 (3d Cir. 2013) (ruling that a plaintiff must show proof of intentional discrimination to establish liability under Section 504).

98 See Wasserman, supra note 49, at 377.

99 See, e.g., Ashford ex rel. N.A. v. Edmond Pub. Sch. Dist., 822 F. Supp. 2d 1189, 1200 (W.D. Okla. 2011) (dismissing all federal claims for lack of subject matter jurisdiction by plaintiffs for failure to exhaust administrative remedies); Thompson ex rel.

Buckhanon v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574, 580 (8th Cir. 1998) (requiring exhaustion where plaintiff sought damages and one-on-one tutoring to remedy alleged denial of free and appropriate public education, and dismissing Section 1983 claim on insufficient evidence grounds).

100 See, e.g., Grogan v. Seaford Union Free Sch. Dist., 873 N.Y.S.2d 225 (N.Y. App. Div. 2007); Ashford, 822 F. Supp. 2d at 1193.

101 See, e.g., Thompson, 144 F.3d at 580 (requiring exhaustion where plaintiff sought damages and one-on-one tutoring under Section 504/ADA that were presumptively redressable through the IDEA's administrative procedures).

102 See generally Colbey T. ex rel. Lisa T. v. Mt. Diablo Unified Sch. Dist., No. C11-03108 LB, 2012 WL 1595046 (N.D. Cal. May 4, 2012). See also W.B. ex rel. E.J. v. Matula, 67 F.3d 484, 494-95 (3d Cir. 1995) (ruling to permit plaintiffs' claim for compensatory damages pursuant to Section 1983 and Section 504, despite the preference for compensatory education over compensatory damages); Padilla ex rel. Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1275 (10th Cir. 2000); Colon, 443 F. Supp. 2d at 676. See also Witte ex rel. Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275-76 (9th Cir. 1999) (holding that exhaustion was not required where the injuries are not educational in nature and are typically remedied through an award of monetary damages).

103 Mt. Diablo Unified Sch. Dist., 2012 WL 1595046.

104 Id. at *1-2.

105 Id. at *2.

106 Matula, 67 F.3d at 494-95 (ruling to permit plaintiffs' claim for compensatory damages pursuant to § 1983 and §504, despite the preference for compensatory education over compensatory damages); Padilla, 233 F.3d at 1274-75 (upholding denial of motion to dismiss for failure to exhaust administrative remedies where plaintiff was not seeking relief under IDEA); Colon, 443 F. Supp. 2d at 676-77 (finding exhausting administrative remedies would be futile when relief was sought under § 1983 and not under IDEA). See also Witte, 197 F.3d at 1275-76 (holding that exhaustion was not required where the injuries are not educational in nature and are typically remedied through an award of monetary damages).

107 Padilla, 233 F.3d 1268 at 1274-75; Colon, 443 F. Supp. 2d at 676. See also Witte, 197 F.3d at 1275-76 (holding that exhaustion was not required where the injuries are not educational in nature and are typically remedied through an award of monetary damages).

108 For substantive due process claims, see, e.g., A.D. ex rel. Dabrowski v. Nelson, No. 2:07-CV-116-PRC, 2007 WL 2446729, at *5-6 (N.D. Ind.); D.L. ex rel. D.L. v. Waukee Cmty. Sch. Dist., 578 F. Supp. 2d 1178, 1182 (S.D. Iowa 2008); Doe ex rel. Doe v. S & S Consol. I.S.D., 149 F. Supp. 2d 274, 287-96 (E.D. Tex. 2001). The procedural due process claims were less frequent. See Couture ex rel. M.C. v. Bd. of Educ., 535 F.3d 1243, 1246 (10th Cir. 2008); Payne v. Peninsula Sch. Dist., 653 F.3d 863, 865 (9th Cir. 2011). In contrast, claims based on the Equal Protection Clause were relatively rare. See, e.g., M.G. ex rel. L.G. v. Caldwell Bd. of Educ., 804 F. Supp. 2d 305, 319 (D.N.J. 2011).

109 Ashford ex rel. N.A. v. Edmond Pub. Sch. Dist., 822 F. Supp. 2d 1189, 1192-93 (W.D. Okla. 2011).

110 Id. at 1197-99.

111 Id.

112 See, e.g., A.C. ex rel. M.C. v. Indep. Sch. Dist. No. 152, No. 06-3099, 2007 WL 1544507, at *6 (D. Minn. May 22, 2007) (concluding that parents could proceed with their substantive due process claim based on the allegedly severe physical manner of placing him in time-out and its excessive duration in light of the limit specified in his IEP).

113 Koehler ex rel. Koehler v. Juniata Cnty. Sch. Dist., 50 IDELR P 71 (M.D. Pa. 2008). See also Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 173-75 (3d Cir. 2001) (reaching same outcome under a four-part test for substantive due process).

114 Koehler, 50 IDELR P 71.

115 See, e.g., C.N. ex rel. J.N. v. Willmar Pub. Sch. Indep. Sch. Dist. No. 347, 591 F.3d 624, 633-34 (8th Cir. 2010) (ruling that the IEP's provision permitting the use of seclusion and restraint to manage the child's behavior was neither excessive nor punitive, and thus failed to violate the Fourth Amendment); Couture ex rel. M.C. v. Bd. of Educ., 535 F.3d 1243, 1256-57 (10th Cir. 2008) (concluding that the use of time-outs, unless used excessively to become the functional equivalent of a school suspension, did not implicate a constitutionally protected interest under the Fourth Amendment).

116 Rasmus, 939 F. Supp. at 715-16 (concluding that the state guidelines should have alerted school officials that locking a student in a so-called time-out room was unreasonable under the Fourth Amendment).

117 A.C. v. Indep. Sch. Dist. No. 152, 2007 WL 1544507, at *5 (ruling that there was no seizure, and thus no Fourth Amendment violation because students' movements are always subject to control by school); A.D. ex rel. Dabrowski v. Nelson, No. 2:07-CV-116-PRC, 2007 WL 2446729, at *6-7 (N.D. Ind. Aug. 20, 2007).

118 Doe ex rel. Doe v. S & S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274, 287 (E.D. Tex. 2001), aff'd mem., 309 F.3d 307 (5th Cir. 2002).

119 C.N., 591 F. 3d at 633.

120 See, e.g., CJN ex rel. SKN v. Minneapolis Pub. Sch., 323 F.3d 630, 640-41 (8th Cir. 2003) (ruling that brief periods of seclusion, if not excessive in length nor accompanied by discomfort, are generally permissible under the applicable Minnesota statute); Sch. Bd. v. Renollett ex rel. Renollett, 440 F.3d 1007, 1012 (8th Cir. 2006) (finding that school officials who escort student to special room to help him calm down when needed, did not violate the state law that requires an emergency IEP meeting before use of time-out or seclusion). See also Butler, supra note 14, at 18.

121 Wash. Admin. Code § 392-172A-03120(1) (Westlaw current with amendments adopted through the 14-2 Wash. State Reg. dated Jan. 15, 2014). The statute defines “aversive interventions” as:
the use of isolation or restraint practices for the purpose of discouraging undesirable behavior on the part of the student. The term does not include the use of reasonable force, restraint, or other treatment to control unpredicted spontaneous behavior which poses one of the following dangers:
(a) A clear and present danger of serious harm to the student or another person.
(b) A clear and present danger of serious harm to property.
(c) A clear and present danger of seriously disrupting the educational process.
Id.

122 B.D. ex rel. C.D. v. Puyallup Sch. Dist. No. 31, 2009 WL 2971753 (W.D. Wash. Sept. 10, 2009), aff'd mem., 456 F. App'x 644 (9th Cir. 2011).

123 See, e.g., D.L. ex rel. D.L. v. Waukee Cmty. Sch. Dist., 578 F. Supp. 2d 1178, 1191 (S.D. Iowa 2008) (dismissing claim of disability discrimination in violation of the Iowa Civil Rights Act for failure to exhaust act's administrative remedies); Sabin ex rel. Sabin v. Greenville Pub. Sch., No. 1:99-CV-287, 1999 U.S. Dist. LEXIS 19469, at *26-27 (W.D. Mich. Dec. 15, 1999) (rejecting parent's claim pursuant to Michigan's Handicappers' Civil Rights Act for failure to exhaust IDEA's administrative remedies); Vernon ex rel. D. v. Bethel Sch. Dist., 170 Wash. App. 1016, at *1 (Wash. Ct. App. 2012) (barring parent's special education related state-law discrimination claims for failure to adhere to applicable statute of limitations); Dalien ex rel. Dalien v. Puyallup Sch. Dist. No. 3, 172 Wash. App. 1021, 1021 (Wash. Ct. App. 2012) (ruling that collateral estoppel barred instant suit under state anti-discrimination law as parents had an opportunity to present their theory before an administrative law judge).

124 See, e.g., A.C., ex rel. M.C. v. Indep. Sch. Dist. No. 152, No. 06-3099, 2007 WL 1544507, at *3 (D. Minn. May 22, 2007) (concluding that there were genuine issues of material fact as to how much time and under what conditions the school placed the student the time-out room in terms of possible violation of the state's human relations act).

125 Doe, 149 F. Supp. 2d at 299 (ruling that the Texas child abuse reporting statute does not provide a right of action for civil liability).

126 Id. at 297 (ruling that the cited Texas statute provides immunity from personal liability for school employees rather than creating affirmative rights for a plaintiff).

127 See, e.g., A.C. v. Indep. Sch. Dist. No. 152, No. 06-3099, 2006 WL 3227768, at *4 (D. Minn. Nov. 6, 2006) (ruling that the state's human relations act preempted plaintiff's state-law tort claims); Doe, 149 F. Supp. 2d at 297 (holding that state's statutory immunity protected the principal from the plaintiff's various tort claims); Muskrat ex rel. J.M. v. Deer Creek Pub. Sch., No. CIV-08-1103-L, 2010 WL 356659, at *5 (W.D. Okla. Jan. 27, 2010) (concluding that Oklahoma law prohibits tort claims against individual defendants in their official capacities and provides immunity to school districts from punitive damages); McElroy ex rel. McElroy v. Tracy Unified Sch. Dist., No. 2:07-cv-00086-MCE-EFB, 2008 WL 5045952, at *14 (E.D. Cal. Nov. 21, 2008) (dismissing parent's claims for IIED and negligence for failure to comply with the California Tort Claims Act pleading requirements).

128 Sabin, 1999 U.S. Dist. LEXIS 19469, at *2.

129 Id. at *26-27.

130 Albert v. Harford Cnty. Pub. Sch., 38 IDELR P 38 (D. Md. 2002).

131 See Nat'l Disability Rights Network, School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools 13-26 (Jan. 2009), http:// www.ndrn.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf.

132 Nevertheless, the outcomes that were inconclusively in favor of the plaintiff-parents, such as denials of motions for dismissal, and those that were inconclusively in favor of the district, such as the dismissals without prejudice for lack of exhaustion, provides the plaintiffs with leverage for settlements.

133 See, e.g., CJN ex rel. SKN v. Minneapolis Pub. Sch., 323 F.3d 630, 640-41 (8th Cir. 2003) (ruling that brief periods of seclusion, if not excessive in length nor accompanied by discomfort, are generally permissible under the applicable Minnesota statute); Sch. Bd. v. Renollett ex rel. Renollett, 440 F.3d 1007, 1012 (8th Cir. 2006) (finding that school officials who escort student to special room to help him calm down when needed, did not violate the state law that requires an emergency IEP meeting before use of time-out or seclusion). Compare Wash. Admin. Code §392-172A-03120 (Westlaw current with amendments adopted through the 14-2 Wash. State Reg. dated Jan. 15, 2014), with B.D. ex rel. C.D. v. Puyallup Sch. Dist. No. 31, 456 F. App'x 644, 645 (9th Cir. 2011) (ruling that the use of a quiet room to enable the student to avoid being overstimulated is not an aversive therapy).

134 Doe ex rel. Doe v. S & S Consol. Indep. Sch. Dist., 149 F. Supp. 2d 274, 297 (E.D. Tex. 2001) (ruling that the Texas child abuse reporting statute does not provide a right of action for civil liability).

135 D.L. ex rel. D.L. v. Waukee Cmty. Sch. Dist., 578 F. Supp. 2d 1178, 1192 (S.D. Iowa 2008).

136 Clark ex rel. J.J. v. Special Sch. Dist., No. 4:10CV2128SNLJ, 2012 WL 592423, at *15 (E.D. Mo. Feb. 23, 2012) (ruling that the IEP included detailed behavioral interventions to support academic and behavioral conduct goals and was substantively appropriate); Robert H. v. Nixa R-2 Sch. Dist., 26 IDELR 564 (W.D. Mo. 1997).

137 Couture ex rel. M.C. v. Bd. of Educ., 535 F.3d 1243, 1252 (10th Cir. 2008).

138 Waukee Cmty. Unit Sch. Dist. v. Douglas L. ex rel. I.L., No. 4:07-cv-00278-REL-CFB, 2008 WL 9374268, at *12 (S.D. Iowa Aug. 7, 2008).

139 See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (reciting "our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (referring to educational policy issues as "another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels").

140 See, e.g., Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 208 (1982) ("We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'") (quoting Rodriguez, 411 U.S. at 42)).

141 For a response to this bias perception in relation to IDEA hearing officer decisions, see Perry A. Zirkel, Balance and Bias in Special Education Hearings, 22 J. Disability Pol'y Stud. 67 (2013).

142 Vernon ex rel. D. v. Bethel Sch. Dist., 170 Wash. App. 1016, at *16 (Wash. Ct. App. 2012).

143 Id.

144 Id.

145 See Ross et al., supra note 1 (reporting that students have been locked in rooms for hours at a time); Rader, supra note 7 (student lost the tip of her finger while placed in seclusion room).

146 Cf. Grogan v. Seaford Union Free Sch. Dist., 873 N.Y.S.2d 225, 226 (N.Y. App. Div. 2007) (dismissing all nine of the parents' claims, ranging from an alleged IDEA violation to IIED based on a single time-out in a 64-square-foot elevator-entry vestibule with at least one adult present during the time-out).

147 See Anna B. Duff, How Special Education Policy Affects Districts, in Rethinking Special Education for a New Century 135 (Chester E. Finn, Jr. et al. eds., 2001), available at http://www.dlc.org/documents/SpecialEd_complete_ volume.pdf (showing how maneuvering the federal and state laws to ensure compliance with special education requirements can frustrate teachers, parents and administrators).

45 UTOLR 505

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