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Perry A. Zirkel, Benjamin H. Frisch^{aa1}

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LONGITUDINAL TRENDS OF JUDICIAL RULINGS IN K-12 EDUCATION: THE LATEST LOOK^{a1}

Previous issues of West's Education Law Reporter provided successive longitudinal analyses of the volume of litigation in the public elementary and secondary school context (hereinafter referred to as "K-12") respectively ending in each of the prior three decades.¹ These trend studies, like other such tabulations,² were based on the West's Key Number System.

The predecessor analyses revealed that on an overall basis the "boom" in education litigation ended in the 1970s, with the succeeding three decades forming more of a rippled high plateau. The most recent of the earlier analyses identified differences in terms of judicial forum and case category.³ For forum, the federal courts' proportion of the overall total increased from 2% in the 1940s to 45% in the decade 2000-09.⁴ For category, the most pronounced change was the continued growth of the special education student category.⁵ The analysis also identified various limitations in tracking trends via the West Key Number system, including, for example, mitigated but not eliminated multiple counting of cases.⁶

***410** As a result, two related metaphors led to revision in the title of this latest analysis. First, although referring generally to "litigation," all of these analyses are limited to the published decisions⁷ that form the proverbial tip of the iceberg, which has several larger levels that are submerged from visibility.⁸ As a result, the title of this article uses "judicial rulings" for improved approximation.⁹ Second, the "explosion" metaphor in the titles of earlier analyses is attributable to the dramatic increase in the numbers found in the initial decades culminating immediately before and after the turbulent 1970s.¹⁰ Instead, the title of this article uses the more accurate and neutral term of "longitudinal trends."

During the intervening period since the 2011 update, other longitudinal tabulations of the volume of K-12 education litigation have been scant, such as one limited to published judicial rulings in special education within a fifteen-year period.¹¹ Such narrow studies employ search strategies that do not rely on the Westlaw Key Number categories because their much smaller scope allow for more time-consuming collection and selection.

Thus, an updated extension of the previous line of broad-based longitudinal analyses is warranted. Due to its feasibility for this purpose, the procedure relies on the Westlaw system.

Method

The current update follows the same pattern and methodology of this article's immediate predecessor, with one major difference in categorization for the sake of more precision, and a technical change in queries due to an update to the Key Number classification system. ***411** Specifically, the major change was the merger of the prior categories of "Desegregation" and "Other

System Level”¹² into a broader “System-Level” category due to the dwindling numbers of desegregation cases.¹³ The change in queries was necessary largely because the updated system abrogated the “Schools” topic upon which the 2011 article relied.¹⁴

Thus, based on the four remaining major categories, the search procedure was substantially similar, although not identical, to that of the 2011 analysis.¹⁵ As in the previous two studies, each query searched the digest field in the ALLSTATES and ALLFEDS databases. The differences were that instead of searching for particular Key Numbers within the former Schools topic, the Boolean queries for this article relied on the relevant elements of the reorganized system, which primarily encompassed the cases with headnotes under topic 141E Education, corresponding to the designated four broad categories.¹⁶ The following example is for the decade 1940-49:

- system-level: DA(aft 1939 & bef 1950) & 141EII(A) 141EII(B) 141EII(F) 141EI + for the former desegregation category: DA(aft 1939 & bef 1950) & 141EII(F)¹⁷

- employees: DA(aft 1939 & bef 1950) & 141EII(C) 141EII(D) 78k1129¹⁸

- general education students: DA(aft 1939 & bef 1950) & 141EII(E) 78k1059 DI(“Family Education Rights #and Privacy Act” FERPA)¹⁹

- special education students: DA(aft 1939 & bef 1950) & 141EII(G)

*412 Results

Table 1 presents the frequency of rulings per decade and per category for the combination of the federal and state forums.

Table 1: Overall Frequency Trend by Decade and Category

| | 1940-49 | 1950-59 | 1960-69 | 1970-79 | 1980-89 | 1990-99 | 2000-09 | 2010-19 |
|----------------------------|---------|---------|---------|---------|---------|---------|---------|---------|
| System-Level ²⁰ | 1324 | 1682 | 2103 | 2789 | 2160 | 2018 | 2023 | 1679 |
| Employees | 526 | 520 | 778 | 2625 | 2803 | 2410 | 2508 | 2235 |
| Gen. Ed. Students | 219 | 271 | 456 | 1166 | 1220 | 1686 | 2147 | 2119 |
| Spec. Ed. Students | 0 | 8 | 8 | 152 | 604 | 761 | 1412 | 1325 |

| | | | | | | | | |
|-------|------|------|------|------|------|------|------|------|
| TOTAL | 2069 | 2481 | 3345 | 6732 | 6787 | 6875 | 8090 | 7358 |
|-------|------|------|------|------|------|------|------|------|

[The preceding image contains the reference for footnote ²⁰]

First, an examination of the bottom row of Table 1 shows that the overall trajectory was upward for the first four decades, particularly into the 1970s; next was relatively level from the 1970s through the end of the century; and then made a moderate ascent and moderating descent in the last two decades. Second, review of the category-by-category data shows that the moderating descent for the overall total during the past decade was largely attributable to the system-level and employee categories. Third, wider examination within each of the successive categories reveals that (a) the system-level category has been mostly, although not entirely, in decline since the 1970s; (b) the employee category has declined more unevenly and moderately during that same period; (c) the trajectory of the general education student category has been upward since the 1970s until a slight decline during the last decade; and (d) the special education student category has largely paralleled the trajectory of the general education student category during the same period but with a more pronounced ascent and a moderate, rather than modest, recent descent. Finally, upon viewing the categories vertically rather than horizontally across the decades, the trend seems to shift from the initial predominance of the system-level category to the shared and more moderate first-place position of the employee and general education categories, even with the most dramatic growth being in the special education category.

Table 2 provides the component frequencies of the rulings in the federal courts and state courts, respectively. The entries for the state courts are *italicized* to facilitate the differentiation.

413 Table 2: Separate Frequency Trends for Federal Courts and *State Courts

| | 1940-49 | 1950-59 | 1960-69 | 1970-79 | 1980-89 | 1990-99 | 2000-09 | 2010-19 |
|----------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| System-Level ²¹ | 32 | 109 | 446 | 971 | 532 | 507 | 434 | 446 |
| | <i>1292</i> | <i>1573</i> | <i>1657</i> | <i>1818</i> | <i>1628</i> | <i>1511</i> | <i>1589</i> | <i>1233</i> |
| Employees | 8 | 9 | 156 | 670 | 401 | 499 | 955 | 959 |
| | <i>518</i> | <i>511</i> | <i>622</i> | <i>1955</i> | <i>2402</i> | <i>1911</i> | <i>1553</i> | <i>1276</i> |
| Gen. Ed. Students | 11 | 22 | 94 | 461 | 397 | 710 | 1084 | 1244 |
| | <i>208</i> | <i>249</i> | <i>362</i> | <i>705</i> | <i>823</i> | <i>976</i> | <i>1063</i> | <i>875</i> |
| Spec. Ed. Students | 0 | 1 | 2 | 38 | 432 | 635 | 1264 | 1264 |
| | <i>0</i> | <i>7</i> | <i>6</i> | <i>114</i> | <i>172</i> | <i>126</i> | <i>148</i> | <i>61</i> |
| TOTAL | 51 | 141 | 698 | 2140 | 1762 | 2351 | 3737 | 3913 |
| | <i>2018</i> | <i>2340</i> | <i>2647</i> | <i>4592</i> | <i>5025</i> | <i>4524</i> | <i>4353</i> | <i>3445</i> |

[The preceding image contains the reference for footnote ²¹]

First, examination of the bottom row's entry pairs reveals (a) an ascending trajectory of rulings in the federal courts with the exception of the 1980s and (b) a reversal to a descending trajectory for state courts starting in the 1990s, both resulting in an overall shift from the state to the federal courts.²² Second, the category-by-category rows successively show that: (a) for the system-level category, the respective federal and state entries are largely parallel in their upward and downward directions except for the last two decades, and the frequencies for the state courts continue to predominate; (b) for the employee category, the direction and the proportion of the federal and state court frequencies vary widely, although the state courts account for the majority of the rulings for every decade except the 1960s; (c) for the general education student category, the trend has been upward except for the federal courts in the 1980s and the state courts in the most recent decade, with an overall shift from a heavy majority in the state courts to a more moderate majority in the federal courts; and (d) for the special education category, the federal courts have increasingly been the locus for the steep upward slope since the 1970s until an even plateau at its high point during the last two decades, with the modest overall decline attributable to the state courts.

Discussion

The delimitations of this line of analyses, which bear repeating here, include not only the iceberg-like measure of education litigation²³ but also the overlapping and evolving nature of the Westlaw classification system.²⁴ Nevertheless, this procedure provides a readily feasible and relatively reliable way to approximate the longitudinal trends in the frequency of judicial decisional activity within the K-12 education context. The boundaries are rather limited and imprecise. Yet, the procedure is uniform for the entire retrospective period. Moreover, like the iceberg metaphor, the overall climate conditions affect both the visible and subsurface levels. Thus, the accretions and diminutions in the proverbial tip imperfectly but significantly *414 correlate with the corresponding fluctuations in the larger mass that is below the surface.²⁵

Within these methodological delimitations and the brevity of this analysis, three successive findings are selected for illustrative discussion. Identification and interpretation of the other results, along with follow-up research, by fellow scholars is encouraged.

First, the major finding of this update is that the resurgence in the overall volume of K-12 published court rulings that the previous analysis found for 2000-09 was not the harbinger of continuing upward slope, like that from the 1940s to the 1970s. Instead, it seems to have signaled what appears to be moderate hills and valleys above the high plains from the 1970s through the 1990s. Referring to the original metaphor, the bottom line of Table 1 shows not only that the boom in the first decade of the current century was far less than the previous "explosion" but also that the next, most recent decade lowered the overall volume. This moderated volume in the first two decades of this century is still above the high level of the three decades that ended the previous century.

Second, the bottom line of Table 2 shows that the moderately reduced level during the last decade is attributable to an accelerated decrease in the state court rulings, with only a partial offset by the continuing but decelerated increase in the federal court rulings. The reasons for this shift to the federal courts likely include their jurisdictional correlation with federal questions,²⁶ their more uniform and stable level of adjudication,²⁷ and their generally higher levels of recovery.²⁸

Third, the special education category serves as the most dramatic illustration of (a) the overall upward and then relatively leveling trajectory and (b) the shift from the state to the federal courts. Fueled initially by the passage of the Individuals with Disabilities Education Act (IDEA) and, to a lesser extent, the Section 504 of the Rehabilitation Act in the 1970s and the successive amendments to the IDEA and, via the Americans with Disabilities Act (ADA), to Section 504, in the subsequent decades,²⁹ this student category has ascended to its current high plateau-like level. Furthermore, federal courts account for 95% of its total for the most recent decade.

Providing further perspective for the significance of the special education student category of court rulings, the proportion of K-12 students under the IDEA has gradually *415 increased since the passage of the Act in the 1970's, with the increase during

the last decade going from about 8% to 10%.³⁰ Due to its broader definition of disability, Section 504 includes, but extends beyond, IDEA-eligible students. The proportion of K-12 students who are exclusively covered by Section 504 has also increased since the 1970s, with the major growth being during the change from about 1% to 3% during the most recent decade.³¹ Thus, the special education category, which approximated one-eighth of the public schools' K-12 enrollment, accounted for more than one-third of this past decade's total for combination of the two student categories.³²

Finally, reinforcing the recognition in the last analysis of the evolving nature of the Westlaw classifications and reclassifications,³³ comparing this latest tabulation with its predecessor reveals that the corresponding entries for the previous decades changed, with the direction being generally downward for the system-level category and to a varying extent largely upward for the other categories. These changes are likely largely attributable to the revisions in the Education and Civil Rights topics and creations of Public Employment and Public Contract topics approximately two years after the publication of the 2011 article.³⁴ In any event, the overall trend, particularly at the bottom line, did not change to a significant extent. For both policymakers and practitioners, these latest data show that the explosion is in the past, but education litigation continues at a high level rather than returning to its pre-boom quiescence.

Footnotes

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^{aa1} Perry A. Zirkel, Ph.D., J.D., LL.M., is university professor emeritus of education and law at Lehigh University and Benjamin H. Frisch, J.D., is a senior attorney editor with Thomson Reuters with the responsibility of being the primary classifier of Key Numbers from the Education topic.

¹ Perry A. Zirkel & Brent Johnson, *The "Explosion" in Education Litigation: The Next Update*, 265 Educ. L. Rep. 1 (2011); Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 Educ. L. Rep. 341 (1997); Perry A. Zirkel & Sharon Richardson, *The "Explosion" in Education Litigation*, 53 Educ. L. Rep. 767 (1989). For parallel analyses for postsecondary education, see Lee Dalton, *The Volume of Higher Education Litigation: The Latest Update*, 349 Educ. L. Rep. 877 (2018); Stacy Donoso & Perry A. Zirkel, *The Volume of Higher Education Litigation: An Updated Analysis*, 232 Educ. L. Rep. 549 (2008); Perry A. Zirkel, *Higher Education Litigation: An Overview*, 56 Educ. L. Rep. 705 (1989).

² David Tyack, Thomas James, & Aaron Benavot, *Law and the Shaping of Public Education 1785-1954* 215-16 (1987); John C. Hogan, *The Schools, the Courts, and the Public Interest* 11 (2d ed. 1985); Michael Imber & Gary Thompson, *Developing a Typology of Litigation in Education and Determining the Frequency of Each Category*, 27 Educ. Admin. Q. 225 (1991); Michael Imber & David Gayler, *A Statistical Analysis of Trends in Education-Related Litigation Since 1960*, 24 Educ. Admin. Q. 55 (1988).

³ The forum differentiation was between ALLFEDS (federal courts) and ALLSTATES (state courts.) The broad categories, which were based on identified combinations of Key Numbers within the topic 345 (Schools) were desegregation, other system level, employees, special education students, and general education students. Zirkel & Johnson, *supra* note 1, at 3 & n.13.

⁴ *Id.* at 5.

⁵ *Id.* at 6. This growth was almost entirely in federal courts. *Id.*

- 6 *Id.* at 7-9. More specifically, the discussion section in the predecessor analysis included this observation: Although the procedure of stringing together, rather than doing separate tabulations, for various Key Numbers reduces ‘double counting’ of cases, this problem persists due to other sources, including 1) decisions with [key] numbers in more than one of the selected broad categories of this series of trend studies, and 2) cases that have multiple, different decisions due to appeals, remands, and separable issues extending from the threshold stage, such as discovery or statute of limitations, to the post-trial stage, such as attorneys’ fees.”
- Id.* at 8.
- 7 Rather than the narrower meaning of those court decisions that are officially published, in the Westlaw system “published” has the broader scope of those court decisions that have headnotes and, thus, Key Number classifications. Nevertheless, this broader meaning does not extend to court decisions in the database with WL numbers that do not have headnotes. More generally, the Westlaw system includes federal trial court decisions more extensively than state trial court decisions.
- 8 *See, e.g.*, Perry A. Zirkel & Diane M. Holben, *Spelunking in the Litigation Iceberg: Exploring the Outcomes of Inconclusive Rulings*, 46 J.L. & Educ. 195 (2017) (examining the ultimate outcomes of inconclusive published court decisions in the context of student bullying claims, including settlements and abandonments); Perry A. Zirkel & Amanda Machin, *The Special Education Case Law “Iceberg”: An Initial Exploration of the Underside*, 41 J.L. & Educ. 483 (2012) (illustrating the successively “hidden” levels of unpublished court decisions, administrative adjudications, and settlements/abandonments).
- 9 The three successively smaller units of analysis, which are often not clearly differentiated but which are largely intercorrelated, are cases, decisions, and rulings. Here, due to the mitigated but not eliminated multiple counting, the unit equates to broad issue category rulings that correspond to the identified two or three subcategories within the search strings for each of the four categories. *See infra* notes 15-19 and accompanying text. For other examples of this unit of analysis, with issue categories of varying scope depending on the nature and purpose of study, *see* Perry A. Zirkel & Diane M. Holben, *District-Initiated Due Process Decisions under the IDEA: Frequency and Outcomes*, 398 Educ. L. Rep. 8, 12 (2022); Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 Conn. Pub. Int. L.J. 169, 175 (2017); Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 Ohio St. J. on Disp. Resol. 525, 549 (2014). Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. Nat’l Ass’n Admin. L. Judiciary 214, 223-24 (2013).
- 10 *Supra* note 1 and text accompanying note 3.
- 11 Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Cases: Frequency and Outcomes of Published Court Decisions 1998-2012*, 27 J. Special Educ. Leadership 55 (2014) (finding upward trajectory, with the highest proportions coming from the Second, Third, and Ninth Circuits).
- 12 *Supra* note 3.
- 13 For the new decade, 2010-19, the overall number in the Desegregation category was 56 compared to its high in 1970-79 of 717 and compared to all of the other categories for 2010-19, which were each well above 1000. For the specific numbers per decade overall and per judicial forum, *see infra* notes 20-21.
- 14 Westlaw’s master classification system of U.S. law, which was initially developed during 1897-1906, indexes headnotes, which are summaries of points of law in a case, into 364 topics and approximately 112,150 classifiable Key Numbers. E-mail from Nicholas W. Koster, Principal Attorney Editor, Thomson Reuters, to Benjamin H. Frisch, Senior Attorney Editor, Thomson Reuters (January 3, 2023, 15:23 CST) (on file with author). Each time, this dynamic system changes to fit the evolution of case law, legacy material is reclassified to the new outline, averaging approximately 600,000 headnotes per year. *See, e.g.*, Maggie Keefe, *Free v. Westlaw: Why You Need the West Key Number System*, <https://legal.thomson-reuters.com/en/insights/articles/using-the-west-key-numbers-system>. For the latest update, a newly created Education topic, with Key Numbers from 141Ek1 to 141Ek1243, replaced the former

Schools and Colleges & Universities topics. Under the Education topic, Roman numeral II, “Public Primary and Secondary Schools,” encompasses the area of this analysis. The sub-categories of II are: A - Establishment, Operation, and Regulation in General; B - Taxpayer Suits and Other Remedies; C - Officers and Employees; D - Teachers and Education Professionals; E - Pupils or Students; F - Racial Segregation and Desegregation; and G - Children with Disabilities/special education. *See, e.g.*, West’s Analysis of American Law 694-706 (2022).

15 Zirkel & Johnson, *supra* note 1, at 3 & nn.13-14.

16 For example, the query in the current article for desegregation was 141EII(F), thereby covering all Key Numbers in Roman numeral II under letter F, which are from 141EK830 to 141EK859, whereas those in the predecessor article for desegregation relied on Key Number 345k13. In addition to the corresponding elements in the Education topic, the search strings extended to cover the few subtopics that moved under the new system to other topics, such as Civil Rights.

17 “System-level” in this context refers to the aforementioned (*supra* note 14) subcategories A, B, and F. More specifically, generic subcategory A includes, for example, the following designated issues: creation, alteration, and dissolution of districts; government and boards; district property in general; school buildings and grounds; district contracts; district liabilities in general; school aid and funding; administration of finances; and school taxes. *See, e.g.*, West’s Analysis of American Law at 694-70.

18 The “employee” category encompasses the aforementioned (*supra* note 14) subcategories C and D and the additional Key Number 78k1129, which captures civil rights in employment in education.

19 The “general education student” category encompasses the aforementioned (*supra* note 14) subcategory E plus Key Number 78k1059, which captures civil rights in education for nondisabled students.

20 The merged Desegregation category frequencies were as follows for each succeeding decade: 1940s-18; 1950s - 91; 1960s - 415; 1970s - 717; 1980s - 307; 1990s - 196; 2000-09 - 90; and 2010-19 - 56.

21 The merged Desegregation category data were as follows for each of these two judicial forums:

| | 1940S | 1950S | 1960S | 1970S | 1980S | 1990S | 2000-09 | 2010-19 |
|----------------|-------|-------|-------|-------|-------|-------|---------|---------|
| Federal Courts | 5 | 76 | 370 | 663 | 284 | 178 | 70 | 50 |
| State Courts | 13 | 15 | 45 | 54 | 23 | 18 | 20 | 6 |

22 The balance changed from almost entirely in favor of state courts to a slight majority in favor of federal courts. The specific federal-court proportion for each succeeding decade was as follows: 1940s -2%; 1950s - 6%; 1960s - 35%; 1970s - 32%; 1980s - 26%; 1990s - 34%; 2000-09 - 36%; and 2010-19 - 53%.

23 *Supra* notes 7-8 and accompanying text.

- 24 *Supra* notes 14-19 and accompanying text. Based on the previous line of analyses, an overlapping limitation is that the scope does not extend to the preschool level of public schools or to private schools at the pre-K or elementary and secondary levels.
- 25 An example that appears to be consistent with this relationship is the largely parallel pattern for impartial hearings under the IDEA, which are the primary level for most cases that are litigated in courts. *See* Zirkel & Skidmore, *supra* note 9, at 529-31, 551 (summarizing other studies and finding a similar upward trajectory from the late 1970s until an overall decline during 2000-09). A subsequent analysis of national CADRE data revealed a levelling off during the next available interval. Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 Educ. L. Rep. 870, 872 (2020) (finding “an uneven plateau for the ten-year period ending in 2018).
- 26 20 U.S.C. § 1331 (“The [federal] district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). This jurisdiction generally overlaps with, rather than being exclusive from, that of state courts. *See, e.g.*, National Center for State Courts, *The Role of State Courts in Our Federal System* (2022), <https://ncsc.contentdm.oclc.org/digital/collection/federal/id/104/rec/1>
- 27 The examples of this uniformity and stability respectively include the Federal Rules of Civil Procedure and the tenure of federal judges under [Article III of the U.S. Constitution](#).
- 28 *See, e.g.*, Theodore Eisenberg, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U.L. Rev. 433, 441 (1996) (finding substantially higher verdicts in federal courts for the same issues in state courts).
- 29 The IDEA was amended in 1986, 1990, 1997, and 2004. *See, e.g.*, OSEP Fast Facts: IDEA 45th Anniversary (2020), <https://sites.ed.gov/idea/osep-fast-facts-idea-45th-anniversary/>. The ADA of 1990 and its amendments in 2008 applied to Section 504. *See, e.g.*, Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA, Section 504/ADA*, 342 Educ. L. Rep. 886 (2017).
- 30 *E.g.*, U.S. Department of Education, 43rd Annual Report to Congress on the Implementation of the Individuals with Disabilities Act 40 (2021), <https://sites.ed.gov/idea/2021-individuals-with-disabilities-e-education-act-annual-report-to-congress/> (reporting the percentages from 2010 to 2019).
- 31 *E.g.*, Perry A. Zirkel & Gina L. Gullo, *State Rates of 504-Only Students in K-12 Schools: The Next Update*, 385 Educ. L. Rep. 14, 18 (2022) (reporting rates gradually increasing from 1.09% in 2009-10 to 2.7% in 2017-18).
- 32 The first fraction is based on the combined percentages of IDEA and 504-only students. The second fraction is based on the entries for the general education and special education student categories for 2010-19 in Table 1. Using the same column of the table, the special education student category accounted for almost one-fifth of the total for this most recent decade.
- 33 Zirkel & Johnson, *supra* note 1, at 6-8.
- 34 *Supra* notes 14 and 16.