The Time-out and Seclusion Continuum: A Systematic Analysis of the Case Law[1]

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- This article provides a conceptual framework with coordinated gradations and discrete definitions to distinguish the three successively more restrictive forms of time-out from seclusion.
- Parental concerns with the use of time-out or seclusion to manage behavior challenges of children with disabilities have led to an increase of litigation both in terms of frequency and complexity.
- The federal and, almost as clearly, state court outcomes have predominated in favor of the District defendants, showing a general trend of judicial deference to school officials.
- As both a prophylactic and professional matter, special education leaders need to provide guidance to staff members on the use of time-out or seclusion practices and on the need for fidelity when implementing the practices as permitted in the IEP.

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As an example of a recent case, B.D. is a student with a disability who had diagnoses of the rare neurological disorder of Landau-Kleffner Syndrome, Attention Deficit Hyperactivity Disorder, and Obsessive Compulsive Disorder. On February 7, 2007, B.D. became agitated and began yelling and thrashing so uncontrollably as to present a danger to self and to others in the classroom. After exiting the other students from the classroom, the teacher asked B.D. if he wanted to go to the quiet room to calm down. He eventually did so voluntarily, without physical intervention or restraint. According to school officials, the purpose of the quiet room was not for discipline, instead providing an opportunity for B.D. to de-escalate his behavior and voluntarily remove himself from an over-stimulating environment. Contending instead that the use of the quiet room was time-out or seclusion denying their child's right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA, 2012) and also violating a Washington state law restricting "aversive interventions," B.D.'s parents filed for a due process hearing and ultimately proceeded all the way to the Ninth Circuit Court of Appeals (*B.D. v. Puyallup School District*, 2011).

This case highlights the divergent terminology and perspectives regarding the use of temporary isolation to respond to the disruptive behavior of students with disabilities. The decision to use what the Washington law generically refers to as aversive interventions in the educational environment with a student with a disability is especially complex in light of the multitude of competing interests, ethical implications, and legal issues. Consonant with the use of this term in not only state laws but also the professional literature, "aversive" serves here as an umbrella descriptor for the variety of intervention practices that are used to decrease or limit undesired behaviors (Jacob-Timm, 1996). High-profile media attention has also contributed to concerns about student safety, particularly in extreme circumstances where children are isolated

in small cell-like rooms for extensive time periods (e.g., Hibbard, 2012; Richards & Bloom, 2012). Further, the fuzzy and flexible boundaries between time-out and seclusion contribute to the significant disconnect between schools and parents. Moreover, the *B.D*. case also illustrates that such controversies in court litigation extend to less sensational forms of aversive interventions.

Schools are under increasing scrutiny for the use of aversive interventions or isolating practices such as seclusion and restraint, as recently reflected by governmental reports and legislative initiatives (Government Accountability Office, 2009). Contributing to these governmental actions are anecdotal reports and high-profile incidents that illustrate the potential risks associated with the use of aversive interventions, especially for students with disabilities (e.g., National Disability Rights Network, 2012). Additionally, special education leaders need to be knowledgeable about the litigation that increasingly arises from the use of not only restraints (Zirkel & Lyons, 2011) but also time-out and seclusion.

Aversive Intervention Controversy

During the past two decades, scholars, educators, and special interest organizations, including advocacy groups have critically examined and debated the ethical and legal use of aversive interventions with individuals with disabilities (Amos, 2004; Gerhardt, Holmes, Alessandri & Goodman, 1991; Rozalski, Yell, & Boreson, 2006; Westling, Trader, Smith, & Marshall, 2010). These interventions comprise a broad spectrum of behavior management techniques including but not at all limited to restraint and seclusion—e.g., time-out, water misting, medication, and mild electric shock (Jacob-Timm, 1996; Lohrmann-O'Rourke & Zirkel, 1998). Their use and abuse has become a major issue in state and national policymaking, with particular attention to restraint and seclusion.

Although the use of these aversive procedures continues to lead to litigation, the special education literature concerning this case law is largely limited in terms of contributing to informed policymaking. The sources specific to the use of time-out and seclusion consist mostly of secondary and anecdotal information (e.g., Gerhardt et al., 1991; Rozalski et al., 2006) rather than comprehensive coverage via a systematic framework and analysis. For example, attributing the current political controversy concerning the use of time-out and seclusion in school settings to recent lawsuits against school districts, Ryan, Peterson, and Rozalski (2007) limited their coverage to a few early court decisions specific to specialized institutions (e.g., *Wyatt v. Stickney*, 1972/1974; *Youngberg v. Romeo*, 1982). The present study seeks to fill this void with an empirical analysis of court cases on the use of time-out and seclusion procedures for students with disabilities as a companion to Zirkel and Lyons' (2011) study focused on restraints. Relatively recent activities of the professional associations and Congress provide the context for such analyses.

Professional Associations' Positions

The majority of professional organizations have advocated for federal and state laws to limit the use of restraint and seclusion in schools. For example, the Council for Children with Behavioral Disorders (2009) issued a position statement that encouraged the adoption of federal, state, and local law making to significantly diminish the need to use seclusion in school settings. Another leading organization in disability advocacy, Equity, Opportunity and Inclusion for People with Disabilities (TASH, 2011), released their review of media coverage on restraint and seclusion in an effort to encourage national awareness of the harmful effects of restraint and seclusion and to promote the passage of legislation. Additionally, the Council of Parent Attorneys and Advocates (2011) has supported federal legislation that eliminates seclusion and

aversive interventions for all students.

Other organizations have taken slightly different positions, and have adopted an approach that would permit the use of restraint or seclusion only in an emergency. For example, the Council for Exceptional Children (2010), while promoting the use the positive educational strategies, has also supported the use of physical restraint or seclusion when the safety of the child or others is in immediate danger. Similarly, the Association for Behavior Analysis International has issued a policy permitting such interventions as part of a behavior intervention plan and in emergency cases within principled limits, including least restrictiveness (Vollmer et al., 2011). More strongly, based on a survey of its members the American Association of School Administrators (2012) has argued for the permissibility of restraint or seclusion when a child's individualized education program (IEP) or behavioral intervention plan provides for it.

Proposed Federal Legislation

Congressional efforts to respond to the escalating concerns about restraint and seclusion have thus far amounted to bills that have not passed both the House and Senate. In 2010 the House of Representatives passed the primary bill, the Preventing Harmful Restraint and Seclusion in Schools Act, but the Senate version failed to make it out of committee.

During the next Congressional term, Representative George Miller re-introduced the bill as the Keeping All Students Safe Act (H.R. 1381, 2011); and Senator Tom Harkin introduced the Senate version (S. 2020, 2011). With regard to seclusion, these latest House and Senate bills differed from each other in terms of the definition and, more strongly, in terms of the extent of the restriction. More specifically, the Senate bills included the following definition: "The term 'seclusion' means the isolation of a student in a room, enclosure, or space that is--(A) locked; or (B) unlocked and the student is prevented from leaving" (S. 2020, 2011). In contrast, the House

version limited the definition to “locked isolation” and expressly excluded time-out (H.R. 1381, 2011). Moreover, the House bill proposed restrictions on the use of seclusion in schools, whereas the Senate version proposed to ban seclusion.

Despite Representative’s Miller’s impassioned efforts, including his letter to colleagues arguing that “there is no excuse for torture or abuse in our schools,” (Butler, 2012b) and Senator’s Harkin’s arrangements for joint hearings in July 2012, the bill failed to make it out of committee. In the next Congressional term Representative Miller reintroduced the Keeping All Students Safe Act (2013). Since then both Miller and Harkin have announced their impending retirements (Layton, 2014).

In any event, this Congressional activity has contributed to the expansion of state laws to regulate seclusion and restraint in schools (GAO, 2009; Jones & Feder, 2010). For example, the number of state laws specifically addressing the use of seclusion and restraint in schools increased from 23 in 2010 (Stewart, 2011) to at least 30 in 2012 (Butler, 2012a). Given the variation in definitions and coverage of time-out and seclusion among the federal bills and the state statutes, systematic study is warranted, starting with a coherent framework.

Time-out and Seclusion Continuum

Although not devoid of notable inconsistencies, the professional literature contains useful guidance. While some sources referred to "seclusion timeout" (Rozalski et al., 2006, p. 13) and "isolation time-out" (Wolf, McLaughlin, & Williams, 2006, p. 22), others used the terms time-out and seclusion distinguishably (Everett, 2010; Westling et al., 2010). Indeed, Wolf et al. (2006) observed that, much like the IDEA’s least restrictive environment mandate, aversive interventions such as time-out and seclusion reflect a continuum of ascending restrictiveness.

As a result, for the purpose of clear consistency, comprehensiveness, and coherence, the

continuum in Figure 1 presents a conceptual framework with coordinated gradations based on discrete definitions for time-out and seclusion. Three successive levels of time-out represent the separation of a child from the other students in a non-locked area either inside or outside the classroom. More specifically, within this side of the continuum, the applied behavior analysis (ABA) literature (e.g., Everett, 2010; Harris, 1985; Mace & Heller, 1990; Ryan, Peterson, Tetreault, & Van der Hagan, 2007; Wolf et al., 2006) has distinguished three successively more restrictive forms of time-out in terms of the imposed location (a) "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; (b) "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); and (c) "seclusion time-out," where the student is alone without immediate access to others but not locked in the designated location. Although these ABA sources provided "a continuum of ascending restrictiveness" (Wolf et al., 2006, p. 22), they failed to mention or discuss seclusion, which fits on the adjoining side of the continuum. More specifically, seclusion, for the purpose of this uniform classification template, is the confinement of a child alone in a locked area (Ryan, Peterson, & Rozalski, 2007).

Similarly blurring the line but reflecting the overlap with the next, generally more restrictive category, Ryan, Sanders, Katziyannis, and Yell (2007) additionally referred to "restrained time-out" (p. 67). For purposes of this study, restraint is included in the continuum solely to show the proximal but separable position of restraint on the adjoining side of seclusion. More specifically, segments 1–4 served as coding categories for our case law analysis. The arrows in Figure 1 represent the increasing degree of isolation and separation of a child from the general education environment.

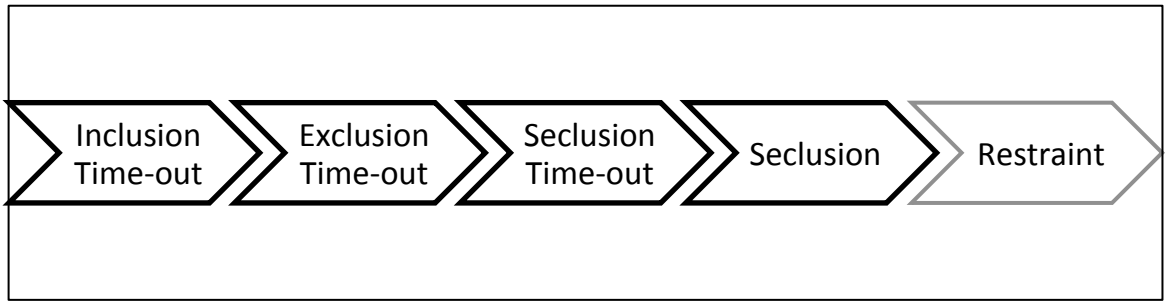


Figure 1. Continuum-based conceptual framework.

Much of the relatively extensive research on the use of aversive interventions for children with disabilities has focused on mental health settings, juvenile justice programs, residential treatment centers, and psychiatric hospitals (e.g., Brown et al., 2012; LeBel, Nunno, Mohr, O'Halloran, 2012; Sivak, 2012). These studies reflect controversy in terms of not only efficacy but also ethics (Kennedy, 2008; Kennedy & Mohr, 2001). The literature, while informative with respect to definitions, fails to provide extensive guidance or specific recommendations regarding the legal ramifications of using time-out or seclusion.

Time-out

Several sources have characterized time-out as effective for reducing problem student behaviors (e.g., Everett, 2010; Taylor & Miller, 1997). As a behavior management strategy, time-out has been successful in multiple education contexts, including special education settings in particular (Ryan & Sanders et al., 2007). Yet, various studies have failed to specifically define time-out (e.g., Taylor & Miller, 1997) or to distinguish it from seclusion (e.g., Fogt & Piripavel, 2002; Gerhardt et al., 1991). Moreover, the incomplete implementation as a behavioral strategy in special education settings (Everett, 2010) and the misuse or abuse of time-out (Wolf et al., 2006) are potential contributing factors to litigation. For example, Wolf et al. cautioned that the

misuse of seclusion or isolation timeout may lead to liability for attorney's fees (p. 27).

Seclusion

Similarly, seclusion is an aversive intervention that is purportedly effective in reducing inappropriate behaviors (e.g., Westling et al., 2010). Also similar to time-out, the literature on seclusion is frequently without clear definition and distinction from adjoining aversives (Amos, 2004; Fogt & Piripavel, 2002; Kennedy, 2008; Westling et al., 2010). For example, Amos described seclusion as "a type of restraint" (p. 265). Finally, time-out and seclusion have been subject to litigation, but both the special education and the legal literature have failed to systematically review the cases and the outcomes of parents' claims against school districts and their personnel.

Instead, the special education literature has provided only scant and unsystematic attention to the case law concerning time-out and seclusion for students with disabilities. For example, Yell (1994) cited only three court decisions specific to time-out, which he defined to include "isolation/seclusion timeout," as part of his formulation of guidelines for schools. Likewise, in their wider boundaries of coverage, Rozalski et al. (2006) identified only three cases in which the parents claimed that the use of "seclusion time-out" violated their children's rights. More recently, Peterson and Smith's (2013) coverage only included two cases specific to time-out or seclusion, with one of them clearly outdated in terms of its subsequently published proceedings.

Similarly, law review articles have been largely limited in coverage of the case law related to aversive interventions, focusing instead on advocacy positions and legislative changes (e.g., Farrell, 2009; Hoffman, 2011; Kaplan, 2010; Miller, 2011). To fill this void, Bon and Zirkel (in press) provide an in-depth review of time-out and seclusion case law through

traditional legal analysis of the state and federal legal theories advanced by parent-plaintiffs on behalf of students with disabilities.

The single exception is Zirkel and Lyons' (2011) systematic analysis of case law on the use of restraints for P–12 students with disabilities. Their analysis serves as a model for this follow-up study of the use of time-out and seclusion for students with disabilities. More specifically, they provided (a) comprehensive coverage of the pertinent cases, including demarcation of the specific boundaries along with identified exclusions and (b) a well-organized coding system that included appropriate differentiation of the units of analysis and the outcomes variable.

Method

Complementary to and contrasted with a traditional legal analysis, which examines the various legal theories in these court decisions (Bon & Zirkel, in press), the approach of this analysis is empirical. More specifically, the research questions for this empirical examination of the case law specific to the use of time-out and seclusion in the public school setting were as follows:

1. What was the total number of (a) court decisions and, within them, (b) claim rulings (e.g., IDEA, §504/ADA, or negligence)?
2. What were the pertinent factual features of these cases in terms of disability classification and time-out/seclusion continuum categorization?
3. What was the longitudinal frequency trend for the court decisions and claim rulings?
4. What was the distribution of the various federal and state claim rulings in terms of frequency and outcomes?

The overall approach mirrored the Lyons and Zirkel template with these exceptions: (a) the subject matter consisted of court cases concerning time-out and seclusion rather than restraint; (b) the four-part continuum provided the organizing framework; and (c) the time period extended to court decisions as of August 30, 2013 rather than June 30, 2010. The remaining details were specific to the scope of and coding of the study.

Scope

For the sake of comprehensive coverage, the starting point was the 1975 passage of the original version of the IDEA, and the ending point was August 30, 2013. The primary databases were Westlaw and LexisNexis. The first step was broad-based collection using combinations of various search terms such as "aversives" "behavior management/modification," "seclusion," "time-out," "exclusion," "isolation," "special education," "student," and "disability." To further ensure comprehensive coverage, the search supplementally extended to the Individuals with Disabilities Law Report (IDELR) via the LRP database, Special Ed Connection®, using both the IDELR topical index and Boolean combinations of the same search terms.

The second step was to screen the initially generated cases for those that met this combination of selection criteria: (a) parental suit on behalf of student with a disability, (b) at least one specific claim and court ruling on the use of seclusion or time-out, and (c) at least one of the defendants listed in the suit is an educational institution serving students within the P–12 grade range, thus excluding defendants that were (a) higher education institutions, (b) hospitals, and (c) juvenile justice, mental health, and residential entities. However, if the case had multiple defendants that included one or more within the P–12 context, the analysis only excluded the ruling(s) specific to the other institutions. Other exclusions were: (a) hearing or review officer decisions, OCR rulings, or state complaint resolution process decisions; (b) rulings concerning

nondisabled children; (c) rulings on technical adjudicative issues, such as attorney's fees, punitive damages, or additional evidence; (d) rulings on other separable issues, such as those exclusively addressing restraints or abuse; and (e) rulings superseded by subsequent decisions for the same case. After determining which cases met the selection criteria, the next step was coding them.

Coding

The coding variables for each case included: (a) the final relevant rulings; (b) the IDEA classification(s) of the child; (c) the one or more categories of the continuum at issue; (d) the legal claims that the court addressed: and (e) the outcome of the rulings for each claim. For cases with subsequent decisions, the coded outcome was the final ruling for each claim, even if it was in the earlier decision.

The coding categories differentiated federal and state claims. The federal categories were constitutional, such as the Fourteenth Amendment substantive due process, procedural due process, or equal protection, and statutory, e.g., IDEA or Section 504/Americans with Disabilities Act (ADA). The state categories included, on a similarly differentiated basis, common law torts, such as assault/battery, negligence, or false imprisonment.

Per Lyons and Zirkel's (2011) model, the claim rulings were not further differentiated except where the outcome differed between or within the two conflated categories of defendants—institutional and individual. For example, if the plaintiff-parent included a claim of negligence against several separately identified staff members and all of the outcomes were identical except one, the coding was limited to two rulings—the different outcome and the outcome for the other individual defendants conflated together.

Similarly per Lyons and Zirkel (2011), the outcomes scale for claim rulings was as

follows:

1 = conclusively for the plaintiff (i.e., the parent(s) or the child)

2 = inconclusively for the plaintiff

3 = split between plaintiff and defendant

4 = inconclusively for the defendant

5 = conclusively for the defendant (i.e., the districts and/or individual personnel)

Conclusive rulings, i.e., a "1" or "5," typically result from the court granting a pretrial motion, such as a request for summary judgment. On the other hand, inconclusive rulings, which are more common than generally recognized, arise when the final ruling, such as denial of a motion for dismissal or summary judgment, allows for further proceedings that are not subsequently reported.

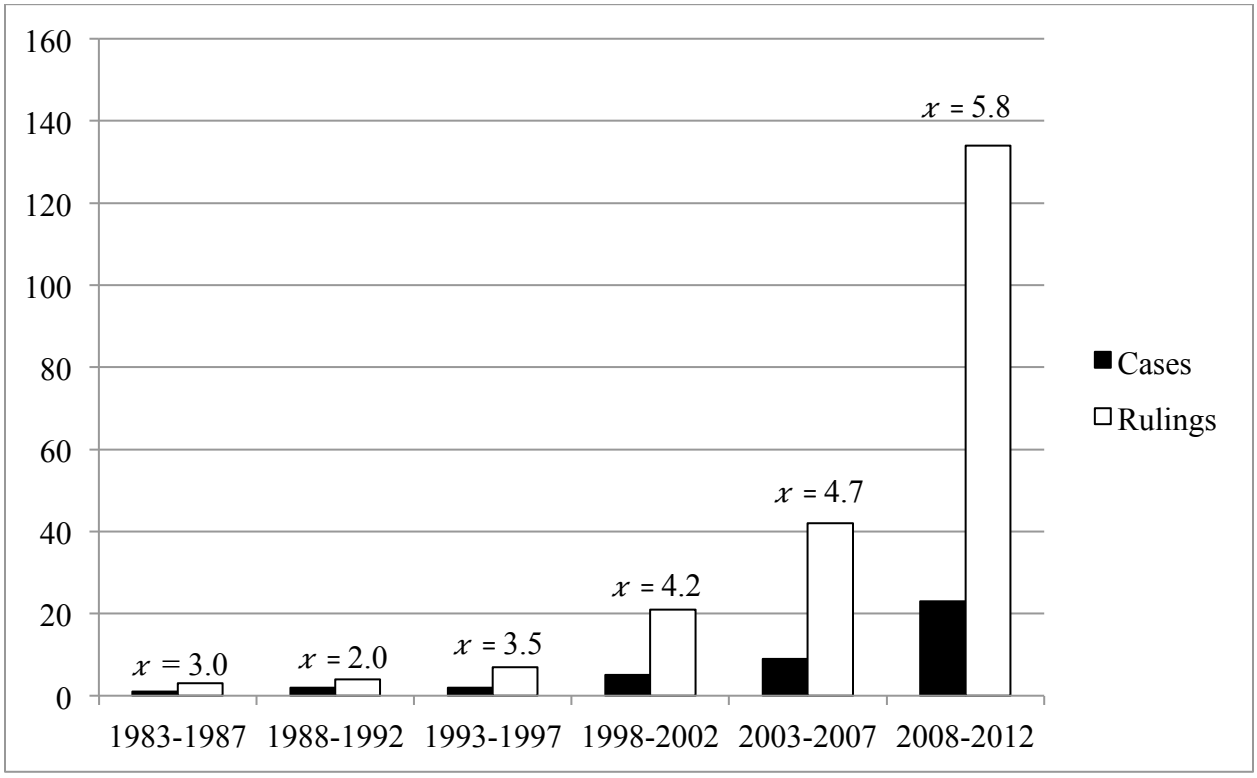
Results

The selection process yielded 51 cases, which, as a result of appeals or other subsequent reported proceedings, resulted in a total of 69 court decisions with final relevant rulings. Their resulting total was 225 claim rulings—130 based on federal law categories and 95 based on state law categories. However, all of the cases were in the federal courts.

The two most frequent disability classifications for the plaintiff-students were emotional disturbance (n=18) and autism (n=15), together accounting for more than half of all the cases. With three cases having more than one category of the continuum at issue, the distribution was as follows: inclusion time-out - 6; exclusion time-out - 17; seclusion time-out - 13; and seclusion - 18.

Figure 2 displays the longitudinal trend in the frequency of cases and their claim rulings for the successive four-year time periods beginning with the first court decision in 1983 and not

including the negligible segment for 2013–16.



Note: The "*x*" above each pair of bars represents the ratio of claim rulings to cases.

Figure 2. Longitudinal frequency trend for court decisions and claim rulings.

Review of Figure 2 reveals a rather steady trend of growth for the number of cases during this 29-year period. This growth—due to increasing rulings per case since 1988-1992—was even more pronounced for the number of claim rulings.

Table 1 shows the distribution of the federal and state claim rulings with respect to the five-category outcome scale and the overall frequency.

Table 1

Distribution of Claim Rulings

Claim Rulings	Outcomes					Total No.
	Parent				District	
	1	2	3	4	5	
Federal Claim Rulings						
Am. XIV substantive due process	0%	33%	0%	7%	60%	33
IDEA	3%	15%	0%	24%	58%	33
§504/ADA	0%	16%	4%	16%	64%	25
Am. IV seizure	0%	33%	0%	7%	60%	15
Am. XIV procedural due process	0%	23%	0%	15%	62%	13
Am. XIV equal protection	0%	20%	0%	20%	60%	5
Miscellaneous federal	0%	40%	0%	0%	60%	5
(Federal Subtotal)	(2%)	(23%)	(2%)	(15%)	(58%)	(129)
State Claim Rulings						
Negligence	0%	22%	0%	33%	44%	18
Miscellaneous state	0%	11%	0%	33%	56%	18
Intentional infliction of emotional distress	0%	25%	0%	19%	56%	16
Negligent infliction of emotional distress	0%	14%	0%	14%	71%	14
State statute (n=10) or regulation (n=3)	0%	15%	0%	8%	77%	13
Assault & battery	0%	0%	0%	44%	56%	9
False imprisonment	0%	25%	0%	38%	38%	8
(State Subtotal)	(0%)	(17%)	(0%)	(26%)	(57%)	(96)
TOTAL CLAIM RULINGS	> 1%	21%	> 1%	20%	58%	225

Review of Table 1 reveals that the most frequently adjudicated claims were all federal

categories—Fourteenth Amendment due process, IDEA, and Section 504/ADA. Moreover, the outcomes were clearly skewed in favor of the district defendants. For example, more than 50% of the claims rulings in every category except negligence were conclusively in their favor, whereas none of the rulings was conclusively in the plaintiffs' favor. As the bottom line of Table 1 shows, almost 60% of all the claim rulings were in the defendants' favor. However, in the converse, almost all of the remaining rulings were in the inconclusive outcome categories, with an half of them—amounting to 21% of all claim rulings—in the plaintiffs' favor.

Finally, upon converting the outcomes from a claim ruling to case basis, via the aforementioned best-for-plaintiff basis, the results were as follows for the 1 (conclusively for plaintiff parent) to 5 (conclusively for district defendants) basis:

1 - 2%; 2 - 37%; 3 - 2%, 4 - 18%; 5 - 41%

Comparing these figures to the distribution on the last row for Table 1 reveals a reduction in the proportion conclusively favoring districts from 41%, with the shift largely evident in the increase in the inconclusive outcomes in favor of parents from 21% to 37%.

Discussion

Although less than the corresponding figures of 61 cases with 458 claim rulings for restraints (Zirkel & Lyons, 2011), the overall finding of 51 cases with 225 claim rulings for time-out and seclusion represents considerable litigation with a similar, though less pronounced, trend by plaintiff-parents to "employ the spaghetti strategy of throwing everything against the wall and hoping something sticks" (Zirkel & Lyons, 2011, p. 346). The various claims that the plaintiff-parents raised and that the court adjudicated serve as the strands in the spaghetti-throwing analogy. This strategy, as further illustrated by challenges to the use of overlapping aversives, is typical of litigation on behalf of students with disabilities aimed primarily at money damages.

For example, in *Schafer v. Hicksville Union Free School District* (2011), the parents sought monetary liability by filing 15 separable claims; over half of which the court ruled conclusively in favor of defendants. Similarly, in *J.G. v. Card* (2009), parents pursued a total of 17 claims on behalf of themselves and the child against the local education agency (LEA), principal, and supervisors. Only 2 of these 17 claims received favorable rulings; and both rulings inconclusively favored the parents. Specifically, the court permitted the child to proceed in litigation against the principal pursuant to a §1983 claim coupled with the Fourteenth Amendment and a negligence claim.

The prevalence of emotional disturbance and autism among the plaintiff-students is not surprising in light of reports that schools struggle to identify appropriate interventions and behavior modification plans for student with challenging behaviors (e.g., Smith, Katsiyannis, & Ryan, 2011). These findings are also consistent more specifically with the companion study of the case law concerning restraints (Zirkel & Lyons, 2011) and more generally with the research documenting the higher incidence of litigation by parents of children with autism (Zirkel, 2011).

Categorization of cases across the time-out/seclusion continuum provides insight into the nature of aversive interventions that are likely to lead to or contribute to increasing litigation by parents of students with disabilities. One could reasonably expect plaintiff-parents to initiate the maximum number of claims on behalf of students who are subject to seclusion because this practice results in a high degree of isolation and separation of the child from peers. Yet, the factual patterns evince a slightly different result—with a fairly even distribution of claims falling into the seclusion (n=18) and exclusion timeout (n=17) categories. The middle category, seclusion time-out (n=13) included twice as many cases as the least restrictive category, inclusion time-out (n= 6). Thus, plaintiff-parents have not focused their litigation efforts solely

on the more restrictive level of the time-out/seclusion continuum. Finally, the low number of claims premised on inclusion time-out may indicate a greater acceptance by parents of this less restrictive category than of the other categories in the continuum.

The longitudinal trend, which Figure 2 displayed, is clearly in the direction of not only more litigation but—as the successive ratios reveal—increased use of the spaghetti strategy. The distribution pattern, as Table I shows, predominates in favor of federal claims, particularly under the Fourteenth Amendment's due process clause and the disability statutes—the IDEA and, paired together, Section 504/ADA. Yet, as the same table shows, the outcomes pattern is clearly in favor of district defendants, reflecting not only the continuing tradition of deference to school authorities but also the relatively—when compared with best practice—indifferent standards of our nation's congested courts. The combination of these two factors, for example, has yielded an uphill liability standard under Fourteenth Amendment substantive due process—similar to the corresponding standard for state claims of intentional infliction of emotional distress—of conduct so outrageous as to be conscience-shocking. Another example of the relatively high hurdle that parent plaintiffs must overcome is the deliberate indifference standard that the courts have developed for Section 504 and ADA liability claims. Consequently, the generally high liability standards negatively impact the likelihood of successful liability claims by parents, who generally bear the burden of proof as plaintiffs (e.g., *Schaffer v. Weast,* 2005).

The only conclusive claim ruling in favor of the parents was under the IDEA, which the courts have generally construed as only providing for remedies other than money damages, such as compensatory education services and tuition reimbursement. At the opposite end of the outcomes scale, the district defendants obtained conclusively favorable rulings for almost 60% and inconclusively favorable rulings in almost 25% of the IDEA claims. All five of the

inconclusive rulings in the defendants' favor were based on the parents' lack of exhaustion of available administrative remedies, typically by failing to file or complete a due process hearing and not fitting within one of the relatively narrow exceptions to this exhaustion defense (Wasserman, 2009).

More generally, as Table 1 also shows, a notable proportion of the claims rulings were in the intermediate—and within them almost entirely the inconclusive—outcome categories. The inconclusive rulings, for example, those where the court denied either party's motion for summary judgment (i.e., without a trial), were subject to further proceedings. In the absence of publication of subsequent proceedings, the possibilities were: (a) the plaintiffs abandoned or withdrew the claim; (b) the parties continued to an adjudicated, but unpublished outcome; or (c) the parties settled. The settlement alternative, thus providing the plaintiff with at least partial relief likely in the form of money, was especially, although not exclusively, likely for the 21% of the outcomes that were inconclusively in favor of the plaintiff. For example, other studies have found a notable extent of settlements in disability-related cases (Moss, Ullman, Swanson, Ranney, & Burris, 2005; Zirkel & Machin, 2012). And, the extensive involvement of insurers in school liability litigation contributes to the leverage for settlement.

Moreover, these intermediate rulings may help explain why the longitudinal trend of increasing litigation has not moderated at this point. However, the incomplete information of parents and their attorneys and the slow process of systemic adjustment are also likely contributing factors. After all, these rulings, especially but not exclusively those in the officially published decisions, cumulatively serve as precedents.

For policymakers as well as practitioners, the similarity of the results of this analysis with those of Lyons and Zirkel (2011) reinforces the treatment of seclusion in tandem with restraint as

part of a wider consideration of the aversive interventions continuum. The increasing frequency and, yet, district-favorable outcomes trend of the litigation suggest the need to consider not only the high transaction costs of lawsuits but also the wide latitude for professional discretion. State laws or federal legislation that restrict or prohibit such procedures are not likely to affect the outcome trend in the courts unless the legislature specifically provides a private right of action, i.e., an individual right to sue, as the mechanism for enforcement. Nevertheless, litigation and within it, liability suits, are only part of the guiding picture for practitioners.

Special education leaders should, as a matter of professional/ethical as well as legal/prophylactic considerations, to advocate and inculcate evidence-based behavioral intervention policies and practices for students with disabilities. One example at the school-wide level is Positive Behavioral Interventions and Supports (PBIS), an evidence-based practice that provides behavioral supports to help all children achieve both social and academic success in school (Bradshaw & Pas, 2011). The results appear to be promising, such as Horner et al. (2009) finding of a reduction in problem behavior following the implementation of PBIS's core features. At the individual level, functional behavioral analysis (FBA) is an example of an evidence-based practice that, usually in combination with a behavior intervention plan, has prophylactic promise (Fox & Davis, 2005).

Moreover, in the limited situations where the requisite IEP process determines that time-out or seclusion is appropriate and necessary, failure to adhere to the IEP may contribute to a court's favorable ruling on behalf of parents. For example, in *A.C. v. Independent School District No. 152* (2007), the IEP permitted the use of time-out, but the court denied the defendants' motion to dismiss their Fourteenth Amendment substantive due process claim because implementation of the time-out departed excessively from the IEP's specifications.

Thus, special education leaders are encouraged to provide effective training for the educators and administrators in regards to the IEP implementation. Furthermore, this training should address the importance of careful fidelity to the time-out or seclusion practices provided in the IEP. On the other hand, if parents consent to the use of a time-out room, as in *Robert H. v. Nixa R-2 School District* (1997), the court is unlikely to conclude that the FAPE provision is violated when the district demonstrates the reasonable and appropriate use of time-out.

Consistent with the advocacy efforts of disability rights organizations (CCBD, 2009), school leaders are encouraged to promote systematic efforts to reduce the use of aversive interventions, which may in turn, contribute to decreased litigation over these interventions. Such institutional changes are not without difficulty. For example, while recommending that schools adopt skill-based treatment programs focused on reducing the use of aversive interventions and the attendant risks of injuries or serious harm to students and staff alike, Ryan, Peterson, Tetreault, et al. (2007) identified the need for additional research to determine whether staff training in de-escalation techniques would diminish the use of aversive interventions.

Nevertheless, the litigation picture is now relatively clear. Despite the breadth and depth of plaintiff-parents' claims, defendants, including school districts, individual teachers, and administrators, prevailed on the majority of claims. The outcome of the case summarized at the outset of this article is representative of the prevailing judicial trend. More specifically, in *B.D. v. Puyallup School District* (2011), the court concluded that the use of the quiet room did not deny the child's right to a free appropriate public education (FAPE) under the IDEA; nor did it violate the Washington state law prohibition on aversive interventions.

Given the likelihood that school districts will continue to use aversive intervention practices such as time-out and seclusion, an increase of litigation both in frequency and

complexity is likely. School districts may also benefit from the adoption of state laws specific to time-out and seclusion, which include reporting and parental notification requirements as well as clear definitions of and guidelines regarding the use of aversive interventions such as time-out, seclusion, and restraint (Butler, 2012a). Additional research is needed to provide alternative practices of addressing challenging student behaviors. Likewise, future research efforts should examine due process hearing outcomes to determine the frequency as well as the nature of parental claims for monetary or equitable relief.

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