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BULLYING OF STUDENTS WITH DISABILITIES: AN EMPIRICAL ANALYSIS OF COURT CLAIM RULINGS ^{a1}

In recent years, educators, parents, and legislators have voiced significant concerns over the frequency of bullying in K-12 schools. Prompted by this outcry, state legislators have enacted anti-bullying statutes;¹ federal agencies have issued proactive policy guidance;² and Congress has provided funding incentives.³ Although these efforts to reduce bullying incidents are commendable, approximately one fifth of U.S. students in 2015 reported bullying victimization within the previous year,⁴ and students with disabilities represent a large proportion of the victims.⁵ As a result, the parents of the victims, prominently including those of students with disabilities, have increasingly resorted to litigation.⁶

A systematic analysis of the court decisions specific to student-plaintiffs with disabilities for the twenty-year period 1998-2017⁷ revealed that the *499 increase was particularly pronounced for claim rulings,⁸ a more precise unit of analysis than the case,⁹ and that the outcomes of these claim rulings were, on a three-category scale,¹⁰ skewed in favor of district defendants but with a significant proportion of inconclusive rulings.¹¹ However, although disaggregating the claim rulings by time interval and disability classification, this analysis did not extend to (1) disaggregation of the claim rulings in terms of their legal bases;¹² and (2) differentiation of the dispositional reasons¹³ within *500 the inconclusive outcomes category.¹⁴

The purpose of this article is to fill these two gaps in the scope of the springboard article.¹⁵ More specifically, as a follow-up for the previous bullying-disability case law analysis,¹⁶ the research questions are as follow:

1. What were the frequency and outcome distributions for the claim rulings disaggregated by legal basis?
2. Which dispositional reasons accounted for most of the inconclusive outcomes?

Method

The previous article¹⁷ provides a comprehensive review of the related literature review and detailed description of the study methods. For the sake of brevity in line with the Education Law Into Practice feature, we limit the coverage here to a summary of the method.

The scope consisted of “published” court decisions in the broad sense of being available in the Westlaw database for the twenty-year period from January 1, 1998, to December 31, 2017. The selection criteria consisted of this combination: (1) the bully and

the victim were K-12 public school students; (2) the bullying occurred on school property or at an off campus school-sponsored event; (3) the plaintiff was a student identified as having a disability (or the student's parents on his or her behalf); (4) the defendant was a school district and/or its individual employees; and (5) the facts fit within the generally accepted Olweus¹⁸ definition of bullying.

The first step was a Boolean search in the Westlaw database, within the designated starting and ending dates, via the alternate terms of “bullying,” “harassment,” “teasing,” or “hazing,” each in combination with the terms *501 “school,” “students,” and/or “peer.” The second step was screening according to aforementioned selection criteria, resulting in various exclusions, such as cases in which (a) the bullying behavior was tangential, rather than the focus, of any of the adjudicated claims;¹⁹ (b) the court's opinion lacked sufficient facts to determine alignment with the Olweus criteria or plaintiff disability status;²⁰ or (c) the act at issue was a physical or sexual assault, including rape, by a student peer that was neither the culmination of nor the stimulus for bullying behavior.²¹

The third step was coding the cases that met the selection criteria. For those cases subject to successive court decisions, the basis of the coding was the final decision for each bullying-related legal claim.²² Per the aforementioned²³ line of research, the unit of analysis was the claim ruling. The coding did not extend to claim rulings in the selected cases that were separable from the bullying behavior, such as defamation, or were targeted to additional defendants beyond those associated with public schools, such as a police officer or social services employee. The taxonomy of legal bases was a subject-specific customization of the template of previous analyses²⁴ and the outcome entry for each legal basis was the aforementioned²⁵ three-category scale.

The new feature for coding was a categorization of the dispositional reasons of the inconclusive claim rulings. Lacking any previous template, this categorization is only exploratory and tentative, subject to follow-up research. Each entry in the aforementioned²⁶ template represented the categorization of the nature (e.g., exhaustion) and effect (e.g., “remote” = granting of motion to dismiss for failure to exhaust, and “intermediate” = denying the motion to dismiss for failure to exhaust) of the dispositional reason for each inconclusive claim ruling. Moreover, for inconclusive claim rulings that had more than one dispositional reason (e.g., exhaustion and prima facie or liability elements),²⁷ we used the one that was the closest to the verdict.²⁸

Results

Research Question No. 1

*502 Table 1 presents the frequency and outcomes distribution of the 600²⁹ claim rulings within the 125³⁰ court decisions for 1998-2017. The legal bases with a frequency of at least five are listed in descending order of frequency for federal and state claims, respectively.

TABLE 1: FREQUENCY AND OUTCOMES OF CLAIM RULINGS PER LEGAL BASIS

		Outcomes Distribution		
	n	Conclusive for Student	Inconclusive	Conclusive for District

Federal Claim Rulings					
Section 504/ADA	160		1%	53%	46%
14 th Amendment Substantive Due Process	82		0%	24%	76%
14 th Amendment Equal Protection	57		0%	42%	58%
IDEA	49		2%	43%	55%
Title IX	30		0%	40%	60%
Title VI	7		0%	43%	57%
14th Amendment Procedural Due Process	6		0%	67%	33%
Total Federal (including Miscellaneous) ³¹	407		1%	41%	58%
State Claim Rulings					
Negligence	72		3%	57%	40%
Intentional Tort	33		0%	46%	54%
State Civil Rights Statute	26		0%	54%	46%
State Constitution	18		0%	11%	89%
Gross Negligence/Recklessness	15		0%	27%	73%
State Education Code	8		25%	63%	13%
State Anti-Bullying Statute	5		0%	60%	40%
Total State (including Miscellaneous) ³²	193		2%	47%	51%
TOTAL	600		1%	44%	55%

An examination of the frequencies in Table 1 reveals that the federal claim rulings predominated, led by Section 504/ADA, which accounted for 27% of all 600 claim rulings. Among the ten most numerous claim rulings, which each had an “n” of at least ten, those with the outcomes that were the least district-skewed were Section 504/ADA and negligence.³³

Research Question 2

Table 2 presents the distribution of the 261 inconclusive claim rulings³⁴ in terms of the aforementioned³⁵ exploratory taxonomy. The sequence is *503 descending frequency order within each of the two successive groups of dispositional reasons.

TABLE 2: DISPOSITIONAL REASONS FOR THE INCONCLUSIVE RULINGS

	n	Remote	Intermediate	Proximate
Relying on Adjudicative Technicalities ³⁶				
Exhaustion ³⁷	72	36	35	1
Federal Ct. Abstention of Supplemental State Claims ³⁸	42	40	2	0
Limitations Period ³⁹	3	0	2	1
Standing ⁴⁰	2	0	2	0
Jurisdiction ⁴¹	2	2	0	0
Notice Requirement ⁴²	2	2	0	0
Miscellaneous ⁴³	1	0	1	0
Addressing the Merits				
Applicable Elements ⁴⁴	111	31	52	28
Defenses ⁴⁵	26	0	10	16
Total Inconclusive Claims	261	111	104	46

*504 A review of the rows in Table 2 reveals that overall, the disposition of the inconclusive rulings was almost evenly split between technical adjudicative reasons (n=124) and those addressing the merits (n=137), and the elements of the merits analysis was the most frequent reason (n=111) followed by the application of the exhaustion doctrine (n=72). Examination of the columns shows a skew toward the remote side of the continuum, which accounted for 43% (n=111) of the inconclusive rulings, as compared with 18% (n=46) on the proximate side.⁴⁶

Discussion

Legal Bases

The predominance of federal claims followed the pattern in previous empirical case law analyses.⁴⁷ The likely reasons include (1) the generally *505 higher verdicts in federal courts,⁴⁸ which are the primary although not exclusive forum for federal claims⁴⁹ and which account for almost all of the bullying cases;⁵⁰ (2) the general barrier, albeit with varying scope or height, of governmental and official immunity for state claims;⁵¹ and, in light of the particular focus here, (3) the specialized disability-based federal legislation, particularly Section 504 and the ADA due to the availability of money damages.⁵² The leading position of Section 504/ADA claim rulings for frequency represents, in light of the previous research, not only an ascending trajectory overall but also an increased primacy in relation to IDEA rulings.⁵³

Within the federal claims, the leading position of Section 504/ADA for outcomes in terms of being least district-skewed is likely attributable to its disability-specific connection. The only other legal basis with this connection, the IDEA, reflects a similar but slightly less mitigating effect; its broader focus on free appropriate public education (FAPE) in comparison to the more specific application of Section 504/IDEA to peer harassment accounts for this difference. Nevertheless, the almost even split between Section 504/ADA rulings in the inconclusive (53%) and conclusively-for-district (46%) categories largely reflect the effects of the exhaustion doctrine⁵⁴ and the evidentiary standards⁵⁵ for successful Section 504/ADA claim rulings.

The corresponding leading position of negligence claim rulings for both frequency and outcomes seems to stem primarily from two overlapping attributes. First, establishing negligence has less rigorous evidentiary standards than applicable to Section 504/ADA, not requiring either a disability nexus or any form of intent, thus contributing to its relatively high frequency. Second, however, because most of the cases were in federal court,⁵⁶ the majority (59%) of the outcomes were inconclusive, largely attributable to the discretionary jurisdiction for supplemental state claims.⁵⁷

***506 Inconclusive Outcomes**

The relatively high proportion of inconclusive claim rulings both overall and for most of the legal bases⁵⁸ makes differentiation of this category worthwhile, particularly in light of the various outcomes studies that failed to take it into account.⁵⁹ Although some of the analyses that did duly address this category found relatively high proportions of inconclusive rulings,⁶⁰ particularly for students with disabilities,⁶¹ the only previous exploration was to trace the eventual outcome of these rulings in the bullying context.⁶² Here, instead, the exploration was differentiation within the inconclusive category, with tentative disaggregation of both the type and level of dispositional reasons. For type, the technical adjudicative reasons, led by application of the IDEA's exhaustion provision and the federal court treatment of supplemental state claims,⁶³ accounted for almost half of the final available dispositions. Their major role reflects the ponderous process of litigation that, in turn, is largely attributable to judicial congestion and proceduralization.⁶⁴ For level, the categorization was similarly only tentative in light of not only the lack of previous research but also the complexity of the courts' decision-making process. For example, the published decision is not only dependent on the parties' claims and motions but also the court's discretionary decisional path. For example, if the plaintiff included a claim under Section 504 and/or the ADA and the defendant filed a motion for dismissal based on the IDEA's *507 exhaustion provision, the applicable statute of limitations, and the intent-type liability standard under Section 504 and the ADA, the court could base its ruling on either of the two alternative technical adjudicative grounds or, using the *assuming arguendo* approach, resolve the matter based on the merits analysis of the liability standard. Moreover, the progress basis for the three-level continuum within the inconclusive category does not necessarily square with the winning-losing basis for the polar outcome categories on its respective sides, because (1) the ultimate other outcome of settlement depends on various factors, including not only the perceived odds of winning or losing but also the past and projected costs for reaching judicially decided closure; and (2) the so-called proximate level only puts the plaintiff closer to what still may be either a conclusive outcome for the defendant or a settlement that may not be particularly favorable to the plaintiff.

Finally, overall limitations for both the disaggregation across all rulings by legal basis and within the inconclusive rulings by dispositional reason include whether the court's decision is available in the Westlaw database⁶⁵ and whether within the database the availability was within the selected period for data collection.⁶⁶ Although this second limitation is less pervasive than the first one, within the few months after the end of our 1998-2017 timeframe, a few cases reached other outcomes in the database⁶⁷ and other relatively recent decisions are still subject to appeal.

Conclusion

This follow-up analysis of the case law concerning bullying of students with disabilities for a recent twenty-year period not only fills the gap with *508 regard to the frequency and outcomes of claim rulings by legal basis, which had the benefit of a previously developed template, but also extends to a previously empirically unexplored and practically significant area, the unpacking of the inconclusive outcomes category, which accounted for a substantial minority of the 600 claim rulings. Further research is warranted and welcome, including applying and refining this tentative template for (1) a larger sampling of the case law specific to bullying of students with disabilities to allow for differentiation of the inconclusive rulings within each legal basis; (2) case law samples for other frequent subjects of education litigation that have substantial proportions of inconclusive rulings, and (3) connecting this area of exploration with the emerging line of research that traces the ultimate outcomes for each of the differentiated levels of inconclusive rulings.⁶⁸ Such scholarship has the potential to increase the stakeholders' understanding and utilization of litigation for resolution of active areas of dispute in the education context.

Footnotes

- a1 *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 361 Ed. Law Rep. [498] (February 21, 2019).
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- 1 See, e.g., Maryellen Kueny & Perry A. Zirkel, *An Analysis of School Anti-Bullying Laws in the United States*, 43 MIDDLE SCH. J. 22 (Mar. 2012).
- 2 E.g., Dear Colleague Letter, 61 IDELR ¶ 263 (OCR 2016).
- 3 E.g., 20 U.S.C. § 7118(5)(C)(iii) (2016).
- 4 National Center for Educational Statistics, *Student Reports of Bullying: Results from the 2015 School Crime Supplement to the National Crime Victimization Survey* (2016), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2017015>
- 5 E.g., Jamila J. Blake, Emily M. Lund, Qiong Zhou, Oi-man Kwok, & Michael Benz, *National Prevalence Rates of Bullying Victimization Among Students with Disabilities in the United States*, 27 SCH. PSYCH. Q. 210 (2012); Chad M. Rose, Susan M. Swearer, & Dorothy L. Espelage, *Bullying and Students with Disabilities: The Untold Narrative*, 45 FOCUS ON EXCEPTIONAL CHILD 2 (2011).
- 6 E.g., Diane M. Holben & Perry A. Zirkel, *School Bullying Case Law: Frequency and Outcomes for School Level, Protected Status, and Bullying Actions*, 18 ETHICAL HUMAN PSYCH. & PSYCHIATRY 111 (2016).
- 7 Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of the Case Law*, 21 ETHICAL HUMAN PSYCH. & PSYCHIATRY (forthcoming 2019). Other analyses of the case law concerning bullying of students with disabilities were not empirical, and their coverage was far less extensive. E.g., Janet R. Decker & Suzanne E. Eckes, *Recent Litigation and Guidance Involving Bullying of Students with Disabilities*, in LEGAL FRONTIERS IN EDUCATION: COMPLEX LAW ISSUES FOR LEADERS, POLICYMAKERS AND POLICY IMPLEMENTERS 19 (Anthony P. Normore et al. eds. 2015); Kathleen Conn, *Guidance on Bullying of Students with Disabilities*, 297 Ed. Law Rep. 1 (2013); Cynthia A. Dieterich, Nicole Di-Rado Snyder, & Christine Villani, *Bullying Issues Impacting Students with Disabilities*, 2015 B.Y.U. EDUC. & L.J. 107; Charles J. Russo & Allan G. Osborne, *Bullying and Students with Disabilities: How Can We Keep Them Safe?*, 316 Ed. Law Rep. 1 (2015).
- 8 The trajectory was consistently upward for the cases but was particularly steep during the most recent interval for claim rulings, because the 5.2 ratio of claim rulings to cases was the highest among the four-year intervals. Holben & Zirkel, *supra* note 7.
- 9 The claim ruling here refers to the court's adjudication of each legal basis that the plaintiff advanced, such as 14th Amendment substantive due process or equal protection, Section 504/ADA or IDEA, or negligence, and the court adjudicated. For previous uses of this unit of analysis, see, e.g., Susan C. Bon & Perry A. Zirkel, *The Time-Out and Seclusion Continuum: A Systematic Analysis of Case Law*, 27 J. SPEC. EDUC. LEADERSHIP 1 (2014); Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An*

Empirical Analysis of the Case Law, 47 AKRON L. REV. 299 (2014); Perry A. Zirkel, *Bullying and Suicidal Behaviors: A Fatal Combination?* 42 J.L. & EDUC. 633 (2013); 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 (2011). To avoid over-fragmentation, the coding provided for conflation where the outcome was the same for individual and institutional defendants. *Id.*

10 The three categories were: conclusive for defendant, inconclusive, and conclusive for the plaintiff. For previous use of this three-category scale, see, e.g., Linda K. Mayger & Perry A. Zirkel, *Principals' Challenges to Adverse Employment Actions: An Empirical Analysis of the Case Law*, 98 NASSP BULL. 219 (2014); Mark A. Paige & Perry A. Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?*, 300 Ed. Law Rep. 1 (2014); Perry A. Zirkel, *The Use of Restraints with Students with Disabilities: An Updated Empirical Analysis of the Case Law*, 327 Ed. Law Rep. 1 (2016); Perry A. Zirkel & Richard Fossey, *Liability for Student Suicide: An Update of the Case Law*, 354 Ed. Law Rep. 628 (2018).

11 Specifically, the outcomes distribution for the 600 claim rulings was as follows: conclusively for district defendants-55%; inconclusive-44%; and conclusive for plaintiff students-1%. Holben & Zirkel, *supra* note 7. The “inconclusive” category consists largely of dismissals without prejudice and denials of motions for dismissal or summary judgment. *Id.*

12 Disaggregation here refers to the frequency and outcomes distribution per the legal basis categories. “Legal bases” in this context refers to a taxonomy similar to the categories in the analogous sources *supra* note 9:

- federal constitution: e.g., 14th Amendment substantive due process and equal protection
- federal legislation: e.g., Section 504/ADA
- state legislation: e.g., state civil rights act
- state common law: e.g., negligence

13 “Dispositional reasons” here refers to the following categorization of the courts' identification of the basis for the inconclusive ruling. Inasmuch as almost all of these rulings are in response to a motion for dismissal or for summary judgment, they fit into two categories: (1) those addressing threshold adjudicative technicalities, such as jurisdiction and statute of limitations, or (2) those addressing the merits, including the essential elements and the defenses. The controlling question was whether the court's final available ruling left the claim open for further judicial proceedings. Although not a bright line, we have drawn it to include, for example, (a) granting a dismissal motion based on failure to exhaust administrative remedies (because the plaintiff potentially could return to court after doing so) and (b) dismissing without prejudice based on either a federal court's discretionary declining to address state law claims (because the plaintiff could potentially bring them in state court) or contingent upon addressing missing elements within a very limited time (because the plaintiff had the opportunity to correct the deficiency). Conversely, we did not include in this broad category the possibility of appeal. As a tentative two-dimensional template (*see infra* Table 1), we identified the rows in terms of the aforementioned two categories and the columns in terms of the plaintiff's approximate adjudicative progress toward a verdict. The columns were in three successive categories in relation to the successive pretrial steps, including the various applicable hurdles raised at each step: remote (e.g., dismissal without prejudice contingent upon a very limited period for rectification and no subsequent ruling in the case), intermediate (e.g., denial of motion for dismissal based on the merits), and proximate (e.g., denial of defendant's motion for summary judgment). Finally, we based the determination on the final available ruling for the claim as of April 1, 2018 (due to any time lag in publication) after tracking the case forward via the History feature of Westlaw.

14 Although the numbers were too small to implement this exploratory differentiation within the various legal bases, it was feasible and meaningful to do so for the relatively pervasive substantial proportion of inconclusive rulings overall (*supra* note 11).

15 Holben & Zirkel, *supra* note 7.

16 *Id.*

17 *Id.*

18 Dan Olweus, *A Profile of Bullying at School*, 6 EDUC. LEADERSHIP 12 (2003) (defining bullying in terms of three essential criteria: (a) aggressive actions intending to harm another student, (b) repetition or a high probability of repetition of these actions over time, and (c) imbalance of power rendering the victim unable to effectively establish a defense against the aggression).

19 *E.g.*, *G.L. v. Ligonier Valley Sch. Dist. Authority*, 802 F.3d 601, 322 Ed. Law Rep. 633 (3d Cir. 2015).

20 *E.g.*, *Tawes v. Bd. of Educ. of Somerset Cnty.*, 2017 WL 6313945 (D. Md. 2017).

- 21 *E.g., Lockhart v. Willingboro High Sch.*, 170 F. Supp. 3d 722, 335 Ed.Law Rep. 220 (D.N.J. 2015).
- 22 Thus, we excluded court decisions that were limited to issues before or after the final ruling, such as admission of evidence and award of attorneys' fees.
- 23 *See supra* note 9.
- 24 *Id.*
- 25 *See supra* note 10.
- 26 *See supra* note 13.
- 27 *E.g., R.P. ex rel. K.P. v. Springdale Sch. Dist.*, 2007 WL 552117 (W.D. Ark. 2007) (denying dismissal motion for Section 504/ADA claim against district, finding exhaustion inapplicable and proceeding to finding the allegations sufficient for liability standard).
- 28 Although the verdict would not necessarily be in the plaintiff's favor, hurdling the various previous stages had the screening effect of putting the plaintiff in the most favorable position in terms of relative odds of success via settlement or verdict. Although not an ordinal scale, the three categories proceed from the conclusive-for-district in the direction of the conclusive-for-parent direction, thus providing the overall framework for the left-to-right sequence of the remote-to-proximate continuum within the inconclusive outcome category.
- 29 *See supra* notes 7 and 11.
- 30 Of these, 94% were federal court decisions, and only 6% were state court decisions.
- 31 An unlisted 16 claim rulings fit in a broad Miscellaneous category, with each of its subcategories (e.g., 1st Amendment retaliation and Section 1985/1986 conspiracy) accounting for less than five claim rulings. Presenting their outcomes distribution either together or separately was not meaningful due to the limited numbers and wide variety, respectively.
- 32 This subtotal includes 12 claim rulings that fit in a broad Miscellaneous category that for the same reasons (*id.*) did not merit a separate row in this table. These claim rulings were either of negligible frequency, such as breach of contract, or too generic, such as referring to "tort claims" or "state law claims," to constitute a sufficiently frequent subcategory.
- 33 In light of the negligible proportions of plaintiff-conclusive outcomes for all of the claim rulings, the swing factor for these two categories was their high and majority proportion (57% for negligence and 53% for Section 504/ADA) of inconclusive rulings.
- 34 *See supra* note 11
- 35 *See supra* note 13 and text accompanying notes 26-28.
- 36 Most of these procedural dispositions are at the threshold level, although the federal court's jurisdiction for supplemental state claims typically comes toward the end of the court's opinion, because it is typically conditional on the disposition of the federal claims.
- 37 This disposition is specific to the IDEA requirement to exhaust administrative remedies prior to litigation of claims. 20 U.S.C. § 1415(l) (2016). Respectively illustrating the three successive categories of remote, intermediate, and proximate, see *G.M. v. Massapequa Union Free Sch. Dist.*, 2015 WL 4069201 (E.D.N.Y. 2015) (granting motion to dismiss the Section 504/ADA claim for failure to exhaust the IDEA's administrative remedies); *Timothy D. v. Titusville Area Sch. Dist.*, 159 F. Supp. 2d 857, 156 Ed.Law Rep. 944 (W.D. Pa. 2001) (granting parents' motion to amend complaint so as not to require exhaustion); *C.M. v. Indep. Sch. Dist. of Boise City No. 1*, 2016 WL 4582047 (D. Idaho 2016) (denying defendants' summary judgment motion, concluding that the plaintiffs had met the exhaustion requirement for their Section 504/ADA claim).
- 38 This disposition is specific to federal court's discretionary treatment of state claims upon dismissing the federal claims. 28 U.S.C. § 1367(c). Illustrating the respective entries for the remote and intermediate levels, see *Doe v. Grosch*, 2017 WL 3970515 (N.D. Ill. 2017) (granting dismissal of supplemental state claims for possible litigation in state court); *Smith v. Guilford Bd. of Educ.*, 226 F. App'x 58 (2d Cir. 2007) (remanding to reinstate state law claims conditional on whether the lower court reverses its dismissal of the IDEA claim upon required reconsideration).

- 39 This disposition is specific to statute of limitations requirements applicable to the particular claim. *E.g.*, *Walden v. Moffett*, 2006 WL 2520291 (E.D. Cal. 2006) (denying dismissal of parents' 14th Amendment substantive due process claim on behalf of their child, finding it to have been timely filed).
- 40 This disposition is specific to whether the plaintiff has the requisite status to file a lawsuit for the applicable claim. The entries are all denials of dismissal motions, fitting in the intermediate category. *E.g.*, *Hector F. v. El Centro Elem. Sch. Dist.*, 227 Cal. App. 4th 331, 305 Ed.Law Rep. 957 (Ct. App. 2014) (denied dismissal, concluding on appeal that the parent had standing for enforcement of the state's anti-bullying law based on the public interest).
- 41 This disposition is specific to determination of whether the plaintiffs meet the court's subject matter standards. *E.g.*, *Moore v. Kansas City Pub. Sch.*, 828 F.3d 687, 334 Ed.Law Rep. 55 (8th Cir. 2016) (remanding the negligence-based claim back to state court for failure to meet the federal court's subject matter jurisdiction for removal).
- 42 This disposition only applies to state tort claims. Both of the rulings for this entry were dismissals without prejudice for the limited opportunity for rectification. *E.g.*, *Sutherlin v. Indep. Sch. Dist. No. 40 of Nowata Cty.*, 960 F. Supp. 2d 1254, 301 Ed.Law Rep. 379 (N.D. Okla. 2013) (dismissing the negligence claim for failure to meet state law notice requirements but with opportunity to amend the complaint to show compliance).
- 43 This disposition is limited to the only singleton, which was for a relatively non-general reason. *Doe v. Cty. of New Bedford*, 2015 WL 13229204 (D. Mass. 2015) (finding that a previous settlement agreement did not bar the plaintiff's Section 504/ADA claims).
- 44 This disposition is specific to whether the claim established the elements for a prima facie case and /or the liability standard for the particular claim. Respectively illustrating the three levels of remote, intermediate, and proximate, see *Hoffman v. Saginaw Pub. Sch.*, 2012 WL 2450805 (E.D. Mich. 2012) (granting defendant's motion to dismiss Section 504/ADA and Title IX claims without prejudice conditional upon rectification in a narrow period); *Lewis v. Blue Springs Sch. Dist.*, 2017 WL 5011893 (W.D. Mo. 2017) (denying dismissal of state breach of contract claim, finding that the allegations sufficiently met the essential elements); *Wormuth v. Lammersville Union Sch. Dist.*, 2017 WL 6344453 (E.D. Cal. 2017) (denying defendant's motion for summary judgment for Section 504/ADA reasonable-accommodation claim, finding triable issue on both elements).
- 45 This disposition is specific to rulings based on defendants' assertion of various immunity defenses. *E.g.*, *R.S. ex rel. Smith v. Starkville Sch. Dist.*, 2013 WL 5295685 (N.D. Miss. 2013) (denying dismissal of some of plaintiffs' tort claims, finding them to be outside the scope of the state's governmental and official immunity); *Doe v. Torrington Bd. of Educ.*, 2017 WL 3392734 (D. Conn. 2017) (denying dismissal of negligence claim, finding the allegations sufficed for the exceptions for governmental and official immunity under state law); *K.M. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005) (denying defendants' motion for summary judgment of Section 504/ADA qualified immunity defense in the context of Section 1983 liability); *J.R. v. New York Cty. Dept. of Educ.*, 2015 WL 5007918 (E.D.N.Y. 2015) (denying dismissal of substantive due process claim based on *Monell* liability, finding sufficient facts to support a custom or policy of ignoring peer-on-peer harassment).
- 46 Most of the claim rulings that showed remote progress were attributable to exhaustion (n=36), supplemental jurisdiction (n=40), and dismissals without prejudice often with little prospect for correction (n=31).
- 47 *See supra* note 9.
- 48 *E.g.*, Thomas H. Cohen, Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts (2006), available at SSRN: <https://ssrn.com/abstract=912691> or <http://dx.doi.org/10.2139/ssrn.912691>
- 49 *E.g.*, H. Redish & John Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976).
- 50 *See supra* note 30.
- 51 *E.g.*, Peter Maher, Kelly Price, & Perry A. Zirkel, *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?* 19 KANS. J.L. & PUB. POL'Y 234 (2010).
- 52 *E.g.*, Perry A. Zirkel, *Are School Employees Liable for Money Damages under the IDEA or Section 504/ADA?*, BYU EDUC. & L.J. (forthcoming 2019).

- 53 Holben & Zirkel *supra* note 9, found 38 Section 504/ADA rulings and 27 IDEA rulings for bullying cases during 1992-2011, representing a ratio of 1.4. Here, the corresponding n's of 162 and 48 for the overlapping period of 1998-2017 reflected a more rapid rise under Section 504/ADA, resulting in a ratio of 3.4.
- 54 *E.g.*, Peter 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 (2011) (showing the blurred boundaries in applying the IDEA exhaustion provision to students in the overlapping but wider coverage area of Section 504/ADA).
- 55 *E.g.*, Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?* 47 J.L. & EDUC. 109 (2018) (showing the difficult hurdles for successful claim rulings against school districts under Section 504 and the ADA, including not only the prima facie elements, such as causation, but the liability standard).
- 56 *See supra* note 30.
- 57 *See supra* note 38 and accompanying text. For the fewer cases in which the negligence ruling reached the defense issue, governmental and official immunity was a notable contributing factor to not only the inconclusive but also the conclusive-for-district category (40%). *See supra* note 45.
- 58 The exceptions for rulings based on 14th Amendment substantive due process and the state constitution were attributable to their overwhelmingly skewing effect of their established district-favorable standards.
- 59 Perry A. Zirkel & Diane M. Holben, *Spelunking in the Litigation Iceberg: Exploring the Ultimate Outcomes of Inconclusive Rulings*, 46 J.L. & EDUC. 195, 196-97 nn.4-7 (2017) (identifying various outcome analyses that failed to differentiate any or at least a sufficiently defined inconclusive category). One contributing factor is the use of the case or decision, rather than a component category, such as issue or claim ruling, as the unit of analysis. However, even for analyses that used a more precise unit of analysis, the conflation to the more customary conception warrants special care. *E.g.*, Perry A. Zirkel & Cathy A. 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, 547-48 (2014) (formulating and applying an alternative to the best-for-plaintiff conflation approach).
- 60 *E.g.*, Holben & Zirkel, *supra* note 6 (32% for bullying generally); Perry A. Zirkel & Richard Fossey, *Liability for Student Suicide: An Update of the Case Law*, 354 Ed.Law Rep. 628 (2018) (44% for student suicide but on a best-for-plaintiff conflation approach).
- 61 *E.g.*, Holben & Zirkel, *supra* note 7 (44% for bullying of students with disabilities); Zirkel & Lyons, *supra* note 9 (40% for restraints of students with disabilities); Bon & Zirkel, *supra* note 9 (44% for time-out/seclusion of students with disabilities).
- 62 Zirkel & Holben, *supra* note 59, at 209 (finding that the ultimate outcome in most of the inconclusive claim rulings was settlement-61%, withdrawal/abandonment-20%, or conclusive for defendant-11%, although 6% were not known).
- 63 *See supra* notes 54-55 and accompanying text.
- 64 *E.g.*, John G. Farrell, *Administrative Alternatives to Judicial Congestion*, 27 J. NAT'L ADMIN. L. JUDICIARY 1, 3-4 (2006) (citing the increased congestion in federal and state courts, resulting in the predominant use of pretrial dispositions, such as dismissals and summary judgments).
- 65 Although much more extensive than the traditional print volumes, this electronic database does not include bench decisions or many other rather routine dispositional rulings, particularly for lower state courts.
- 66 *See supra* note 11 (allocating an additional period until April 1, 2018 for any time lag in publication).
- 67 *E.g.*, *Eskenazi-McGibney v. Connetquot Cent. Sch. Dist.*, 2018 WL 6519330 (N.Y. App. Div. 2018) (changing previous remote-level for state law claims to conclusive for defendant for the state anti-bullying statute claim and intermediate-inconclusive for the negligence claim); *Sauers v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 2018 WL 1627160 (M.D.N.C. 2018) (changing previous negligent infliction of emotional distress ruling from intermediate-inconclusive to conclusive for defendant); *Doe v. Cty. of Bedford*, 2018 WL 1524399 (D. Mass. 2018) (changing Section 504/ADA ruling from previous remote-level within inconclusive to conclusive for defendant); *Lewis v. Blue Springs Sch. Dist.*, 2018 WL 1126751 (W.D. Mo. 2018) (approving settlement of previously intermediate-level inconclusive rulings for Section 504/ADA and 14th Amendment substantive due process claims); *Bowe v. Eau*

Claire Area Sch. Dist., 2018 WL 791416 (W.D. Wis. 2018) (changing previous intermediate-level inconclusive rulings for 14th Amendment equal protection, Section 504/ADA, and Title IX to conclusive for district); *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 327 F. Supp. 3d 477, 358 Ed.Law Rep. 945 (N.D.N.Y. 2018) (changing previous intermediate-level inconclusive rulings for 14th Amendment equal protection, Section 504/ADA, and Title IX to conclusive for district). Conversely, some of the post-period decisions merely confirmed the prior rulings. *E.g.*, *Porco v. Lewis Palmer Sch. Dist. No. 38*, 728 F. App'x 835, 356 Ed.Law Rep. 80 (10th Cir. 2018) (affirming the district court's dismissal of the IDEA and Section 504/ADA claims for lack of exhaustion); *Barnwell v. Watson*, 880 F.3d 998 (8th Cir. 2018) (affirming the lower court's granting of summary judgment to the superintendent for all claims); *Cormier v. Cty. of Lynn*, 91 N.E.3d 662, 352 Ed.Law Rep. 296 (Mass. 2018) (affirming the lower court's dismissal of state tort claims based on sovereign immunity).

68 Zirkel & Holben, *supra* note 59.

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