

# Bullying Litigation: An Empirical Analysis of the Dispositional Intersection Between Inconclusive Rulings and Ultimate Outcomes

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## I. INTRODUCTION

The news reports of bullying are frequent and frightening. A 12-year-old girl takes her own life after relentless bullying by classmates, which culminated in one student asking her in public when she was going to kill herself.<sup>1</sup> Another 13-year-old victim dies by suicide after months of relentless bullying on the school bus concerning his weight and

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<sup>1</sup> *School Accused of Doing Nothing to Stop Bullying of Girl Who Took Her Life*, CBS: NEWS (Jun. 21, 2018), <https://www.cbsnews.com/news/mallory-grossman-death-parents-bullied-girl-sue-new-jersey-school-district-after-suicide-copeland-middle-school/>.

appearance.<sup>2</sup> For yet another victim, cyber-bullying continues even after he enrolls in a new school to escape his tormentors.<sup>3</sup> These examples, coupled with student survey data self-reporting an annual bullying victimization rate of approximately one fifth of U.S. students aged 12–18,<sup>4</sup> highlight the serious effects of bullying victimization.<sup>5</sup>

In response, legislators in all fifty states have enacted anti-bullying statutes that primarily provide reporting, investigation, and policy requirements for school districts.<sup>6</sup> Additionally, federal agencies have issued proactive policy guidance under relevant civil rights laws.<sup>7</sup> Finally, Congress has provided funding incentives for school district anti-bullying prevention efforts through the Every Student Succeeds Act.<sup>8</sup>

Despite these efforts, an increasing number of victims and their families look to the courts to address harm caused by peer-to-peer bullying. Illustrating this trend, a previous systematic analysis of court decisions specific to bullying victimization revealed increases in the frequency of both cases and claim rulings,<sup>9</sup> which is a more precise unit of analysis than

<sup>2</sup> Stephen Sorace, *Michigan Boy, 13, Kills Himself After Being Bullied on School Bus, Mom Says*, FOX NEWS: US (Feb. 6, 2019), <https://www.foxnews.com/us/michigan-boy-13-kills-himself-after-being-bullied-on-school-bus-report>.

<sup>3</sup> Erica Breunlin, *Bullying Forced Student to Leave Farragut High; Parents Say Knox County Schools Did Nothing to Help Him*, KNOXVILLE NEWS SENTINEL: EDUC. (Nov. 29, 2018), <https://www.knoxnews.com/story/news/education/2018/11/29/bullying-knox-county-schools-farragut-high-student/1920550002/>.

<sup>4</sup> INST. FOR EDUC. SCI., NAT'L CTR. FOR EDUC. STAT., STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2015 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY T1.1 (2016), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2017015>.

<sup>5</sup> Common effects of prolonged bullying victimization include chronic absenteeism, mental health concerns such as depression and anxiety, and suicidal ideation. *See, e.g.*, Sandra Graham, *Victims of Bullying in Schools*, 55 THEORY INTO PRACTICE 136, 137–38 (2016); Erin Grinshteyn & Tony Yang, *The Association Between Electronic Bullying and School Absenteeism Among High School Students in the United States*, 87 J. SCH. HEALTH 142 (2017).

<sup>6</sup> The Department of Health and Human Services maintains a website that provides access to all fifty states' anti-bullying statutes and summarizes their key components. *Laws, Policies & Regulations*, STOPBULLYING.GOV, <https://www.stopbullying.gov/laws/index.html> (last visited Apr. 19, 2020). For a comparative analysis of state anti-bullying statutes, *see* Maryellen Kueny & Perry A. Zirkel, *An Analysis of School Anti-Bullying Laws in the United States*, 43 MIDDLE SCH. J. 22 (Mar. 2012).

<sup>7</sup> *See, e.g.*, CATHERINE E. LHAMON, ASSISTANT SEC'Y FOR CIVIL RIGHTS, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: RESTRAINT & SECLUSION OF STUDENTS WITH DISABILITIES (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/oct/letters/colleague-201612-504-restraint-seclusion-ps.pdf>.

<sup>8</sup> 20 U.S.C. § 7118(5)(C)(iii) (2018).

<sup>9</sup> Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical*

the case,<sup>10</sup> across the twenty-year time period from 1992 to 2011.<sup>11</sup> “Claim ruling” refers to the court’s adjudication of each legal basis that the plaintiff advanced, such as Fourteenth Amendment substantive due process or equal protection, Section 504/ADA or IDEA, or negligence, with the added refinement of separation when the outcomes differed between the two defendant categories—institutional or individual. The outcomes of these claim rulings were analyzed using a five-category scale (conclusive for defendant, inconclusive for defendant, split, inconclusive for plaintiff, and conclusive for plaintiff)<sup>12</sup> with the skew in favor of district defendants but including a significant proportion of inconclusive rulings.<sup>13</sup> Because cases with at least one inconclusive claim ruling proceed, an aggregate outcomes frequency that includes all claim rulings can be a misleading indicator of plaintiff success. For example, a case may incorporate five separate claims. If just one claim ruling is inconclusive and the other four are conclusive for the defendant, the case will proceed based upon the single inconclusive

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*Analysis of the Case Law*, 47 AKRON L. REV. 299, 313 (2014) [hereinafter *School Bullying Litigation*]. More specifically, for the twenty-year time period from January 1, 1992 to December 31, 2011 the trajectory was consistently upward for the cases but was particularly steep during the most recent four-year interval for claim rulings, with 2008–2011 accounting for just over a third of the cases and claim rulings. *Id.*

<sup>10</sup> *Id.* at 309 nn.72–73. For previous uses of this unit of analysis, see, for example, 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); *School Bullying Litigation*, *supra* note 9; 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).

<sup>11</sup> *School Bullying Litigation*, *supra* note 9, at 313.

<sup>12</sup> *Id.* at 311. For previous use of this five-category scale, see, for example, Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 367–68 (2008).

<sup>13</sup> *School Bullying Litigation*, *supra* note 9, at 314. Specifically, the outcomes distribution for the 742 claim rulings was as follows: conclusively for district defendants – 62%; inconclusive for the defendant – 10%; split ruling – 5%; inconclusive for the plaintiff – 21%; and conclusive for plaintiff students – 2%. The inconclusive for defendant category consisted largely of dismissals without prejudice. Similarly, the inconclusive for plaintiff category consisted largely of denials of motions for dismissal or summary judgment. *Id.* at 324 n.140. Rulings considered as inconclusive included, 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 as inconclusive the possibility of appeal.

ruling. When converted to a best-for-plaintiff basis,<sup>14</sup> an approach that uses the most plaintiff-favorable claim ruling in the case as the outcome for this overall unit of analysis, the outcomes distribution displayed a more pro-plaintiff skew, with a higher frequency of inconclusive rulings and a proportionally lower frequency of rulings conclusive for district defendants.<sup>15</sup> Consequently, these results supported the use of the “spaghetti strategy,”<sup>16</sup> where plaintiffs file multiple claims to increase the odds of at least one claim moving forward, thus increasing the likelihood of a settlement or favorable verdict.

Illustrating the tradeoff of the spaghetti litigation strategy, a follow-up analysis of bullying cases revealed that both parent plaintiffs and school district defendants invest significant time<sup>17</sup> and expense<sup>18</sup> in the litigation process. Additionally, because these best-for-plaintiff inconclusive rulings are for largely pretrial motions,<sup>19</sup> they only represent progress toward a final disposition, not the ultimate outcome of the case.<sup>20</sup> The ultimate outcome is the final disposition of the case, resolving all outstanding claims other than attorneys’ fees. The various categories of the final disposition are conclusive decision for plaintiff or defendant, settlement, and

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<sup>14</sup> Zirkel & Lyons, *supra* note 10, at 344.

<sup>15</sup> *School Bullying Litigation*, *supra* note 9, at 320. The outcomes distribution, on a best-for-plaintiff basis representing the 166 cases, was as follows: conclusively for district defendants – 41%; inconclusive for the defendant – 15%; split ruling – 5%; inconclusive for the plaintiff – 34%; and conclusive for the plaintiff – 5%. For similar patterns using a simplified three-point outcomes scale conflating the three inconclusive outcomes categories, see Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of the Case Law*, 20 ETHICAL HUM. PSYCHOL. & PSYCHIATRY 133 (2018) [hereinafter *Bullying of Students with Disabilities*], and Diane M. Holben & Perry A. Zirkel, *School Bullying Case Law: Frequency and Outcomes for School Level, Protected Status, and Bullying Actions*, 18 ETHICAL HUMAN PSYCHOL. & PSYCHIATRY 111 (2016) [hereinafter Holben & Zirkel (2016)], and *infra* text accompanying note 39.

<sup>16</sup> Zirkel & Lyons, *supra* note 10, at 346.

<sup>17</sup> On average, parties litigated bullying cases for 2.01 years prior to the most recent inconclusive claim ruling and an additional 0.77 years after the ruling until final disposition for a total of just under three years of litigation. Perry A. Zirkel & Diane M. Holben, *Spelunking in the Litigation Iceberg: Exploring the Ultimate Outcomes of Inconclusive Rulings*, 46 J.L. & EDUC. 195, 210 (2017).

<sup>18</sup> Although ascertaining the total cost of litigation for each was difficult, the publicly available settlements with monetary compensation for this sample of cases ranged from \$4,250 to \$4,800,000. *Id.* at 212 n.96. For some of the cases with settlement agreements that specified the allocation for attorneys’ fees, this amount exceeded the net payment to the plaintiff students. *Id.*

<sup>19</sup> Most commonly, court opinions for pretrial motions available in electronic subscription databases, such as Westlaw or LexisNexis, address either of the successive motions for dismissal or summary judgment.

<sup>20</sup> Zirkel & Holben, *supra* note 17, at 198 and 206.

abandonment or withdrawal. To explore the possible relationship between inconclusive rulings and plaintiff-favorable ultimate outcomes, a subsequent analysis traced the ultimate outcome of each case within an updated twenty-year time period, finding that approximately two-thirds of the best-for-plaintiff inconclusive claim rulings resulted in a settlement.<sup>21</sup> However, this analysis did not examine whether the ultimate outcomes frequency varied according to specific factors in the courts' disposition of these inconclusive rulings.<sup>22</sup>

As the next step in this exploration of the inconclusive claim rulings and their possible relationship to ultimate outcomes, a recent analysis of those bullying cases specific to plaintiff students with disabilities for the period 1998–2017 provided a tentative taxonomy of the dispositional factors for these inconclusive claim rulings.<sup>23</sup> More specifically, this taxonomy consisted of two factors. The first factor is the court's identified reason or "gravamen,"<sup>24</sup> for the rulings within two subcategories—(a) threshold adjudicative prerequisites, such as jurisdiction, exhaustion, and statute of limitations, and (b) the merits, divided into essential elements of and defenses to the claim. The second factor is the plaintiff's approximate adjudicative progress toward a verdict within three successive levels in relation to the successive pretrial steps—(a) remote (e.g., dismissal without prejudice contingent upon a very limited period for rectification and no subsequent ruling in the case); (b) intermediate (e.g., denial of motion for dismissal based on the merits), and (c) proximate (e.g., denial of defendant's motion for summary judgment).<sup>25</sup> The results for this

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<sup>21</sup> The categories of the ultimate outcome and the percentages for each one among the 352 bullying claim rulings were as follows: conclusive for plaintiff (via subsequent court decision) – 1%; settlement – 61%; withdrawal/abandonment – 20%; conclusive for defendant (via subsequent court decision) – 11%; and unknown – 6%. *Id.* at 210. The settlement rate is closer to the two-thirds approximation upon omitting the unknown dispositions.

<sup>22</sup> For an initial identification of these factors, see Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of Court Claim Rulings*, 361 EDUC. L. REP. 498, 499 n.13 (2019) [hereinafter *Bullying of Students with Disabilities: An Empirical Analysis*].

<sup>23</sup> *Id.*

<sup>24</sup> In a recent decision in the education context, the Supreme Court explained that "gravamen" is "legal-speak" for the crux, or fulcrum. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017). However, there the referent was the plaintiff's claim, whereas here the referent is the court's ruling.

<sup>25</sup> *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22, at 499 n.13. For inconclusive claim rulings yielding more than one identified disposition, we used the one closest to a verdict. For this purpose, we used the latest documented disposition as of September 1, 2019 available in the Westlaw History feature (allowing for any lag in publication), the PACER or state electronic database dockets. These dispositions ranged

exploratory analysis were approximately evenly split between the threshold prerequisites and the merits, with those based on threshold prerequisites skewed toward the more defendant-favorable progress level whereas those based on the merits were skewed toward the more plaintiff-favorable intermediate and proximate progress levels.<sup>26</sup>

However, this most recent exploration did not extend to the larger pool of bullying cases and to the disaggregation of claim rulings within the inconclusive outcomes category. The purpose of this article is to address gaps via a refined typology to explore the dispositional factors, specifically the overall bases and progress levels, for the inconclusive rulings and their interactions with the ultimate outcome for the rulings.

## II. FRAMEWORK

Contrary to public perception, judicial outcomes in education<sup>27</sup> and other contexts<sup>28</sup> extend beyond the corresponding limited empirical categorization of winning or losing a case.<sup>29</sup> Similar to an iceberg,<sup>30</sup> many layers lie below the surface of a published<sup>31</sup> court decision or verdict,

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from a combination of the reason category of threshold prerequisites and a progress level of remote at the farthest end to a combination of the reason category of merits and the progress level of proximate on the closest end.

<sup>26</sup> *Id.* at 503.

<sup>27</sup> *E.g.*, Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483 (2012) (using a seven-category outcomes scale for special education cases not only reported in Westlaw but also "below the surface," i.e., only available in the PACER system).

<sup>28</sup> *E.g.*, Robert A. Mead, "Unpublished" Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals, 93 L. LIBR. J. 589 (2001); Peter Siegelman & John Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990) (analyses comparing outcomes of private sector cases above and below the surface of official publication).

<sup>29</sup> *E.g.*, Richard Arum & Irene R. Beattie, *How Judges Rule*, in RICHARD ARUM, JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY 88 (2003) (pro-district and pro-student based on unclear statistical explanation); Elwood M. Clayton & Gene S. Jacobsen, *An Analysis of Court Cases Concerned with Student Rights 1960–1971*, 58 NASSP BULL. 49 (1974) (student won or student lost without explanation); MELINDA MALONEY & BRIAN SHENKER, *THE CONTINUING EVOLUTION OF SPECIAL EDUCATION LAW 1980 TO 1995* (LRP Publications 1995) (parents won and schools won without explanation).

<sup>30</sup> Zirkel & Machin, *supra* note 27.

<sup>31</sup> "Published" here refers to decisions appearing in the primary legal databases, whether appearing in an official reporter series or not. For the differences, see, for example, Ellen Platt, *Unpublished vs. Unreported: What's the Difference*, 5 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 26 (1996) (discussing the respective criteria for the courts' designation of officially published opinions and the electronic databases' selection among

resulting in a more nuanced outcomes categorization that includes and differentiates between inconclusive rulings. Often, the ultimate outcome of a legal claim is an unpublished order or docket entry that documents a subsequent disposition, with the access via the Westlaw or LexisNexis legal research databases limited by the comprehensiveness of the user's subscription.<sup>32</sup> The Public Access to Court Electronic Records (PACER), provides expanded access to federal court case documents for a per page fee, but lacks the keyword search tools present in commercial databases.

A continuing line of research within the K–12 education context has led to more refined and in-depth outcomes analysis via three successive steps: (a) identifying the claim ruling unit of analysis; (b) using an outcomes scale that includes categorization of inconclusive rulings; and, most recently, (c) initiating the exploration of the dispositional factors for the inconclusive rulings. Canvassing the line of research for these successive steps provides a foundation for a more fine-grained analysis of the dispositional factors for the inconclusive claim rulings on a best-for-plaintiff basis,<sup>33</sup> the ultimate outcomes of the case, and their intersection.

### *Inconclusive Claim Rulings*

The claim ruling is a more precise and practicable unit of empirical analysis of litigation outcomes than the case, consisting primarily of the legal basis of the claim, and, secondarily upon different outcomes, the type of defendant. For the limited foundational research, the categorization of legal bases was within two broad groupings—state and federal. For bullying-related litigation, the federal legal bases predominated, with the most common ones being Title IX, Fourteenth Amendment substantive due process, and Fourteenth Amendment equal protection.<sup>34</sup> Within the less

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the remaining opinions).

<sup>32</sup> David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 691-693 (2007) (noting the incomplete collection of orders and opinions in both the Westlaw and LexisNexis databases, as compared to court document availability through electronic docketing databases); Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 480 (2004) (noting the wide discretion of judges in determining which orders and opinions to submit for inclusion in the Westlaw and LexisNexis databases).

<sup>33</sup> Zirkel & Lyons, *supra* note 10, at 344.

<sup>34</sup> *School Bullying Litigation*, *supra* note 9, at 316 (finding that the federal legal bases accounted for 485 of the 742 claim rulings for the time period 1992–2011, with the top three by far being Title IX (n=118), Fourteenth Amendment substantive due process (n=112), and Fourteenth Amendment equal protection (n=111)).

frequent state group, the most common legal bases were negligence, intentional torts, and state civil rights laws.<sup>35</sup>

Successive subsequent analyses of the claim rulings found a pronounced skew toward defendant-favorable outcomes moderated by a significant segment of inconclusive outcomes, both on the original five-category basis and on a subsequent customized three-category basis.<sup>36</sup> Moreover, disaggregated analysis revealed higher proportions of inconclusive rulings for some federal and state legal bases, suggesting that inconclusive rulings may differ due to factors such as (a) the ability to demonstrate specific elements of a prima facie case for federal claims; (b) failure to meet threshold requirements for pursuing a claim, such as statute of limitations or standing requirements; or (c) the reluctance of federal courts, upon rejection of all federal claims, to retain their discretionary supplemental jurisdiction of state claims. More specifically, several previous analyses noted frequencies of inconclusive claim rulings exceeding forty percent for federal claims under Title IX, IDEA, and 504/ADA, and for state claims of negligence, intentional tort, and state civil rights law claims.<sup>37</sup>

Additionally, court decisions resulting in one or more inconclusive claim rulings provide plaintiffs with increased leverage for a favorable ultimate outcome either via settlement or verdict. Plaintiff's inconclusive success at the pretrial stages implicate two of the contributing factors to settlement—probabilities of conclusive success and the extent of transaction costs. However, settlement also depends on various other factors, which in the school district context include public relations, the individual parties'

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<sup>35</sup> *Id.* at 318 (finding that the state legal bases accounted for 257 of the 742 claim rulings, with the leading three being negligence (n=81), state civil or anti-bullying laws (n=54), and intentional infliction of emotional distress (n=38)).

<sup>36</sup> *Bullying of Students with Disabilities*, *supra* note 15, 145 (finding for the 600 claim rulings during the period 1998–2017 an outcomes distribution of 55% conclusively for defendant, 44% inconclusive, and 1% conclusively for plaintiff); *Bullying of Students with Disabilities*, *supra* note 15, 121 (finding for the 1016 claim rulings during the period 1995–2014 an outcomes distribution of 63% conclusively for defendant, 35% inconclusive, and 2% conclusively for plaintiff). Across broader school law analyses, the proportion of inconclusive outcomes varies widely based upon (1) the unit of analysis, (2) the scope of the subject matter, and (3) the size, or skew, of the other outcome categories. *E.g.*, Bon & Zirkel, *supra* note 10 (41%); William H. Lupini & Perry A. Zirkel, *An Outcome Analysis of Education Litigation*, 17 EDUC. POL'Y 257, 261 (2003) (19%); Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law: Frequency and Outcomes of Published Court Decisions 1998–2012*, 27 J. SPECIAL EDUC. LEADERSHIP 55, 58 (2014) (10%); Perry A. Zirkel, *Revocation or Suspension of Educator Certification: A Systematic Analysis of the Case Law*, 44 J.L. & EDUC. 539, 553 (2015) (18%).

<sup>37</sup> *School Bullying Litigation*, *supra* note 9, at 322–23; *Bullying of Students with Disabilities*, *supra* note 15, at 132; Zirkel & Holben, *supra* note 17, at 502.

perceptions and relationship, and the local culture.<sup>38</sup> As a result, when analyzing plaintiff progress toward a verdict, conflation of claim rulings within a case on a best-for-plaintiff basis provides a more accurate approximation of the outcome than the case unit of analysis. This approximation aligns with the spaghetti strategy for litigation and facilitates tracing the inconclusive to the ultimate outcome.

### *Ultimate Outcomes*

The continuing line of outcomes analyses of education litigation has been largely limited to the claim rulings of published<sup>39</sup> court opinions as the sole data source.<sup>40</sup> The results have included a notable proportion of inconclusive outcomes, particularly for the bullying litigation, representing a continuum of plaintiff or defendant success for each individual claim ruling. This outcome category is only a limited measure of plaintiff success as of the pretrial steps of the litigation process, subject to revision upon the final disposition, or ultimate outcome, of the case.

Overall, the professional literature restricted analyses of the ultimate outcomes of court decisions, mostly limited to settlements outside the education context.<sup>41</sup> The springboard for the present analysis not only was within the education context but also extended to final disposition beyond settlements.<sup>42</sup>

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<sup>38</sup> For a recent illustration arising from IDEA claims, see, for example, Kristin Taketa, *Expensive Legal Fights Ensure When Families Say They Are Not Getting the Right Special Education Services*, SAN DIEGO UNION TRIB., Oct. 5, 2019, <https://www.sandiegouniontribune.com/news/education/story/2019-10-05/expensive-legal-fights-ensue-when-families-say-theyre-not-getting-the-right-special-education-services>.

<sup>39</sup> For the broad meaning of “published” here, see *supra* text accompanying note 31.

<sup>40</sup> *School Bullying Litigation*, *supra* note 9; *Bullying of Students with Disabilities*, *supra* note 15; Zirkel & Lyons, *supra* note 10; Chouhoud & Zirkel, *supra* note 12.

<sup>41</sup> *E.g.*, Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement*, 29 J.L. ECON. & ORG. 898, 11 (2012) (finding that the frequency of settlement represented about two-thirds of ultimate outcomes in a five year sample of federal district court veil-piercing corporate cases); Kathryn Moss, Michael Ullman, Jeffrey Swanson, Leah M. Ranney & Scott Burris, *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 305 (2005) (reporting that 58% of ADA Title I cases analyzed ended in a settlement, with the majority of the remaining outcomes favoring the defendants).

<sup>42</sup> For an earlier foray that used the PACER docketing database for special education litigation but only partially extending to final dispositions, see Zirkel & Machin, *supra* note 27, at 504 (for the 127 relevant cases with sufficient information to determine the issue outcomes, 25% ended in settlement, 25% were ongoing, and 50% reached a court decision).

### *Dispositional Factors*

As cases progress through the litigation process, the parties' success on pretrial motions may influence the likelihood of obtaining a favorable final disposition.<sup>43</sup> To explore this potential interaction, the most recent previous exploration of ultimate outcomes in education posited a two-dimensional conception of dispositional factors, "reason" and "progress," finding that inconclusive dispositions based on the merits yield more proximate progress for plaintiffs.<sup>44</sup>

The immediately earlier exploration, which tentatively identified and applied two overlapping dimensions of dispositional factors, suggested the need for more extensive analysis of the relationship between dispositional factors for inconclusive claim rulings and the ultimate outcome of the case.<sup>45</sup> This follow-up investigation provided three methodological adjustments: (a) a broader sample of bullying litigation; (b) disaggregation by legal basis for the outcomes of the claim rulings, and (c) inferential statistical analysis of the differences between the dispositional factors for the best-for-plaintiff inconclusive rulings and the ultimate outcomes for the cases.

### III. METHODOLOGY

The purpose of this follow-up analysis is to explore the dispositional factors, specifically the overall bases and progress levels, for the inconclusive rulings and their intersection with the ultimate outcome for the rulings. The specific research questions are as follows:

1. What is the distribution of the dispositional factors for the inconclusive claim rulings, both overall and disaggregated by dispositional factor, with respect to:
  - a. reason category (threshold prerequisites or the merits)
  - b. progress level (remote, intermediate, or proximate)
2. What is the distribution of the ultimate outcomes (conclusive for defendant, abandonment/withdrawal, settlement, or conclusive for plaintiff) for the inconclusive rulings, both overall and for each legal basis?

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<sup>43</sup> Boyd & Hoffman, *supra* note 41, at 921–22 (concluding that the filing of substantive, non-discovery motions and subsequent plaintiff-favorable rulings influences the likelihood and timing of settlements for veil-piercing corporate cases).

<sup>44</sup> *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22.

<sup>45</sup> See *supra* text accompanying note 25.

3. What is the intersection between the dispositional factors for the best-for-plaintiff inconclusive claim rulings and the ultimate outcomes of the cases with respect to:
  - a. reason category (threshold prerequisites or the merits)
  - b. progress level (remote, intermediate, or proximate)

### *Case Selection*

The chronological scope includes the thirty-year time period from January 1, 1989 to December 31, 2018. Within this period, the authors identified an initial pool of 539 published<sup>46</sup> cases, first from previous analyses of student-to-student bullying in public schools<sup>47</sup> and second via a Boolean search of the Westlaw database using a subscription that included not only federal trial and appellate court decisions and state appellate court decisions but also trial court orders and a set of jury verdicts and settlements. Consequently, the limitations of the subscription excluded any cases litigated only at the state trial court level or that resolved without a published court opinion.<sup>48</sup> This search extended not only to the additional years but also identified, via a Westlaw subscription upgraded from that used in the initial study, additional cases within the original period that met the selection criteria. Consistent with the previous analyses, this search employed the alternate terms of “bullying,” “harassment,” “teasing,” or “hazing,” combined with the terms “school,” “student,” and/or “peer,” and the selection within the resulting cases was limited to the following combination of criteria: (1) the bully and the victim were K–12 public school students; (2) the plaintiff was a student and/or the student’s parents; (3) the defendant was a school district and/or its individual employees; (4) the bullying occurred on the school campus or at an off-campus school-sponsored event; and (5) the factual description, generally the allegations from a pretrial motion ruling interpreted in the light most favorable to the nonmoving party, with the alleged negative conduct in question fitting within the generally accepted uniform definition of bullying developed by

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<sup>46</sup> For this context, “published” refers broadly to cases in the Westlaw database rather than the narrower meaning of the smaller segment of cases selected for official publication.

<sup>47</sup> *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22 (disability-related bullying cases from 1998–2017); *Bullying of Students with Disabilities*, *supra* note 15 (disability-related bullying cases from 1998–2017); Zirkel & Holben, *supra* note 17 (all bullying-related cases with inconclusive claim rulings from 1992 to 2014); *Bullying of Students with Disabilities*, *supra* note 15 (all bullying-related cases from 1995–2014); *School Bullying Litigation*, *supra* note 9 (all bullying-related cases from 1992–2011).

<sup>48</sup> For limitations on court document availability, see Hoffman et al., *supra* note 32, and Gerken, *supra* note 32.

the Centers for Disease Control (CDC). This uniform definition identifies the three elements of bullying victimization as (a) unwanted aggressive behaviors toward a victim; (b) an observed or perceived power imbalance; and (c) repetition or a high likelihood of repetition of the aggressive behaviors.<sup>49</sup> The most frequent exclusions were bullying cases where (a) the student plaintiffs were enrolled in non-public schools;<sup>50</sup> (b) the bully was an adult, not a student peer;<sup>51</sup> or (c) the case was not congruent with one or more of the bullying uniform definition criteria.<sup>52</sup>

The final selection among the 539 cases resulted from a two-step screening procedure first to identify those with at least one inconclusive claim ruling and then, via initially examining the dockets for these decisions,<sup>53</sup> to determine whether the case had reached an ultimate

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<sup>49</sup> R. MATTHEW GLADDEN, ALANA M. VIVOLO-KANTOR, MERLE E. HAMBURGER, & COREY D. LUMPKIN, BULLYING SURVEILLANCE AMONG YOUTHS: UNIFORM DEFINITIONS FOR PUBLIC HEALTH AND RECOMMENDED DATA ELEMENTS 4–5 (2014), <https://www.cdc.gov/violenceprevention/pdf/bullying-definitions-final-a.pdf>. Primarily referencing the seminal work of Dan Olweus in identifying the key attributes of bullying incidents, this uniform definition excludes aggression between siblings or dating partners. *See generally*, DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO (1993).

<sup>50</sup> *See, e.g.*, *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517, 519 (3d Cir. 2011); *N.K. v. St. Mary's Springs Academy of Fond du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1028 (E.D. Wis. 2013); *Bass ex rel. Bass v. Miss Porter's Sch.*, 738 F. Supp. 2d 307, 311 (D. Conn. 2010).

<sup>51</sup> *See, e.g.*, *Cockrell v. Lexington Cty. Sch. Dist. 1*, No. 3:11-CV-2-42-CMC, 2011 WL 5554811 (D.S.C. Nov. 15, 2011); *H.M. v. Kingsport City Sch. Bd. of Educ.*, No. 2:05-CV-273, 2009 WL 2986606 (E.D. Tenn. Sept. 10, 2009); *D.B. ex rel. C.B. v. Jersey City Bd. of Educ.*, No. A-2095-17T2, 2018 WL 6424126 (N.J. Super. Ct. Dec. 7, 2018).

<sup>52</sup> *See, e.g.*, *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000) (victim engaged in self-defense); *A.B. v. Clarke Cty. Sch. Dist.*, No. 3:08-CV-041-CDL, 2009 WL 902038 (M.D. Ga. Mar. 30, 2009) (defendant lacked intent to harm the victim); *Halladay ex rel. A.H. v. Wenatchee Sch. Dist.*, 598 F. Supp. 2d 1169 (E.D. Wash. 2009) (action was an isolated incident).

<sup>53</sup> The Westlaw Jury Verdicts and Settlements feature included in the subscription utilized for this study provides access to summaries of ultimate outcomes of cases in their federal-level and state-level reporters. However, the database coverage itself is limited by the sources of the reported verdicts and settlements, which generally are jury verdict publishers as opposed to electronic court databases. This limitation necessitates the use of other, fee-based electronic court databases as primary sources for the ultimate outcomes. For the remaining federal cases, we located the docket for the case in the PACER database, which is organized by the type of federal court and is searchable by the docket number, party name, or attorney name. Additionally, documents under seal are barred from access. *See Hoffman et al., supra* note 32 and accompanying text. For the remaining state cases, including those potentially re-filed or remanded from federal court, we searched each state's electronic court filing system, which range widely from statewide integrated systems to disconnected systems at the county court level. The state court databases also vary in their depth of information available to the public.

outcome. The exclusions during this procedure were for cases in which (a) the bullying behavior was not the primary focus of the adjudicated claims;<sup>54</sup> (b) the aggressive behavior represented a physical or sexual assault that was unrelated to prior or subsequent bullying actions;<sup>55</sup> (c) the court decision lacked sufficient facts to determine alignment with the uniform bullying definition or the nexus between the bullying and the claims;<sup>56</sup> or (d) an ultimate outcome had not been reached as of September 1, 2019.<sup>57</sup> This screening procedure yielded a sample of 247 cases meeting these criteria, which contained 515 claim rulings. Per the procedure in the previous analyses and for cases that were subject to more than one court decision, the selection was limited to the most recent relevant decision for each claim ruling.<sup>58</sup>

### Case Coding

For each of the 247 cases, the first step was coding the inconclusive claim rulings, primarily in terms of the legal basis. The categorization of legal basis followed the template of the corresponding previous analyses. The overall “federal” and “state” categories in this context refer to the source of the legal basis (for example, U.S. Constitution or state statute), not the forum for litigation (for example, U.S. district court or state appellate court). The jurisdiction of these two forums overlap, causing a high but far from complete correlation between the category of legal basis and that of the judicial forum.<sup>59</sup> Additionally, cases were coded by the defendant type for the relatively few cases where the outcome differed between the individual and institutional defendants.<sup>60</sup> The second step was the coding of the dispositional factors for the inconclusive claim rulings. Modifying the template in the preceding exploratory analysis,<sup>61</sup> we made two adjustments to facilitate statistical analysis: (a) separating the two factors of dispositional reason category and dispositional progress level, and (b)

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<sup>54</sup> *E.g.*, *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015).

<sup>55</sup> *E.g.*, *Lockhart v. Willingboro High Sch.*, 170 F. Supp. 3d 722 (D.N.J. 2015).

<sup>56</sup> *E.g.*, *Tawes v. Bd. of Educ. of Somerset Cty.*, No. RDB-17-2375, 2017 WL 6313945 (D. Md. Dec. 11, 2017).

<sup>57</sup> As of the date of the final selection, 23 cases were in this open, or pending, category. *E.g.*, *Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ.*, No. 1:15-cv-787, 2018 WL 4539440 (S.D. Ohio Sept. 21, 2018).

<sup>58</sup> *Supra* text accompanying note 47.

<sup>59</sup> For the legal bases in these two respective categories, see *infra* Table 1.

<sup>60</sup> *School Bullying Litigation*, *supra* note 9, at 316–18.

<sup>61</sup> *Supra* text accompanying notes 24–25.

conflating the several reason subcategories into the two over-arching categories of threshold prerequisites and the merits.<sup>62</sup>

The third step was to ascertain the ultimate outcome for each identified case using the four coding categories as follows:

(a) conclusively in favor of defendant – verdict for the defendants or a dismissal of claims with prejudice;

(b) abandonment/ withdrawal – dismissal of claims without prejudice followed by lack of plaintiff actions to further pursue litigation, default judgment order for lack of prosecution of claims, or an order voluntarily withdrawing the claim in the absence of a settlement;

(c) settlement – joint stipulation to dismiss claims based on a settlement or mediation agreement, docket notation of a successful settlement conference, or court-approved minor’s compromise;<sup>63</sup> and

(d) conclusively in favor of plaintiff – verdict for the plaintiffs or granting of summary judgment motion for the plaintiffs.

Based on the aforementioned Westlaw, PACER, and state court electronic data sources, we obtained the ultimate outcomes for all but five of the cases that contained inconclusive rulings. For this remaining small segment of cases, we directly contacted the court clerk and the listed party attorneys with a request for the category of the ultimate outcome. This process identified the ultimate outcome for all but one case that was removed from the analysis due to a lack of access to the state trial court documents and a lack of response when contacting the parties’ attorneys for clarification, yielding a final sample of 246 cases and 513 claim rulings. Because the corresponding third research question required a comparison between two different units of analysis, namely the claim ruling level for dispositional factors and the case level for ultimate outcomes, we employed the best-for-plaintiff claim ruling conflation process to identify the ultimate outcome and its dispositional factors at the case level.<sup>64</sup>

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<sup>62</sup> In contrast, we retained the three subcategories of progress (remote, intermediate, and proximate), because their more limited number allowed for sufficient cell size for statistical significance analysis.

<sup>63</sup> If the docket noted a joint stipulation for dismissal of claims without any clarifying notation, we contacted the parties to inquire which ultimate outcome category applied, as per the process described *supra* note 74.

<sup>64</sup> For the occasional case in which the court opinion identified multiple dispositional reason factors for the same best-for-plaintiff inconclusive ruling, we used the reason factor closest to a verdict.

*Data Analysis*

Finally, via use of a statistical database software program,<sup>65</sup> we obtained results for the research questions. More specifically, for research questions one and two, the results were in the form of frequency distributions. For research question three, we employed a chi-square test for independence, a nonparametric inferential test that determines whether differences in frequency distributions for two or more categorical variables in the sample are significant, and thus generalizable, to the overall population. Using the frequencies of cases entered into a contingency table, this test measures whether the distribution of the data likely represents a significant relationship between the ultimate outcomes and the dispositional factor variables, as opposed to random chance.<sup>66</sup> We considered frequency distribution differences significant at a probability of  $p < .05$ .<sup>67</sup>

## IV. RESULTS

*Research Question 1*

Table 1 presents the disaggregated frequency distribution of the two dispositional factors—reason category and progress level—for the 513 inconclusive claim rulings within the 246<sup>68</sup> cases reaching an ultimate outcome in the time period 1989–2018. The disaggregation is by the legal basis of the inconclusive claim ruling, listed in descending order of frequency for federal and state claims, respectively.<sup>69</sup>

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<sup>65</sup> The software used for analysis was the Statistical Program for the Social Sciences (SPSS) Version 25, a robust statistical analysis application.

<sup>66</sup> MEREDITH D. GALL ET AL., EDUCATIONAL RESEARCH: AN INTRODUCTION 325–27 (2007). The data set met the requirement that at least 80% of expected cell counts in the table are a minimum of five. DAN YATES, DAVID S. MOORE & GEORGE MCCABE, THE PRACTICE OF STATISTICS 734 (1999).

<sup>67</sup> A probability ( $p$ ) calculation less than .05 represents a 95% probability that the distribution of the results were not due to random chance. DAVID C. HOWELL, FUNDAMENTAL STATISTICS FOR THE BEHAVIORAL SCIENCES 357–63 (2004).

<sup>68</sup> Of these 246 cases, 92% arose in federal court and only 8% in state court; however, a few of these cases moved between the two judicial systems based on removal or discretionary ancillary jurisdiction. *E.g.*, *Lamberth v. Clark Cty. Sch. Dist.*, 2015 WL4760696 (D. Nev. Aug. 12, 2015), *aff'd*, 698 Fed. Appx. 387 (9th Cir. 2017), *remanded*, No. A-14-708849-C (Clark Cty. Ct. Feb. 22, 2019) (originally filed in state court, removed to federal court, and ultimately settled after remand back to state court).

<sup>69</sup> The disaggregation omits legal bases with frequencies of less than five. As a result, five miscellaneous federal claim rulings (four based on Fourteenth Amendment procedural due process and one based on sections 1985/1986) and seventeen miscellaneous state claim rulings (ten unspecified beyond generically characterized as state claims, two based on state

*Table 1. Disaggregated Distribution of Dispositional Reasons for Inconclusive Claim Rulings*

Legal Basis	n	Reason Category		Progress Level		
		Threshold Prerequisites	Merits	Remote	Intermediate	Proximate
<b>Federal Claim Rulings</b>						
Title IX	80	5%	95%	11%	43%	46%
Am. XIV Equal Protection	53	15%	85%	28%	30%	42%
Am. XIV Sub. Due Process	47	11%	89%	30%	30%	40%
Section 504/ADA	45	36%	64%	33%	45%	22%
IDEA	25	80%	20%	56%	32%	12%
Title VI	19	5%	95%	16%	21%	63%
Am. I Free Speech/Retaliation	13	0%	100%	16%	46%	38%
Total Federal <sup>70</sup>	287	19%	81%	26%	36%	38%
<b>State Claim Rulings</b>						
Negligence	110	47%	53%	43%	26%	32%
State Civil Rights Law	32	31%	69%	26%	32%	42%
Intentional Tort	30	60%	40%	63%	23%	13%
Gross Negligence	14	57%	43%	50%	36%	14%
Assault/battery	6	83%	17%	67%	16%	16%
State Constitution	6	80%	20%	60%	0%	40%
State Education Code	6	83%	17%	33%	67%	0%
State Anti-Bullying Statute	5	100%	0%	100%	0%	0%
Total State <sup>71</sup>	226	50%	50%	47%	26%	27%
<b>TOTAL</b>	<b>513</b>	<b>33%</b>	<b>67%</b>	<b>35%</b>	<b>31%</b>	<b>34%</b>

Table 1 provides successive layers of findings. On an overall, or bottom-line, level, the reason category of these 513 inconclusive claim rulings was largely (67%) a matter of the merits, and the progress was rather evenly distributed among the three levels. As for the “n” column, the majority

mental health statutes, two based on child abuse statutes, and one each based on civil hazing, breach of implied contract, and concussion protocol statutes) are not listed, because their dispositional factors percentages would be meaningless.

<sup>70</sup> The percentages for this total include the miscellaneous five rulings.

<sup>71</sup> The percentages for this total include the miscellaneous seventeen rulings.

(247=56%) of the rulings were for federal claims, but the most frequent legal basis was for simple negligence, which accounted for 20% of the total. Next, within the two respective legal basis groups, the gravamen for the vast majority (81%) of federal claims was in the merits category, whereas the state claims were evenly split between the threshold prerequisites and merits categories. As an overlapping matter, the progress toward a verdict was more advanced for the federal than the state claims. For both the reason category and the progress level, the highest frequency of decisions on the merits at a proximate level were Title IX for federal claims and state civil rights acts for state claims. Conversely, legal bases with high frequencies of decisions on technical adjudicative prerequisites at the remote level included IDEA and, to a lesser extent, Section 504/ADA federal claims and all other state claims except negligence.

#### *Research Question 2*

Table 2 provides the corresponding distribution of the ultimate outcomes for the 513 inconclusive claim rulings by legal basis. Consistent with the results display for question 1, the table's sequence is descending frequencies for federal and state claims separately, with omission of the miscellaneous claims with n's of less than five.

*Table 2. Disaggregated Distribution of Ultimate Outcomes for Inconclusive Claim Rulings*

	n	Ultimate Outcomes			
		Conclusively for District	Abandonment/ Withdrawal	Settlement	Conclusively for Plaintiff
<b>Federal Claim Rulings</b>					
Title IX	80	10%	10%	76%	4%
Am. XIV Equal Protection	53	11%	15%	72%	2%
Am. XIV Substantive Due Process	47	6%	11%	81%	2%
Section 504/ADA	45	9%	20%	67%	4%
IDEA	25	16%	28%	52%	4%
Title VI	19	5%	21%	74%	0%
Am. I Free Speech	13	0%	8%	77%	15%
Total Federal <sup>72</sup>	287	9%	15%	73%	4%
<b>State Claim Rulings</b>					
Negligence	110	9%	26%	58%	6%
State Civil Rights Law	32	9%	13%	78%	0%
Intentional Tort	30	10%	37%	53%	0%
Gross Negligence	14	7%	36%	57%	0%
Assault/battery	6	17%	50%	33%	0%
State Constitution	6	0%	0%	100%	0%
State Education Code	6	0%	33%	67%	0%
State Anti-Bullying Statute	5	0%	60%	40%	0%
Total State <sup>73</sup>	226	8%	29%	59%	4%
<b>TOTAL</b>	<b>513</b>	<b>9%</b>	<b>21%</b>	<b>67%</b>	<b>3%</b>

Table 2 shows that the predominant proportion (67%) of inconclusive claims ended in settlement. This trend was moderately more pronounced for the federal claims, with the corresponding reduction being almost entirely in the abandonment/withdrawal category. Among the most frequent legal bases, the proportion of settlements was particularly high for substantive due process and particularly low for IDEA and common law tort claim rulings.

<sup>72</sup> For the omitted, miscellaneous claims in the federal category, see *supra* note 69.

<sup>73</sup> For the omitted, miscellaneous claims in the state category, see *supra* note 71.

*Research Question 3*

Tables 3 and 4 display the intersection between each of the two factors of the dispositional factors on a best-for-plaintiff basis and the ultimate outcomes of the case. Table 3 provides the frequency distribution and chi-square analysis of ultimate outcomes for the two overall categories of dispositional factors. Within this table, the order of the ultimate outcomes moves from the most district-favorable to the most plaintiff-favorable.<sup>74</sup>

*Table 3: Intersection Between the First Dispositional Factor and Ultimate Outcome*

Reason Category	n	Ultimate Outcomes			Chi-Square
		Conclusively For District	Abandonment/ Withdrawal	Settlement	
Threshold Prerequisites	77	7 (9%)	43 (56%)	27 (35%)	$\chi^2 = 87.747$ $df = 3$ $p < .001$
Merits	169	16 (10%)	8 (5%)	132 (78%)	
Total	246	23 (9%)	51 (21%)	159 (65%)	

Table 3 that the ultimate outcomes distribution was significantly different at a very high level of probability ( $p < .001$ ) between the two reason categories. Visual inspection suggests that the tendency for the inconclusive claims based on threshold prerequisites is to end with abandonment/withdrawal, whereas those based on the merits tend to end with settlement.

Table 4 provides the frequency distribution and chi-square analysis of the ultimate outcomes for the three progress levels. As within Table 3, the sequence of the ultimate outcomes is in approximate order of favorability for the parent.

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<sup>74</sup> This sequence is only approximate, because (1) abandonment/withdrawal may be regarded as equivalent to a verdict conclusively in favor of the defendant, and (2) the specific terms of the settlement, which are often difficult to ascertain, vary widely from between the two polar positions.

*Table 4: Intersection Between the Second Dispositional Factor and Ultimate Outcomes*

	n	Ultimate Outcomes				Chi-Square
		Conclusively for District	Abandonment/ Withdrawal	Settlement	Conclusively for Plaintiff	
Remote	71	7 (10%)	43 (61%)	21 (30%)	0 (0%)	$\chi^2 = 107.133$ $df = 6$ $p < .001$
Intermediate	77	4 (5%)	5 (7%)	66 (65%)	2 (3%)	
Proximate	96	11 (12%)	3 (3%)	71 (74%)	11 (12%)	
Total	246	23 (9%)	51 (21%)	159 (65%)	13 (5%)	

Table 4 reports a significant difference with a similarly high probability for the ultimate outcome distributions among the three successive progress levels. More specifically, inspection of the respective distributions reveals the dispositions resulting in remote progress tended to end with abandonment/ withdrawal, whereas those resulting in intermediate or proximate progress tended to end in settlement.

## V. DISCUSSION

### *Research Question 1*

The first question sought the frequency distribution of the two dispositional factors for the inconclusive claim rulings, both overall and by legal basis. The predominant proportion overall (67%) was on the merits, as compared with threshold prerequisites. This result supersedes the earlier finding of an almost even split between the two categories, because the previous analysis was for a smaller subset of bullying cases in terms of both subject matter and time period.<sup>75</sup> The preponderance (56%) of inconclusive rulings with federal legal bases is a disaggregated element not in the previous analyses and is likely attributable to (1) the lack of a private right to sue under state anti-bullying statutes;<sup>76</sup> (2) the difficulties, including

<sup>75</sup> The earlier analysis was limited to bullying cases where the victim was a student with disabilities and for a twenty-year period within the thirty-year period of the present analysis. *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22 and accompanying text.

<sup>76</sup> *E.g.*, Kueny & Zirkel, *supra* note 6. New Jersey is a limited exception to the extent

sovereign immunity,<sup>77</sup> that impede successful state tort liability claims;<sup>78</sup> and (3) the wider federal availability of civil rights statutes and constitutional provisions that generally provide for attorneys' fees<sup>79</sup> and higher verdicts for prevailing plaintiffs in federal court.<sup>80</sup> Discretionary abstention in federal courts for state claims and the overlapping barriers of governmental and official immunity for common-law tort claims were the likely primary reasons for the predominance of threshold prerequisites for the state claims. Conversely, the more advanced progress levels of the federal claims were likely due to their overlapping high frequency for the merits category.

With respect to specific legal bases, the high frequency of Title IX claims resolved on the merits at an intermediate or proximate progress level may reflect courts' evolving interpretations of whether harassment based on perceived sexual orientation is actionable as gender stereotyping under Title IX.<sup>81</sup> State civil rights law claims displayed, to a lesser extent, a similar pattern, possibly due to the overlap with Title IX in cases in which the

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that its Law Against Discrimination, which is a generic civil rights, rather than specific anti-bullying law, explicitly provides for victims to file a complaint in Superior Court. N.J. STAT. ANN. § 10:5-13 (West 2019). *E.g.*, L.G. *ex rel.* L.W. v. Toms River Reg'l Sch. Bd. of Educ., 915 N.E.2d 535 (N.J. 2007) (affirming modified money damages award for victim of gender-based bullying). In contrast, New Jersey's extensive anti-bullying law, like its counterparts in other states, does not provide a private cause of action. N.J. STAT. ANN. §§ 18A:37-13–18A:37-37 (West 2019). *E.g.*, D.B. *ex rel.* C.B. v. Jersey City Bd. of Educ., 2018 WL 6424126 (N.J. Super. Ct. App. Div. Dec. 7, 2018) (dismissing plaintiff's claim under the state's anti-bullying law based on the comprehensive enforcement jurisdiction of the commissioner of education).

<sup>77</sup> *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) (canvassing the considerable cumulative scope of tort immunity for school districts and their employees across the 50 states).

<sup>78</sup> *E.g.*, Daniel B. Weddle, *Bullying in Schools: The Disconnect between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 687–96 (2004) (reviewing requirements to demonstrate foreseeability as barriers to liability findings in bullying-related tort litigation).

<sup>79</sup> *E.g.*, Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980) (reviewing the courts' discretion to award attorney's fees in federal civil litigation).

<sup>80</sup> *E.g.*, Theodore Eisenberg, John Goert, Brian Ostrom, & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 438 (1996) (finding that jury awards in federal court trials greatly exceed those in state court trials).

<sup>81</sup> *See generally* Adele P. Kimmel, *Title IX: An Imperfect But Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. 2006 (2016) (reviewing courts' application of Title IX to gender stereotyping claims on behalf of LGBTQ+ students).

plaintiffs raised claims on both of these legal bases.<sup>82</sup> Conversely, the higher frequency of IDEA and, to a lesser extent, Section 504/ADA claims resolved on threshold prerequisites at a remote level may be attributable to their applicable requirement for exhaustion of administrative remedies prior to adjudication on the merits.

### *Research Question 2*

Question 2 targeted the frequency distribution of the ultimate outcomes for the inconclusive claim rulings, both overall and by legal basis. Overall, the prevalence (67%) of settlements was slightly higher and generally more representative than the corresponding proportion in the previous analysis of a subsample of cases.<sup>83</sup> The similar distribution for the remaining categories, particularly the 21% for abandonment/withdrawal, is striking when compared to the common conception that the parties ultimately settle.<sup>84</sup> The more pronounced proportion of settlement of federal claims and the conversely high rate of abandonment/ withdrawal of state claims may be attributable to differences in the correlative judicial forum. For inconclusive federal claims, the congestion<sup>85</sup> of federal courts and the resulting judicial pressure for party negotiations may explain the higher settlement rate. Conversely, given the high frequency of bullying-related cases filed in federal court,<sup>86</sup> the effect of the federal courts' discretionary

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<sup>82</sup> In the event of a dispute over an eligible student's educational program, the IDEA requires the exhaustion of administrative remedies, such as mediation or due process, prior to litigation. 20 U.S.C. § 1415(i)(2)(A)(B) (2018). To the extent that a student plaintiff's Section 504/ADA claims overlap with provisions of the IDEA, the requirement to exhaust administrative remedies applies. 20 U.S.C. § 1415(l) (2018).

<sup>83</sup> See *supra* note 17 (61% but with 6% in a residual unknown category not counted in the present analysis).

<sup>84</sup> Although stated settlement rates may quote frequencies as high as 95%, empirical evidence of observed settlement rates rarely supports these figures. *E.g.*, Theodore Eisenberg & Charlotte Lanver, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (concluding that empirical evidence rarely supports the common conception of a 95% settlement rate); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STANFORD L. REV. 1339, 1339–40 (1994) (noting that quoted settlement rates of 85%–95% are misleading); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004) (citing the conventional wisdom that, if 5% of cases go to trial, the remaining 95% must have settled).

<sup>85</sup> See generally Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 N.D. LAW. 648 (1980) (discussing Congressional action leading to caseload increases in federal courts).

<sup>86</sup> *Supra* note 72 and accompanying text.

declining of ancillary jurisdiction for state claims may explain the higher rate of abandonment/withdrawal for state law claims. It may be that many plaintiffs in the wake of such dismissals without prejudice opt not to refile them in state court in light of the loss of the more potent federal claims<sup>87</sup> and the increasing transaction costs of continuing the litigation in another forum.

Upon disaggregation by specific legal basis, the higher settlement rate for Fourteenth Amendment substantive due process claims may be attributable to the particularly high “shocks the conscience” standard for surviving pretrial motions.<sup>88</sup> For the relatively few cases that meet this hurdle, the leverage for settlement may be higher due to the requisite flagrancy of the district’s actions or inactions. The similar but slightly lower settlement rate for inconclusive Title IX and state civil rights law claim rulings may reflect the leverage arising from plaintiff success in arguing the prima facie elements of a discrimination claim at the pretrial motion stage. Conversely, the relatively low settlement rate for inconclusive IDEA claims may be attributable to the effect of the exhaustion doctrine, which shifts such cases from federal courts to the forum of due process hearings. Although due process hearings may result in settlements, the outcomes of such hearings are not reported in the court record and therefore not reflected among the ultimate outcomes data. Additionally, the low settlement rate for state tort claims may reflect the relatively high frequency of federal courts declining supplemental jurisdiction of state claims. Upon remand to state court, plaintiffs may face immunity defenses that significantly increase the odds of a defendant-favorable ruling.

However, the disaggregation of legal bases for this purpose faces a major limitation. Many of the cases with inconclusive outcomes have more than one claim with such an outcome. In such cases, it is not known which claim was the impetus for the settlement.

### *Research Question 3*

To extend the exploration of potential patterns among inconclusive claim rulings,<sup>89</sup> question 3 analyzed the alignment between each of the

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<sup>87</sup> The federal claims include the possibility of attorneys’ fees, the prospect of generally higher damage awards, and the much lower scope of governmental immunity.

<sup>88</sup> *E.g.*, *Bryan v. Clark Cty. Sch. Dist. (CCSD)*, 2017 WL 3386551, No. 14A700018 (Nev. Dist. Ct. Jun. 27, 2017) (denying summary judgment on substantive due process claims based upon failure to investigate known ongoing physical assaults and homophobic slurs against two students as required by both Title IX and Nevada state law).

<sup>89</sup> The predecessor analysis not only was limited to a smaller sample of disability-based bullying cases but also did not extend to an inferential statistical analysis of the possible

dispositional factors and the ultimate outcomes for the cases. On a best-for-plaintiff approach for conflating claim rulings to cases,<sup>90</sup> the chi-square analysis found a significant difference in ultimate outcomes between the two reason categories and among the three progress levels. Although correlated, these two dispositional factors are not at all the same because (a) each reason category may reach a final, inconclusive ruling at either the dismissal or the more proximate summary judgment stage, and (b) the reason subcategories of inconclusive rulings within both threshold issues (e.g., exhaustion doctrine or ancillary jurisdiction v. statute of limitations) and the merits (e.g., prima facie factors v. defenses) vary in terms of their resulting progress level. Nevertheless, the overall strong and differential probability for inconclusive rulings to end in settlement when they are based on the merits and progress to the intermediate or proximate levels is useful for parties and their attorneys in determining the most cost-effective approach for dispute resolution.

A limitation on the interpretation of this question 3 analysis is the lack of any disaggregation by legal basis. The aforementioned disaggregation for questions 1 and 2 suggests that the alignment between the technical prerequisites reason category, the remote progress level, and an ultimate outcome of abandonment/withdrawal would include a large proportion of cases with a best-for-plaintiff claim based upon the IDEA, negligence, or intentional torts. Conversely, the alignment between the merits reason category, the intermediate and proximate progress levels, and an ultimate outcome of settlement is suggestive of a large proportion of cases with a best-for-plaintiff claim based upon Title IX, Fourteenth Amendment substantive due process, or state civil rights law. However, further research is needed to confirm these possible relationships.

## VI. CONCLUSIONS

As previously described, the multiple layers of the litigation iceberg yield ultimate outcomes beyond the polar extremes of conclusive rulings for each party. Expanding upon the original exploratory study,<sup>91</sup> the factors of this refined dispositional taxonomy are a meaningful mechanism for disaggregating inconclusive claim rulings. The nuances of the dispositional factors for inconclusive claims—reason category and progress level—are useful in forecasting ultimate outcomes.

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relationship between the two dispositional factors. *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22, at 204–09.

<sup>90</sup> *Supra* note 14.

<sup>91</sup> *Bullying of Students with Disabilities: An Empirical Analysis*, *supra* note 22.

The variations in findings among specific legal bases warrant additional research to further explore the alignment between the dispositional factors and the ultimate outcomes. For example, using a larger sample of cases would facilitate conducting the chi-square analysis for disaggregated variables such as the legal basis. Further exploration of this dispositional taxonomy also should replicate and refine the methodology and terminology<sup>92</sup> with case samples representing other types of education litigation, such as special education or sexual harassment cases. Continued empirical exploration of the subsurface strata of the glacial mass of litigation will assist both student plaintiffs and district defendants in their planning of litigation strategies to maximize outcomes while minimizing cost.

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<sup>92</sup> Illustrating this movement, we have refined the wording of the dispositional factors from the predecessor article. *Id.* at 501 (replacing the previous descriptor of “nature” with the term “reason” and the previous descriptor of “effect” with the term “progress level” to more accurately describe each factor).