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School Bullying Litigation: An Empirical Analysis of the Case Law

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SCHOOL BULLYING LITIGATION: AN EMPIRICAL ANALYSIS OF THE CASE LAW

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I. INTRODUCTION

In 2006, twelve-year old student Sawyer Rosenstein contacted his guidance counselor on numerous occasions to report having been subjected to bullying and seek advice on how to best address the

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situation. In May of that year, one of the bullies punched Sawyer in the back with such force as to cause a blood clot that rendered him paralyzed from the waist down. Sawyer's parents filed suit against the New Jersey district. The suit reportedly resulted in a settlement for $4,200,000.[1]

The bullying behavior that this case represents is not an anomaly. The perceived frequency and consequences of bullying have been the focus of news media attention across the country, particularly in cases where the victim ultimately committed suicide rather than continue to suffer the abuse.[2] Hollywood has also spotlighted the perils of bullying in movies such as the documentary, *Bully*.[3] The political realm has reflected and reinforced this concern. Many states have enacted or expanded anti-bullying laws for public schools,[4] and the U.S. Department of Education hosted its third national Bullying Summit in August 2012.[5]

As a result of this media and political attention, the increasing expectation is that schools will identify and minimize bullying behaviors among students. While anti-bullying statutes seldom include a private right of action,[6] bullied students and their parents may seek legal redress under federal civil rights laws and/or state tort law. However, in contrast to coverage of the number and nature of the state laws[7] and of the doctrinal details of occasional high-profile cases,[8] the literature lacks

1. KSEE News, *Teen Paralyzed by Punch from Bully Wins Multi-Million Dollar Lawsuit*, Apr. 19, 2012, http://www.ksee24.com/news/local/Teen-Parlalyzed-by-Punch-from-Bully-Wins-Multi-Million-Dollar-Lawsuit-148177045.html.

2. *See, e.g.*, Michael Inbar, *Mom: Bullying Drove My 10-Year Old Girl to Suicide*, TODAY SHOW, Nov. 18, 2011, http://www.today.com/id/45354766/site/todayshow/ns/today-parenting_and_family/t/mom-bullying-drove-my—year-old-girl-suicide/;Vivian Yee, *On Staten Island, Relentless Bullying is Blamed for a Teenage Girl's Suicide*, N.Y. TIMES, Oct. 25, 2012, http://www.nytimes.com/2012/10/26/nyregion/suicide-of-staten-island-girl-is-blamed-on-bullying.html?_r=0.

3. *See* A.O. Scott, *Behind Every Harassed Child?: A Whole Lot of Clueless Adults*, N.Y. TIMES, Mar. 29, 2012, http://movies.nytimes.com/2012/03/30/movies/bully-a-documentary-by-lee-hirsch.html?_r=0.

4. *See, e.g.*, VICTORIA STUART-CASSEL, ARIANA BELL & J. FRED SPRINGER, ANALYSIS OF STATE BULLYING LAWS AND POLICIES (2011), http://www2.ed.gov/about/offices/list/opepd/ppss/reports.html#state-bullying-laws.

5. U.S. Department of Education, *Upcoming: U.S. Department of Education to Host Third Annual Bullying Prevention Summit*, www.ed.gov/news/press-releases/upcoming-us-department-education-host-third-annual-bullying-prevention-summit.

6. Maryellen T. Kueny & Perry A. Zirkel, *An Analysis of School Anti-Bullying Laws in the United States*, 43 MIDDLE SCH. J. 22, 29 (Mar. 2012); STUART-CASSEL, BELL, & SPRINGER, *supra* note 4, at 34.

7. *See, e.g.*, *supra* note 4, at 34.

8. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) (holding that

systematic research on the frequency and outcomes of these court cases.[9]

Responding to this gap in the professional literature, this study will analyze the case law specific to bullying in the public school context during a recent twenty-year period. More specifically, its scope will include the frequency and the outcomes of the liability and "free and appropriate public education" ("FAPE")[10] claims on a longitudinal basis. Part I of the article provides the context in terms of (a) the definition of bullying, and (b) the literature concerning the rate and effects of bullying as well as the extent of anti-bullying policies and practices at the school district and state levels. Part II provides the methodological information, including the scope of and variables for the data collection. Part III reports the results of the data analysis. Part IV discusses the significance of the results, with recommendations for further research concerning the frequency of claims addressing specific types of bullying and the demographics of the plaintiff victims as well as the implementation of best practices for educators to proactively prevent bullying-related liability litigation.

II. CONTEXT

A. Definition of Bullying

As an initial matter, establishing a definition of bullying is akin to Justice Potter Stewart's reflection that, while he found it difficult to define obscenity, he knew it when he saw it.[11] The first obstacle is to distinguish between bullying and harassment. In the context of student-to-student conduct, "harassment" typically refers to discriminatory acts toward a member of a protected class[12] as defined by federal civil rights

Title IX does not preclude § 1983 claim based on equal protection clause for peer sexual harassment); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (establishing multi-part test for liability for peer sexual harassment, including gender-based bullying, under Title IX).

9. Kueny & Zirkel, *supra* note 6, at 25.

10. Although marginal, claims under the Individuals with Disabilities Education Act ("IDEA") for denials of "free appropriate public education" ("FAPE") are included for the sake of completeness. Although money damages are not available under the IDEA, the remedies of compensatory education and tuition reimbursement may have a costly effect on school districts. *See, e.g.*, Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 4 (2011).

11. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

12. *See, e.g.*, Michael B. Greene & Randy Ross, *The Nature, Scope, and Utility of Formal Laws and Regulations that Prohibit School-Based Bullying and Harassment*, 95-96 (2005), *available at* http://gwired.gwu.edu/hamfish/merlin-cgi/p/downloadFile/d/16896/n/off/other/1/name/GreeneandRoss5237Paperpdf/.

laws.[13] However, bullying is often based on factors extending beyond protected class,[14] such as personal appearance, social relationships, or personality.[15] Thus, harassment and bullying overlap, and we include the claims under federal civil rights laws to the extent that they fit within the boundaries of bullying. Second, a certain amount of negative interaction between students is developmentally appropriate; the definition of bullying must identify behaviors that go beyond the ordinary childhood incidents of teasing or fighting.[16]

To address both of these issues, we have used the generally accepted bullying definition developed by Dan Olweus, a Norwegian researcher.[17] Specifically, the Olweus definition stipulates three key characteristics: (a) aggressive behavior or intentional harm toward another student; (b) this behavior is repeated over time; and (c) an imbalance of power that renders the victim unable to effectively establish a defense against the aggressive conduct.[18] Further, these behaviors may be physical, verbal, or relational actions, and they may aim directly or indirectly at the victim.[19] Finally, in accordance with the recent trend among educators and legislators, we treat cyber-bullying—i.e., "willful, repeated harm inflicted through the use of computers, cell phones, and other electronic devices"[20]—as a subset of verbal and relational bullying between minors.[21]

13. *E.g.*, Title VI of the Civil Rights Act of 1964 prevents discrimination based on race, color, or national origin; Title IX of the Education Amendments of 1972 prohibits discrimination based on gender; and both § 504 and the Americans with Disabilities Act prohibit discrimination against persons with disabilities. 42 U.S.C. §§ 2000d *et seq*. (2006); 20 U.S.C. §§ 1681-1688 (2006); 29 U.S.C. § 794 (2006). The lead case establishing the multipart test, or set of standards, for liability of school districts for peer harassment is Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

14. Neither these civil rights laws nor other federal legislation or regulations address bullying per se. *See, e.g.*, STUART-CASSEL, BELL & SPRINGER, *supra* note 4, at 17.

15. *See, e.g.*, Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 149 (2009).

16. *See, e.g.*, Tracy Tefertiller, *Out of the Principal's Office and into the Courtroom: How Should California Approach Criminal Remedies for School Bullying?*, 16 BERKELEY J. CRIM. L. 168, 169-70 (2011).

17. Dan Olweus, *A Profile of Bullying*, 60 EDUC. LEADERSHIP 12 (2003).

18. *Id*.

19. *Id* at 14.

20. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER (2010), http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.

21. *See, e.g.*, Kelsey Farbotko, *With Great Technology Comes Great Responsibility: Virginia's Legislative Approach to Combating Cyberbullying*, 15 RICH. J.L. & PUB. INT. 38 (2011).

B. Frequency and Effects of Bullying

The ongoing publicity concerning a number of high-profile bullying cases has created a public awareness of bullying incidents and their consequences. Several recent studies of the prevalence of bullying among teenagers found that approximately 20%-25% of students ages 12-18 self-reported experiencing bullying at school within the past year.[22] One study reported the rate to be 50%.[23] For cyber-bullying, the more limited research to date has reported rates ranging from 6%[24] to 20% of teens.[25]

The frequency of bullying is a major issue for educators because victims experience a higher risk of depression and suicidal ideation due to the low self-esteem that develops from bullying,[26] which in turn creates both academic and peer group difficulties in the school setting. Victims of bullying also experience greater difficulty establishing friendships, suffer from the humiliation of peer knowledge of the bullying incidents, and develop a greater risk of abuse of drugs or alcohol.[27] Other negative consequences include lower school attendance rates and the potential for the victim to become a bully in return.[28] Thus, schools have an interest and, at least professionally,[29] a duty to engage in efforts to prevent bullying.

C. School District Bullying Policies

In response to its frequency and effects, various groups proposed recommendations for stronger measures to prevent and punish bullying.

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22. JILL DEVOE & CHRISTINA MURPHY, STUDENT REPORTS OF BULLYING AND CYBERBULLYING: RESULTS FROM THE 2009 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY (Aug. 2011);http://nces.gov/pubsearch/pubsinfo.asp?pubid=2011336; SIMONE ROBERTS, JIJUN ZHANG, & JENNIFER TRUMAN, INDICATORS OF SCHOOL CRIME AND SAFETY *(* 2010), http://nces.ed.gov/pubs2011/2011002.pdf; Tefertiller, *supra* note 16, at 17.5

23. JOSEPHSON INSTITUTE, BULLYING AND VIOLENCE: THE ETHICS OF AMERICAN YOUTH, (2010), http://charactercounts.org/programs/reportcard/2010/installment01_report-card_bullying-youth-violence.html.

24. DEVOE & MURPHY, *supra* note 22, at 5.

25. Tefertiller, *supra* note 16, at 17.6

26. *See, e.g.*, *id*. at 172-173; Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE. L. REV. 641, 647-50 (2004).

27. Tefertiller, *supra* note 16, at 17.

28. *Id*.

29. Similarly, this ethical norm is the basis for the converse conclusion that students have the right to be educated in an environment free of fear and without disruption to academic performance. *See, e.g.*, Nathan Essex, *Bullying and School Liability: Implications for School Personnel*, 84 CLEARINGHOUSE 194 (May 2011).

These recommendations include (a) the development and enforcement of anti-bullying policies, including clear reporting procedures, prompt investigation, and appropriate consequences; (b) timely notice of the anti-bullying policy to parents and students; (c) staff development that addresses awareness of the frequency of teen bullying and appropriate responses when bullying incidents occur; and (d) implementation of student anti-bullying programs that encourage peer support and student reporting of incidents.[30]

However, the literature also shows that the scope and enforcement of these policies are not devoid of problems, including legal limitations. For example, governmental and official immunity present a barrier in many states to liability suits against school districts and their personnel premised on negligence in response to student bullying.[31] Moreover, for verbal bullying in public schools, the First Amendment freedom of expression may pose a significant consideration or limitation.[32] While schools have the authority to punish speech that causes, or foreseeably will cause, a substantial disruption, what constitutes a substantial disruption is rarely a bright-line determination.[33] This interpretation becomes even more blurred for incidents of cyber-bullying; schools must determine whether there is a sufficient nexus between the off-campus speech and the in-school actual or potential disruption.[34] Similarly, the afore-mentioned[35] overlap with harassment introduces the legal limitations for schools—and, conversely, the legal protections for students—under the various civil rights laws.[36]

30. *Id*. at 195; Olweus, *supra* note 17, at 15.

31. *See, e.g.*, STUART-CASSEL, BELL & SPRINGER, *supra* note 4, at 9; Weddle, *supra* note 26, at 674. For the varying patterns among states, *see* Peter Maher, Kelly Price & Perry A. Zirkel, *Governmental Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J.L. & PUB. POL'Y 234 (2012).

32. Tefertiller, *supra* note 16, at 183. For the relevant case law governing regulation of public school student speech, see Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

33. *See, e.g.*, Sameer Hinduja & Justin W. Patchin, *Cyberbullying and Self-Esteem*, 80 J. SCH. HEALTH 614, 619 (2010).

34. Andrew B. Carrabis & Seth D. Haimovitch, *Cyberbullying Adaptation from the Old School Sandlot to the 21st Century World Wide Web*, 16 J. TECH. L. & POL'Y 143, 145 (2011). *See, e.g.*, Kowalski v. Berkeley Cnty. Sch., 652 F.3d. 565, 567 (4th Cir. 2011); J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1110 (C.D. Cal. 2010).

35. *See supra* notes 12-13 and accompanying text.

36. By providing an alternative for protected groups, particularly racial and ethnic minorities, and by extending to limited, extreme situations of students more generally, § 1983 provides the basis for claims under the Fourteenth Amendment Equal Protection and Due Process clauses, respectively.

D. State Anti-Bullying Laws

The responding legal framework in recent years has expanded in terms of new or strengthened anti-bullying laws at the state level. According to successive studies, the number of state anti-bullying laws was approximately fifteen in 2003,[37] sixteen in 2004,[38] twenty-one in 2009,[39] and forty-three in 2010.[40] Most of these statutes are unfunded mandates, and they vary widely in their scope and sanctions.[41] Moreover, the trend continues to be in flux.[42]

The published analyses to date have reported several key areas of variance, starting with the definition of bullying among these state laws. For example, these definitions often do not include all of Olweus' generally accepted criteria.[43] Similarly, the state laws vary from covering only the federally protected class groups to adding additional, particularly vulnerable, categories, such as gender identity or perceived sexual orientation.[44] These studies not only analyzed the provisions of the state anti-bullying laws,[45] but also identified deficiencies and recommended revisions.[46]

E. Case Law Specific to Bullying

In contrast to the coverage of state anti-bullying legislation, the literature lacks systematic study of the litigation concerning bullying. The lines of pertinent case law on various grounds, such as Fourteenth Amendment substantive due process, federal civil rights laws, and negligence, thus far have received only peripheral attention incidental to

37. Michael J. Furlong, Gale M. Morrison & Jennifer L. Greif, *Reaching an American Consensus: Reactions to the Special Issue on School Bullying* 32 SCH. PSYCH. REV. 456, 462 (2003).

38. Fred Hartmeister & Vickie Fix-Turkowski, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 2 (2005).

39. John Dayton & Anne Proffit Dupre, *A Child's Right to Human Dignity: Reforming Anti-Bullying Laws in the U.S.*, 28 IRISH EDUC. STUD. 333, 338 (2009).

40. Kueny & Zirkel, *supra* note 6, at 26.

41. *Id*.

42. For example, an increasing number of states are currently moving toward legislation that criminalizes bullying. *See, e.g.*, STUART-CASSEL, BELL, & SPRINGER *supra* note 4, at 20.

43. *See id.* at 25; *see, e.g.*, Kueny & Zirkel, *supra* note 6, at 27.

44. Sacks & Salem, *supra* note 14, at 148-49.

45. *See, e.g.*, STUART-CASSEL, BELL & SPRINGER, *supra* note 4, at 6; Dayton & Dupre, *supra* note 39, at 336; Furlong, Morrison & Greif, *supra* note 37, at 458; Hartmeister & Fix-Turkowski, *supra* note 38, at 10; Kueny & Zirkel, *supra* note 6, at 27.

46. *See, e.g.*, Hartmeister & Fix-Turkowski, *supra* note 38, at 3; Kueny & Zirkel, *supra* note 6, at 29.

other bullying issues, such as liability concerns for school personnel,[47] legal bases for bullying litigation,[48] or limitations of anti-bullying policies and statutes.[49] Consequently, Kueny & Zirkel believe "comprehensive, up-to-date systematic study is warranted for the pertinent case law."[50]

III. METHOD

The purpose of this study is to systematically analyze the case law specific to student-on-student bullying in the public school context from 1992 through 2011. The specific questions addressed are as follows:

1. What was the total number of court decisions, and what were the key characteristics of the plaintiff (i.e., protected class or not) and defendant (i.e., individual and/or institutional)?
2. What was the total number of claim rulings,[51] and what was the distribution in terms of legal bases (e.g., Fourteenth Amendment equal protection, Title IX, or negligence)?[52]
3. What was the longitudinal trend in the frequency of court decisions and claim rulings?
4. What were the outcome distributions for the claim rulings (a) overall and (b) longitudinally?
5. What was the outcomes distribution of the claim rulings disaggregated by legal basis?
6. What was the outcomes distribution of the court decisions in terms of the most plaintiff-favorable claim rulings per decision (a) overall and (b) longitudinally?[53]

47. *See, e.g.*, Essex, *supra* note 29, at 1; Sameer Hinduja & Justin W. Patchin, *Cyberbullying: A Review of the Legal Issues Facing Educators*, 55 PREVENTING SCH. FAILURE 71 (2011).

48. *See, e.g.*, Elizabeth M. Jaffe & Robert J. D'Agostino, *Bullying in Public Schools: The Intersection Between the Student's Free Speech and the School's Duty to Protect*, 62 MERCER L. REV. 407 (2011); Tefertiller, *supra* note 16, at 172; Weddle, *supra* note 26, at 644.

49. *See, e.g.*, STUART-CASSEL, BELL & SPRINGER, *supra* note 4, at 1; Kueny & Zirkel, *supra* note 6, at 29; Sacks & Salem, *supra* note 15, at 149-52.

50. Kueny & Zirkel, *supra* note 6, at 30.

51. "Claim rulings" refers to a unit of analysis at a component level of court decisions. More specifically, it refers to an adjudicated claim under one of the legal bases classified herein. For a more detailed description, *see infra* notes 72-73 and accompanying text.

52. For the classifications of legal basis, see *infra* notes 74-75 and accompanying text.

53. For this approach to return to the court decision as the unit of analysis, *see infra* note 108 and accompanying text.

The chronological scope was the twenty-year time period from January 1, 1992, to December 31, 2011. The case-law scope consisted of "published" court decisions in the broad sense of being available in the Westlaw database rather than the narrower sense of being in an official, hard-copy reporter series, such as the Federal Reporter or the Federal Supplement. The subject-matter scope was the following combination of criteria: (1) the bully and the victim were K-12 public school students, regardless of whether the bullying was on or off campus; (2) the plaintiff was a student and/or the student's parents; (3) the defendant was a school district and/or its individual employees; and (4) the facts[54] fit within the generally accepted Olweus definition of bullying.[55]

The first two steps were searching and screening. The search in the Westlaw database, within the designated starting and ending dates, was via the alternate terms of "bullying," "harassment," "teasing," or "hazing," each in combination with the terms "school," "students," and/or "peer." Next was careful screening of the published opinions of the resulting court decisions in relation to the aforementioned[56] selection criteria. Thus, for example, the exclusions were bullying cases (1) in non-public schools,[57] (2) where the primary bully was an adult rather than another student;[58] and (3) not congruent with the Olweus criteria, such as cases where (a) the perpetrator, due to cognitive limitations, lacked an intent to harm the victim;[59] (b) the harmful behavior was limited to an isolated incident;[60] or (c) the victim displayed an effective

54. "Facts" here includes allegations in court opinions deciding dismissal and summary judgment motions.

55. For the elements of this definition, see *supra* notes 18-21 and accompanying text.

56. *See supra* text accompanying notes 18-20.

57. *E.g.*, Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 519 (3d Cir. 2011); Doe v. Kamehameha Sch., 625 F.3d 1182 (9th Cir. 2010); C.J.S. v. Bd. of Dir. of City Trusts, No. 11-1471, 2011 WL 3629171 (E.D. Pa. Aug. 17, 2011); M.Y. v. Grand River Acad., No. 1:09 CV 2884, 2010 WL 2195650 (N.D. Ohio May 28, 2010); Bass v. Miss Porter's Sch., 738 F. Supp. 2d 307, 310 (D. Conn. 2010); D.C. v. R.R., 106 Cal. Rptr. 3d 399 (Ct. App. 2d Dist. 2010).

58. *E.g.*, Cockrell v. Lexington Cnty. Sch. Dist. 1, No. 3:11-CV-2-42-CMC, 2011 WL 5554811 (D. S.C. Nov. 15, 2011). Culbertson v. Fletcher Public Sch. Dist., No. CIV-11-138-M, 2011 WL 3477112 (W.D. Okla. Aug. 9, 2011); H.M. v. Kingsport City Sch. Bd. of Educ., No. 2:05-CV-273, 2009 WL 2986606 (E.D. Tenn. Sept. 10, 2009); O'Conner v. Meyer, No. CV065006438S, 2008 WL 5481704 (Conn. Super. Ct. Dec. 5, 2008).

59. *E.g.*, A.B. v. Clarke Cnty. Sch. Dist., No. 3:08-CV-041 (CDL), 2009 WL 902038 (M.D. Ga. Mar. 30, 2009). ; J.N. v. Pittsburgh City Sch. Dist., 536 F. Supp. 2d 564 (W.D. Pa. 2008); Jones v. Indiana Area Sch. Dist., 397 F. Supp. 2d 628, 634 (W.D. Pa. 2005).

60. *E.g.*, Halladay v. Wenatchee Sch. Dist., 598 F. Supp. 2d 1169 (E.D. Wash. 2009); Creekbaum v. Livingston Parish Sch. Bd., 80 So.3d 771 (La. Ct. App. 2011).

self-defense rather than an imbalance of power.[61] Moreover, even where the facts aligned with the bullying definition, the case was excluded if the bullying behavior was not the target of one or more adjudicated claims, instead being tangential to other disability-related[62] or regular education[63] issues. Similarly excluded as tangential were cases where the focus of the plaintiffs' challenge was not specific bullying behavior, but rather either disciplinary consequences[64] or a bullying policy.[65] The exclusions also extended to court opinions that lacked sufficient facts[66] to determine whether the case fit within the Olweus criteria.[67] Finally, the selection excluded cases of physical or sexual assault, including rape, by a student peer when the assault was neither the culmination of nor the stimulus for bullying behavior toward the victim.[68]

61. *E.g.*, Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000); T.C. v. Valley Cent. Sch. Dist., 777 F. Supp. 2d 577, 584 (S.D. N.Y. 2011); J.M. v. Hopkins Sch. Dist., No. Civ. 01-2124 MJD/SRN, 2003 WL 41639 (D. Minn. Jan. 3, 2003).

62. *E.g.*, K.R. v. Sch. Dist. of Philadelphia, 373 F. App'x 204, 206 (3d Cir. 2004); N.T. v. Baltimore City Bd. of Sch. Comm'rs, No. JKB-11-356, 2011 WL 3747751 (D. Md. Aug. 23, 2011); J.L. v. Francis Howell R-3 Sch. Dist., 693 F. Supp. 2d 1009 (E.D. Miss. 2010); Lewellyn v. Sarasota Cnty. Sch. Bd., No. 8:07-cv-1712-T-33TGW, 2009 WL 5214983 (M.D. Fla. Dec. 29, 2009); S.M. v. W. Contra Costa Cnty. Unified Sch. Dist. Fin. Corp., No. C 07-5829 CW, 2009 WL 1033826 (N.D. Cal. Aug. 16, 2009); Ron J. v. McKinney Indep. Sch. Dist., No. 4:05CV257, 2006 WL 2927446 (E.D. Tex. Oct. 11, 2006); State of Hawaii v. L.K., No. 05-00616 JMS/BMK, 2006 WL 1892220 (D. Hawaii July 10, 2006); Mr. and Mrs. I. v. Maine Sch. Admin. Dist. No. 55, No. Civ. 04-165-P-H, 2005 WL 1389135 (D. Me. June 13, 2005); Sylvie M. v. Bd. of Educ. of Dripping Springs Indep. Sch. Dist., 48 F. Supp. 2d 681 (W.D. Tex. 1999).

63. *E.g.*, C.H. v. Rankin Cnty. Sch. Dist., 415 F. App'x 541 (5th Cir. 2011); M.G. v. E. Reg'l High Sch. Dist., 386 F. App'x 186 (3d Cir. 2010); Doe v. Cape Henlopen Sch. Dist., 759 F. Supp. 2d 522 (D. Del. 2011); DNK v. Douglas Cnty. Sch. Dist., No. 04-CV-02513-MSK-CBS, 2006 WL 2331086 (D. Colo. Aug. 10, 2006); Walden v. Moffett, No. CV-F-04-6680 REC DLB, 2005 WL 2155572 (E.D. Cal. Sept. 6, 2005).

64. *E.g.*, Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 567 (4th Cir. 2011). Wayne v. Shadowen, 15 F. App'x 271, 274 (6th Cir. 2001); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000); Donavan v. Ritchie, 68 F.3d 14, 15 (1st Cir. 1995); J.K. v. Minneapolis Pub. Sch., 849 F. Supp. 2d 865, 868 (D. Minn. 2011); J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).

65. *E.g.*, Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874, 875 (7th Cir. 2011); Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 670 (7th Cir. 2008); Morrison v. Bd. of Educ. of Boyd Cnty., 521 F.3d 602, 605 (6th Cir. 2008); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 245 (3d Cir. 2002); Saxe v. State College Area Sch. Dist., 240 F.3d 200, 202 (3d Cir. 2001).

66. *See supra* note 62.

67. *E.g.*, D.T. v. Somers Cent. Sch. Dist., 348 F. App'x 697 (2d Cir. 2009); Hill v. Bradley Cnty. Bd. of Educ., 295 F. App'x 740, 741 (6th Cir. 2008); Peters v. Bd. of Tr. of the Vista Unified Sch. Dist., No. 08cv1657-L (NLS), 2009 WL 4626644 (S.D. Cal. Dec. 7, 2009); Davis v. Hooper, No. 07-632-GMS, 2008 WL 4220062 (D. Del. Sept. 15, 2008); Ronald D. v. Titusville Area Sch. Dist., 159 F. Supp. 2d 857, 859 (W.D. Pa. 2001).

68. *E.g.*, Webb v. Warner Middle Sch., 349 F. App'x 677, 678 (3d Cir. 2009); Winzer v. Sch. Dist. City of Pontiac, 105 F. App'x 679, 680 (6th Cir. 2004); Soper v. Hoben, 195 F.3d 845, 849

The third step was coding of the cases that met all the selection criteria. For those cases subject to successive court decisions, the basis of the coding was the final decision on the merits. Thus, the coding did not include decisions or claim rulings specific to technical or procedural issues, such as admission of evidence,[69] or those concerning attorneys' fees.[70] Similarly, the coding did not include decisions on the merits that were subject to reversal or modification upon further proceedings.[71]

Although the initial unit of analysis for the selection was the court decision, the ultimate unit of analysis for the coding was the "claim ruling,"[72] which is the combination of two categories—legal basis (e.g., Title IX) and defendant type (e.g., individual district employees).[73] The categories for the federal and state legal bases, respectively, were the

(6th Cir. 1999); Murrell v. Sch. Dist. No. 1, Denver, 186 F.3d 1238, 1243 (10th Cir. 1999); Doe v. Jackson Local Sch. Dist., 695 F. Supp. 2d 627, 630 (N.D. Ohio 2010); Pemberton v. W. Feliciana Parish Sch. Bd., No. 09-30-C, 2010 WL 431572 (M.D. La. Feb. 10, 2010); Jones v. Ewing Twp. Bd. of Educ., No. 3:09-cv-3536 (FLW), 2010 WL 715554 (D.N.J. Feb. 26, 2010); T.Z. v. City of New York, 635 F. Supp. 2d 152, 164 (S.D. N.Y. 2009); Doe v. Butte Valley Unified Sch. Dist., No. CIV. 09-245 WBS CMK, 2009 WL 2424608 (E.D. Cal. Aug. 6, 2009); Doe v. Allentown Sch. Dist., No. 06-cv-1926, 2009 WL 536671 (E.D. Pa. Mar. 2, 2009); Renguette v. Bd. of Sch. Tr. Brownsburg Cmty. Sch. Corp., 540 F. Supp. 2d 1036, 1037 (S.D. Ind. 2008); Doe v. Upper St. Clair Sch. Dist., No. 08-0910, 2008 WL 4861892 (W.D. Pa. Nov. 9, 2008); D.J. v. Stevens Elementary Sch., No. 07-579, 2008 WL 4722654 (W.D. Pa. Oct. 23, 2008).

69. *See, e.g.*, K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 347 (N.J. Super. Ct. App. Div. 2011); R.W. v. Georgia Dep't of Educ., No. 1:07-CV-535-WSD, 2007 WL 2915911 (N.D. Ga. Oct. 4, 2007).

70. *See, e.g.*, C.H. v. Rankin Cnty. Sch. Dist., 415 F. App'x 541, 548 (5th Cir. 2011); M.G. v. E. Reg'l High Sch. Dist., No. 08-4019 (RBK), 2009 WL 3489358 (D.N.J. Oct. 21, 2009); O'Conner v. Meyer, No. CV065006438S, 2008 WL 5481704, *15 (Conn. Super. Ct. Dec. 5, 2008); State of Hawaii v. R.L.K., No. 05-00616 JMS/BMK, 2006 WL 1892220 (D. Hawaii July 10, 2006).

71. *See, e.g.*, Moore v. Houston Cnty. Bd. of Educ., 358 S.W.3d. 612 (Tenn. Ct. App. 2011).

72. For the model for this type of empirical analysis, see Perry A. Zirkel & Caitlyn A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical analysis of the Case Law*, 10 CONN. PUB. INTEREST L.J. 323 (2011). "Claim ruling" in this context refers to disaggregating the court decision into each adjudicated issue category in terms of the designated categories of the legal bases and the two types of defendant (i.e., individual and institutional). *Id*. at 333-36. The primary advantage of this unit of analysis is precision for not only frequency but, more importantly in this context, outcome. However, for practical purposes, the initial calculation of frequency and the ultimate calculation of outcome are included herein in terms of court decisions as the unit of analysis. However, because the bullying case law—unlike that specific to restraints—was not characterized by multiple decisions on the merits, this analysis did include the larger unit of analysis, of the Zirkel & Lyons study, which was the case. Here, the case and the decision are effectively synonymous.

73. The outcomes within either type were conflated as one claim ruling except in the limited instances where they differed. For example, if the court dismissed the claims based on Title IX against four different individuals, they were coded as one claim ruling, but if the outcome was different for one of them, the coding resulted in two claim rulings—one for the three that had the same outcome and the other for the one with a different outcome.

bulleted items as follows:[74]

Federal

Constitutional:

- Amend. I expression
- Amend. XIV procedural due process
- Amend. XIV substantive due process
- Amend. XIV equal protection
- Constitutional right to privacy

Statutory:

- Title VI (race or ethnic discrimination)
- § 504 or Americans with Disabilities Act ("ADA")
- Title IX (sex discrimination)
- Individuals with Disabilities Education Act ("IDEA")
- §§ 1981, 1985, and/or 1986 (conspiracy)

State

Constitutional

E.g., equal protection

Legislation/Regulations

E.g., state civil rights act

E.g., state education code

E.g., state special education law

E.g., state anti-bullying statute

Intentional Torts:

- Assault and battery
- Intentional infliction of mental distress

Recklessness or gross negligence[75]

Negligence

The categories for the defendant were limited to two types—institutional and individual.[76] For example, an adjudication of Title IX claims against the school district and five named individual school employees counted as two claim rulings, one for institutional defendants and one for individual defendants. If an individual school employee claim ruling included multiple defendants, and rulings differed among the defendants, the ruling was considered a split ruling.[77] Conversely,

74. This claims categorization was a customization of the same Zirkel-Lyons model. Zirkel & Lyons, *supra* note 72, at 335.

75. This approximate term here refers generically to common law torts intermediate between negligence and intentional torts, where the alleged gravity is variously termed reckless or wanton conduct or gross negligence.

76. *See* Zirkel & Lyons, *supra* note 72, at 334.

77. While Zirkel & Lyons tallied the rulings for each individual defendant, due to the volume of cases and claims, this study considered all individual defendants together and provided one aggregate ruling. If the rulings differed for various individual school employees on the same claim, the analysis considered the ruling to be a split ruling.

the coding of the decisions excluded their rulings for claims separable from bullying behavior (e.g., the parent's defamation claim)[78] or specific to additional defendants beyond those associated with public schools (e.g., a police officer or social services employee).[79] Similarly, the coding did not cover claims that were not subject to adjudication in the court decision (e.g., those reserved for further proceedings that were not subsequently published).

For both institutional and individual school employee claim rulings, the coding identified the outcome for the claim. Specifically, the outcome entry for each claim ruling was in accordance with Chouhoud and Zirkel's five-category scale:[80]

> 1 = conclusively for the plaintiff (i.e., parent of the child and/or the child)
> 2 = inconclusively for the plaintiff (e.g., denial of motion for dismissal)[81]
> 3 = split between plaintiff and defendant
> 4 = inconclusively for the defendant (e.g., denial of plaintiff's motion for summary judgment)[82]
> 5 = conclusively for the defendant

After training with the second author based on a pilot sample of the finally selected court decisions, the first author coded the claim rulings for all of the cases, consulting with the second author as needed to insure accurate coding of complicated claims.[83] The coding entries for each claim ruling were recorded on a spreadsheet[84] that included the case citation, type of defendant, legal basis of each claim ruling, and outcome of each claim ruling. Claims against institutional and individual school employee defendants were recorded separately, as they were considered

78. *See, e.g.*, Gelinas v. Boisselle, No. 10-30192-KPN, 2011 WL 5041497 (D. Mass. Oct. 17, 2011) (claims concerning violation of First Amendment rights to complain publicly about bullying); O'Connor v. Meyer, No. CV065006438S, 2008 WL 5481704 (Conn. Super. Ct. Dec. 5, 2008) (claims concerning parental liability); Ramsey v. Harman, 661 S.E.2d 924 (N.C. Ct. App. 2008) (claims concerning no contact order).

79. *See, e.g.*, C.H. v. Rankin Cnty. Sch. Dist., 415 F. App'x 541 (5th Cir. 2011).

80. Youssef Chouhoud & Perry A. Zirkel, *The* Goss *Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353, 368 (2008); *see also* Zirkel & Lyons, *supra* note 72, at 336.

81. Other examples include denial of defendant's motion for summary judgment or granting of plaintiff's motion for a preliminary injunction.

82. Another example would be dismissing a claim without prejudice.

83. For a prior example of the same procedure, see Diane Holben & Perry A. Zirkel, *Empirical Trends in Teacher Tort Liability for Student Fights*, 40 J.L. & EDUC. 151, 161 (2011).

84. This spreadsheet is available from the first author (holbendm@npenn.org) upon request.

separate outcomes for the analysis.

IV. RESULTS

The total number of court decisions from the beginning of 1992 to the end of 2011 within the scope of the Olweus definition of bullying was 166. Of these 166 decisions, 148 (89%) were in federal court, with the remainder in state court. The plaintiffs were members of a protected class in 140 (84%) of the 166 decisions, with the most frequent categories being gender (n=67), disability (n=27), perceived sexual orientation (n=25), and race/ethnicity (n=20).[85] The majority of the decisions named both institutional and individual school employee defendants (n=112), with almost all (n=163) including the institutional type (i.e., school district).[86]

These 166 decisions contained 742 claim rulings.[87] The most frequent legal bases of these rulings were Title IX (n=116), Fourteenth Amendment substantive due process (n=112), Fourteenth Amendment equal protection (n=111), negligence (n=81), and state legislation (n=54). The state legislation was typically a civil rights law or a state constitution equal protection claim, but only infrequently an anti-

85. Reflecting the wide variance among scholars, advocates and other individuals in the terminology and definitions regarding gender and sex, courts have not been entirely consistent in their interpretation and application of the equal protection clause and Title IX in bullying and harassment cases. For the sake of uniformity, we follow the guidance of the Office for Civil Rights ("OCR"), which has defined gender-based harassment as based on "sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature." This broad definition includes harassment based on perceived sexual orientation; frequently, but not exclusively, this perceived sexual orientation references harassment based on the assumption that the victim is homosexual. Department of Education, Office for Civil Rights, *Dear Colleague Letter*, (OCR 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Thus, for the purpose of this study, the protected category of gender represents female students who sued for either sexual harassment or gender-based harassment that also met the aforementioned criteria for bullying, with students bullied due to perceived sexual orientation categorized separately.

86. Institutional defendants included the school district and/or the school board sued in their official capacities. Individual school employee defendants included administrators, teachers, or other personnel employed by the district. Only three cases solely named individual defendants. Evans v. Bd. of Educ. Sw. City Sch. Dist., 425 F. App'x 432, 433 (6th Cir. 2011) (ruling limited on appeals to qualified immunity for claims against principal for gender discrimination, although previous lower court decision concerned not only principal but also district); Crispim v. Athanson, 275 F. Supp. 2d 240, 242-43 (D. Conn. 2003) (claims against a principal and a teacher for racial harassment); Washington v. Pierce, 895 A.2d 173 (Vt. 2005) (claims against a principal for violation of state law prohibiting student-on-student harassment).

87. Thus, the overall average number of claim rulings was 4.5 per decision. State court cases had a ratio of 2.6 claim rulings per decision, while federal court cases had a ratio of 4.6 claim rulings per decision. The average more closely reflects the federal ratio due to the low proportion (11%) of state court decisions.

bullying law (n=6).

Figure 1 provides the frequency of court decisions and claim rulings for the successive four-year intervals within the period 1992 through 2011.

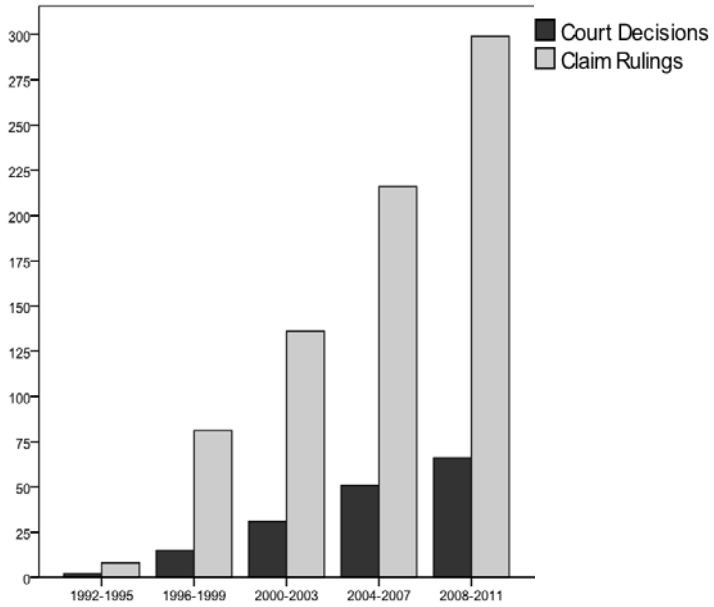

Figure 1. **Longitudinal Trend in Frequency of Court Decisions and Claim Rulings**

The frequency of court decisions started at a negligible level in the early 1990s but steadily increased in the subsequent intervals. Similarly, the number of claim rulings increased at each interval, with the ratio fluctuating to a relatively limited and balanced extent around 4.5 per court decision during the entire period.[88] The proportion of claims also remained relatively constant between individual (45%) and institutional (56%) defendants during each interval.[89]

88. The average number of claim rulings per court decision for each successive interval was: 4.0 for 1992-95; 5.0 for 1996-99; 4.4 for 2000-03; 4.2 for 2004-07; and 4.6 for 2008-11.

89. *See, e.g.*, *supra* notes 86-87 and accompanying text. The number of claims includes both institutional and individual school employee claims as separate claim rulings, increasing the number of claims per decision. The overall ratio aligns to the ratio for federal decisions as these represented 148 of 166 decisions analyzed.

The overall outcomes distribution of the 742 claim rulings was as follows:

- conclusively for the plaintiff(s) – 2% (n=11)
- inconclusively for the plaintiff(s) – 21% (n=159)
- relatively even split between the parties – 5% (n=37)
- inconclusively for the defendant(s) – 10% (n=72)
- conclusively for the defendant(s) – 62% (n=463)[90]

Thus, on a claim-by-claim basis, the outcomes, particularly the polar, conclusive rulings, were clearly skewed in favor of the district defendants. Figure 2 disaggregates these claim rulings among the successive four-year intervals, with the first two intervals combined due to their low numbers.

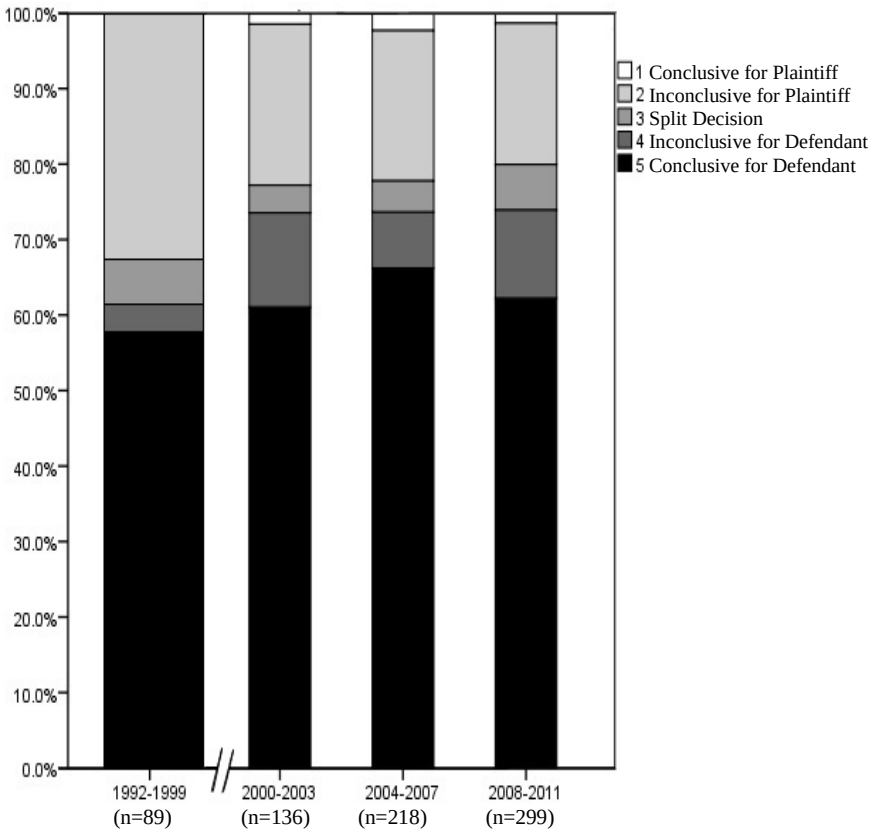

Figure 2. **Longitudinal Trend of Outcome Distribution for Claim Rulings**

90. "[P]laintiff(s)" here serves simply as a shorthand way of designating the parent and/or student, and "defendant(s)" does the same for the district and its employees.

An examination of Figure 2 reveals that the claim rulings predominantly favored the defendants during each interval, with the pattern particularly consistent during the last three intervals, which was also the time of the highest frequency. More specifically, during the three most recent intervals, the outcome was conclusively in favor of the district defendants for approximately two thirds of the claim rulings, with most of the remainder being inconclusive or intermediate; conversely, the proportion of claim rulings conclusively in the plaintiffs' favor was less than three percent.[91]

For each of the designated[92] federal bases, Table 1 summarizes the frequency and outcomes distribution of the claim rulings for the entire period by federal legal basis.[93] The sequence of legal bases is in descending order of their respective frequencies.

91. Alternatively viewed in terms of conflated outcomes categories on each side, the relatively stabilized level during the three most recent intervals was approximately 75% conclusively or inconclusively in favor of the defendants and approximately 20% conclusively or inconclusively in favor of the plaintiffs.

92. For the designated categories, see *supra* note 74 and accompanying text (bulleted items under "Federal").

93. All federal claim rulings were decided by federal courts.

	Outcomes				
	Student 1	2	3	4	District 5
Title IX (n=118)[94]	5%	30%	8%	1%	56%
Am. XIV substantive due process (n=112)	0%	14%	2%	4%	80%
Am. XIV equal protection (n=111)	0%	23%	3%	7%	67%
ADA/§ 504 (n=38)	0%	18%	6%	0%	76%
IDEA (n=27)[95]	4%	37%	7%	7%	45%
Title VI (n=17)	0%	12%	6%	0%	82%
Am. XIV procedural due process (n=16)	0%	25%	0%	0%	75%
Am. I expression (n=14)	0%	7%	0%	14%	79%
§ 1985/§ 1986 conspiracy (n=11)	0%	0%	0%	9%	91%
Constitutional right to privacy (n=5)	0%	0%	20%	0%	80%
§ 1981 (n=4)	0%	0%	0%	0%	100%
Miscellaneous others (n=12)[96]	0%	0%	17%	0%	83%
TOTAL (n=485)	**1%**	**19%**	**5%**	**4%**	**71%**

***Table 1*. Outcome Distribution and Frequency for Each Federal Claim**

94. For rulings conclusive for the plaintiff, see Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000) (affirming jury decision, noting that the standard of liability under Title IX was appropriate); Doe v. E. Haven Bd. of Educ., 200 F. App'x 46 (2d Cir. 2006) (affirming lower court ruling that student was sexually harassed and district response was clearly inadequate); Mathis v. Wayne Cnty. Bd. of Educ., No. 1:09-0034, 2011 WL 3320966, (M.D. Tenn. Aug. 2, 2011) (denying district request for post-trial relief from jury verdict); Dawn L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 384-85 (W.D. Pa. 2008) (concluding that severe, pervasive harassment occurred and district personnel did not take sufficient steps to halt it).

95. For rulings conclusive for the plaintiff, see Shore Reg. High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004) (ruling that district district's proposed placement was not appropriate due to risk of continued severe and pervasive bullying and the parent's unilateral placement was appropriate based on child's academic and social progress, thus awarding tuition reimbursement). A recent policy letter from the U.S. Department of Education repeated an earlier reminder to school districts about the importance of protecting students with disabilities from bullying, with a new distinction—specifically, the Section 504 provides relevant protection limited to disability-based harassment, whereas the IDEA applies to harassment, regardless of whether based on the child's disability, if so severe as to constitute denial of FAPE. Department of Education, Office for Civil Rights, *Dear Colleague Letter* (OSERS 2013), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf.

96. Each of the legal bases in this catchall category had a frequency of 3 or less. Examples are FERPA (n = 1), federal safe school law (n= 1), and First Amendment retaliation (n=1).

The most frequent federal legal basis cited was Title IX, closely followed by Fourteenth Amendment substantive due process and Fourteenth Amendment equal protection claims with the other federal bases being far less numerous. Although the outcomes, on balance, clearly favored the district defendants for each enumerated federal category, parents fared best, on the losing side, for claims under the IDEA and Title IX.[97] Moreover, the total proportion of federal claim rulings conclusively in favor of the district defendants (70%) was higher than the corresponding proportion (62%) for the overall (i.e., federal and state) claim rulings.[98]

Table 2 displays the corresponding frequency and outcomes for each of the designated[99] state legal bases in descending order of frequency.[100]

97. Although the IDEA was the only basis for which conclusively defendant-favorable rulings were not in the majority, the plaintiffs' limited counterbalancing outcomes were largely in the inconclusive category. Moreover, as explained *supra* note 10, the IDEA claims are marginal in terms of the liability focus of the analysis. For Title IX, the defendants' conclusive rulings were in the majority, and plaintiffs had a similar partial counterbalancing effect limited largely to the inconclusive category.

98. *See supra* note 89 and accompanying text.

99. *See supra* note 4 and accompanying text (bulleted items under "State").

100. The legal basis does not equate to the judicial forum. More specifically, federal courts accounted for several of these rulings via their discretionary supplemental jurisdiction for state claims; when federal courts declined supplemental jurisdiction without prejudice, the ruling was considered inconclusive for the defendant.

	Outcomes				
	Student 1	2	3	4	District 5
Negligence (n=81)[101]	2%	24%	7%	27%	40%
State legislation/regulations (n=54)[102]	4%	40%	4%	11%	42%
Intentional infliction of emotional distress (n=38)	0%	18%	3%	37%	42%
Recklessness, wanton misconduct, gross negligence (n=26)	0%	23%	0%	12%	65%
Assault/battery (n=12)	0%	33%	0%	33%	33%
State constitution (n=21)	0%	0%	10%	0%	90%
Miscellaneous others (n=23)[103]	0%	4%	4%	21%	71%
TOTAL (n=257)	**2%**	**23%**	**5%**	**21%**	**49%**

***Table 2*. Outcome Distribution and Frequency for Each State Claim**

Comparing the bottom lines of Tables 1 and 2 reveals that state claims were far less frequent than federal claims[104] and that the skew in favor of district defendants was less pronounced for state than federal claims.[105] Reviewing Table 2 alone reveals that negligence and state codes (i.e.,

101. For the two rulings conclusively in favor of the plaintiff, see M.W. v. Panama Buena Vista Union Sch. Dist., 1 Cal.Rptr.3d 508, 511 (Ct. App. 2003) (affirming lower court finding of liability for negligence in student sexual assault); Moore v. Houston Cnty. Bd. of Educ., 358 S.W.3d 612 (Tenn. Ct. App. 2011) (affirming verdict finding district liable for negligence due to pervasive sexual harassment and reversing determination of board immunity).

102. This category includes state civil rights acts, state education codes, state special education laws, and state anti-bullying laws. The sole ruling conclusively in favor of the plaintiff was based on the state civil rights law corresponding to Title IX, see L.W. v. Toms River Reg'l Sch. Bd. of Educ., 915 A.2d 535 (N.J. 2007) (concluding that the New Jersey Law Against Discrimination applies to student-on-student harassment based on an individual's perceived sexual orientation if the school district's failure to reasonably address that harassment has the effect of denying the student any of the school's accommodations, advantages, facilities, or privileges). The only cases that included a basis on a state anti-bullying law were in Connecticut, and in both cases, the court ruled that this law lacked an express or implied private right of action. Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639, *10 (Conn. Super. Ct. Sept. 26, 2008); Santoro v. Town of Hamden, No. CV040488583, 2006 WL 2536595, *2 (Conn. Super. Ct. Aug. 18, 2006).

103. Each of the legal bases in this catchall category had a frequency of three or less. Examples are state open records act (n=1) and state anti-hazing statute (n=1).

104. More specifically, the respective proportions of the state and federal law legal bases were 35% (n=257) and 65% (n=485).

105. For example, the percentage of rulings conclusively in favor of the defendants was 49% for state law legal bases compared to 71% for federal law bases, although the remainder tended to be in the inconclusive categories. At the opposite pole, the respective percentages conclusively in favor of the plaintiffs were only 2% and 1% for the state and federal law bases.

legislation and/or regulations) were not only the most frequent but also among the most plaintiff-favorable legal bases of the state claims.[106]

Finally, Figure 3 reanalyzes the longitudinal outcomes distribution of Figure 2 in terms of court decisions rather than claim rulings, again with the first two four-year intervals combined due to their low numbers. For the purpose of returning to the usual unit of analysis,[107] the claim ruling most favorable to the plaintiff represents the outcome of the court decision.[108]

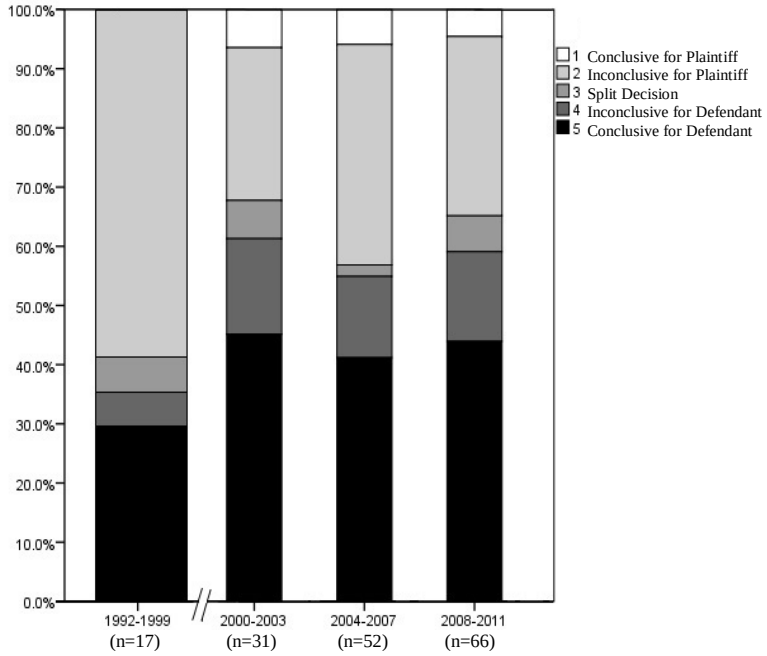

Figure 3. **Longitudinal Trend of Outcome Distribution for Court Decisions (Via Plaintiff's "Best" Claim Ruling)**

106. These two state legal bases were the only ones that yielded rulings that were conclusively in favor of the plaintiffs. However, the negligible number of these rulings, the relatively low frequency for many of these other bases, and the relatively high proportions in the inconclusive categories precluded comparisons that are more definitive.

107. Customarily, the parties and others view litigation results in terms of cases or decisions, which are basically synonymous here. *See supra* note 72.

108. For the model for this conversion, see Zirkel & Lyons, *supra* note 72, at 344. This approach, which—like any alternative (e.g., calculating the average outcome of all the claim rulings for each court decision or trying to weight each claim ruling in terms of its monetary value or estimated importance)—is only a limited approximation. However, it was the choice here because, like the litigation analyzed in Zirkel & Lyons, it fits with the so-called spaghetti strategy that has the common aim—with the IDEA FAPE cases being at the margin—of liability. It is also approximately in-line with the conception of whether the plaintiff is the prevailing party in the context of attorneys' fees, which is a latent issue in the majority of these cases.

Comparing Figure 3 with Figure 2 reveals that on a decision-by-decision basis, when the most parent-favorable outcome is selected among the claims that the plaintiff raised and the court adjudicated, the skew in favor of districts persisted, but on a notably reduced basis. More specifically, on this basis, the relatively stable pattern for the three most recent intervals changed from 60%-65% to 40%-45% conclusively in favor of the district defendants.[109] Conversely, the corresponding change on the other side was largely in terms of an expansion of the category of decisions inconclusively in favor of the plaintiffs.[110]

Based on this same best-outcome approach for conversion from claim rulings to court decisions, the overall outcomes distribution was as follows:

- conclusively for the plaintiff(s) – 5% (n=8)
- inconclusively for the plaintiff(s) – 34% (n=57)
- relatively even split between the parties – 5% (n=8)
- inconclusively for the defendant(s) – 15% (n=24)
- conclusively for the defendant(s) – 41% (n=69)

As compared to the aforementioned[111] outcomes distribution for claim rulings, this less pronounced district-favorable pattern represents, in effect, the other end of the range for characterizing the overall outcomes of the adjudicated bullying cases.[112] The balance still favors the defendants but the conflated categories (i.e., conclusive and inconclusive) on each side (i.e., defendant: plaintiff) change from 72:23% to 56:39%.[113]

V. DISCUSSION

Bullying is a pervasive national problem that has taken a prominent position on the agenda for K-12 school leaders, as evidenced by the dramatic increase in the number and scope of state anti-bullying laws. Yet, in contrast to major attention in the national media and professional literature to various other aspects of this problem, policy makers and practitioners have not had available a systematic analysis of the case law. To address this gap, this study

109. Similarly, adding the 4's in with the 5's, the proportion in favor of districts for the last three intervals changed from approximately 75% to slightly less than 60%.

110. For the last three time periods, the proportion in this category expanded from slightly less than 20% to slightly more than 30%. The decisions conclusively in favor of the plaintiffs increased notably but still did not exceed 5% and trended slightly downward rather than upward during the latest interval.

111. *See supra* note 89 and accompanying text.

112. The difference between the claim rulings analysis and this decision analysis is a decrease from approximately 60% to approximately 40% conclusively in favor of districts, with the major corresponding increase from 21% to 34% in the decisions inconclusively for the parents.

113. The small residual category of relatively evenly split outcomes remained at 5% for both units of analysis.

empirically analyzed the extent and nature of the published court decisions for cases fitting the prevailing definition of bullying,[114] with special attention to liability-related outcomes.

A. Total Number of Court Decisions and Key Characteristics of Plaintiffs

Overall, the study identified 166 pertinent cases during the twenty-year period 1992-2011. Of these decisions, institutional defendants were more frequent than individual defendants, although the plaintiff named both types in two thirds of the cases and, for the individual type, typically more than one school employee. The multiplicity of named defendants was likely attributable to the plaintiffs' efforts to maximize their chance of establishing liability, with the "deeper pocket" of the district included in almost every case.

Similarly shaped by liability based on the coverage of civil rights laws, the plaintiff in at least 84%[115] of cases was a member of a protected class. The most common protected classes were gender and perceived sexual orientation, attributable to not only the intersecting coverage of the equal protection clause and Title IX for sexual harassment[116] but also the prevailing discrimination in society and its youth against females and, even more, against perceived or actual homosexuals.[117] Within this predominant protected category, the plaintiffs in the perceived sexual orientation cases were males subjected to anti-gay verbal taunts and physical harassment.[118] Conversely, female plaintiffs

114. *See supra* note 18 and accompanying text.

115. This proportion was an undercount because it was limited to identification in the court opinion associated with the prima facie requirements of one or more civil rights laws. For example, the gender of the alleged victim was only identified and counted for Fourteenth Amendment or Title IX claims.

116. *See supra* note 8.

117. The courts have shown difficulty in addressing this social stigma. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 457 (7th Cir. 1996) (assuming, without deciding, that discrimination based on sexual orientation and discrimination based on gender were identical under Fourteenth Amendment equal protection); Hoffman v. Saginaw Pub. Sch., No. 12-10354, 2012 WL 2450805, *9-10 (E.D. Mich. June 27, 2012) (distinguishing between sexual connotations and sexual causation for same-sex harassment under Title IX); Drews v. Joint Sch. Dist. 393, No. CV04-388-N-EJL, 2006 WL 851118 (D. Idaho Mar. 29, 2006) (distinguishing between perceived sexual orientation and actual sexual orientation when claiming discrimination under Title IX); Patenaude v. Salmon River Cent. Sch. Dist., No. 3:03-CV-1016, 2005 WL 6152380, *5-6 (N.D. N.Y. Feb. 16, 2005) (considering that the determination of whether the use of specific derogatory terms is gender-based harassment depends upon the manner and context in which those terms are used); L.W. v. Toms River Reg. Sch. Bd. of Educ., 915 A.2d 535 (N.J. 2007) (recognizing perceived sexual orientation as a protected class under state anti-bullying law).

118. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996) (claiming equal protection violations due to perceived sexual orientation); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 139-40 (N.D. N.Y. 2011) (claiming severe and pervasive harassment under Title

were more likely to claim sexual or gender-based harassment based upon traditionally heterosexual name-calling or physical harassment.[119] Partly attributable to these and other civil rights claims and partly attributable to their generally higher verdicts than in state courts, the clear majority (89%) of the 166 cases were in federal court. Contributing to the low proportion of bullying cases in state court is the general, although varying, pattern of immunity for school districts and their employees to state torts.[120]

B. Total Number of Claim Rulings and Distribution of Legal Bases

In response to the second question of the study,[121] the 166 cases, or decisions,[122] yielded 742 claim rulings. This disaggregated unit of analysis is relatively conservative; it is based on the legal basis and defendant type, not extending to (1) claims that the plaintiff raised but the court did not address and, with a limited exception,[123] (2) separate rulings for each of the named defendants. The majority (65%) of claim rulings relied upon federal rather than state legal bases, with the most frequent legal bases being, in order, Title IX, Fourteenth Amendment substantive due process, and Fourteenth Amendment equal protection. Reliance upon federal constitutional and civil rights claims avoids limitations of state immunity to tort liability.[124] However, the coverage

IX and state law based upon perceived sexual orientation); Sandoval v. Merced Union High Sch., No. CV-F-06-066 REC/DLB, 2006 WL 1171828 (E.D. Cal. May 3, 2006) (claiming verbal and physical harassment as well as death threats based upon gender and sexual orientation); Shaposhnikov v. Pacifica Sch. Dist., No. C 04-01288 SI, 2006 WL 931731 (N.D. Cal. Apr. 11, 2006) (citing harassment based upon his status as a competitive ballroom dancer and conservative manner of dress); Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869 (N.D. Ohio 2003) (claiming verbal and physical harassment based upon advocacy of tolerance toward homosexuals).

119. *See, e.g.*, Doe v. Hamden, No. 3:06-CV-1680(PCD), 2008 WL 2113345 (D. Conn. May 18, 2008) (claiming offensive touching and verbal intimidation following an off campus rape); Addison v. Clarke Cnty. Bd. of Educ., No. 3:06-CV-05 (CDL), 2007 WL 2226053 (M.D. Ga. Aug. 2, 2007) (citing fondling and offensive touching in school and on the bus); Bruning v. Carroll Community Sch. Dist., 486 F. Supp. 2d 892, 902-04 (N.D. Iowa 2007) (claiming offensive touching and gender-based verbal slurs by a group of male students); Leffler v. Memphis City Sch. Bd. of Educ., No. 04-2141, 2005 WL 2008234 (W.D. Tenn. Aug. 22, 2005) (citing verbally harassing conduct by a male student). *Contra* Dawn L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 340-41 (W.D. Pa. 2008) (alleging sexual harassment of a female student by another female student).

120. *See* Maher, Price, & Zirkel, *supr*a note 31. *E.g.*, Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639 (Conn. Super. Ct. Sept. 26, 2008); Bell v. West Haven Bd. of Educ., No. NNHCV970399597, 2005 WL 1971264 (Conn. Super. Ct. July 19, 2005); Albers v. Breen, 806 N.E.2d 667 (Ill. App. Ct. 2004); Golden v. Milford Exempted Village Sch. Dist. Bd. of Educ., No. CA2010-11-092, 2011 WL 4916588, *3 (Ohio Ct. App. Oct. 17, 2011).

121. *See supra* notes 51-52 and accompanying text.

122. *See supra* note 72.

123. The limited exception was for legal bases where the outcome differed among defendants within the individual type. *See supra* note 74.

124. *See supra* note 31 and accompanying text.

of federal civil rights laws may cause a skew in relation to the actual incidence of bullying to those cases based on protected class status,[125] and the 65% is similarly skewed in relation to the actual incidence of bullying litigation due to the lesser likelihood of state cases being published.[126] Additionally, the higher ratio of claims per decision for federal court cases may represent in part a greater tendency for plaintiffs to include state law claims in federal court cases to avoid state immunity limitations.[127]

C. Longitudinal Trend of Court Decisions and Claim Rulings

The third finding was that the frequency of the bullying cases and their corresponding claims rulings rose steadily from the earliest to the most recent of the four-year intervals. This longitudinal trend was generally in line with the trend for K-12 student litigation[128] but in partial contrast with the moderating trend for K-12 school discipline cases more specifically.[129] The boundaries of this study are different from those for discipline case law in at least two ways: (1) the focus here is liability,[130] and, conversely, (2) overlapping cases, i.e., those where the challenge focused on disciplinary consequences, were one of the exclusions.[131]

The contributing factors for the steady growth of bullying cases during the past two decades likely include the continuing attention in the mass media and professional literature, an expansion of the use of Title IX and the Fourteenth

125. For recognition of the wider incidence, see *supra* note 15 and accompanying text. On the other hand, the concomitant high frequency of substantive due process claims, which is generic in terms of plaintiff status, serves to moderate this skew.

126. *See, e.g.*, William A. Hilyerd, *Using the Law Library: A Guide for Educators—Part I*, 33 J.L. & EDUC. 213, 222 (2004). The difference is especially although not exclusively applicable to the trial level. *Id*.

127. *See supra* note 87 and accompanying text.

128. *See, e.g.*, Perry A. Zirkel & Brent Johnson, *The "Explosion" in Education Litigation: An Update*, 265 EDUC. L. REP. 1, 4-5 (2011) (increasing from 1,762 in 1990-99 to 2,728 in 2001-09, though less pronounced for the larger, non-disability category); Susan A. Leonard, Trends in Education-Related Litigation: 1986-2004 (September 5, 2007) (unpublished Ed.D. dissertation, University of Kansas) (on file with first author) (litigation growth parallel to increase in student population).

129. *See, e.g.*, Richard Arum & Doreet Preiss, *Still Judging School Discipline*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN EDUCATION 238, 247 (Joshua Dunn & Martin West eds., 2009) (steady increase from 1990 to 2000, but lower frequency until final year of 2007); Chouhoud & Zirkel, *supra* note 79, at 370 (leveling off during the last period, which was 2001-2005).

130. As a partially closer analogy, Zirkel & Lyons, *supra* note 72, focused on liability within the narrower area of the use restraints for students with disabilities. Their results showed a leveling off in 1999-2006, but a major increase in 2007-10. Richard Arum & Doreet Preiss, *supra* note 129, at 340.

131. *See supra* note 64 and accompanying text.

Amendment as the legal basis for bullying claims,[132] and the recognition of protected classes not explicitly stated in federal civil rights legislation.[133] On the other hand, the recent expansion of anti-bullying laws was not a direct contributor in light of their negligible frequency as a direct or, via negligence theory, an indirect legal basis for the 742 claim rulings. Moreover, the persistent unfruitful outcomes did not appear to dampen the frequency of this litigation. Perhaps the plaintiffs and their attorneys are ill informed or, via the sensationalizing selective skew of the media, misinformed.[134]

D. Overall and Longitudinal Distribution of Outcomes

In response to the fourth question,[135] the overall outcomes of the claim rulings clearly favored the district defendants. For example, 62% of the claim rulings were conclusively in their favor in comparison to 2% conclusively in favor of the plaintiffs.[136] Moreover, this pattern was relatively consistent on a longitudinal basis during this twenty-year period, with no particular abatement in the plaintiffs' direction.[137] This overall and longitudinal distribution of outcomes is consistent with systematic analyses of various other areas of student litigation.[138] The principal reasons appear to be (1) the re-emergence of the deference doctrine, i.e., the traditional tendency of the judiciary, especially but not exclusively the federal courts, to provide ample latitude to public school authorities, during the recent decades,[139] and (2) the corresponding effect of state immunities to tort liability.[140]

132. *See supra* note 8 and accompanying text.

133. *See supra* notes 12-15 and accompanying text.

134. *See* Chouhoud & Zirkel, *supra* note 80, at 375.

135. *See supra* notes 51-52 and accompanying text.

136. *See supra* notes 89 and accompanying text. The higher proportion of inconclusive rulings in favor of the plaintiffs (21%) than in favor of the defendants (10%) only partially mitigated this dramatic disparity. *Id.*

137. *See supra* Figure 2.

138. *See, e.g.*, Arum & Preiss, *supra* note 129, at 248 (student discipline); Chouhoud & Zirkel, *supra* note 80, at 369-70 and 372 (student suspensions); Holben & Zirkel, *supra* note 83, at 162 (fighting); Zirkel & Lyons, *supra* note 72, at 341-342 (restraints).

139. *See, e.g.*, Hasenfus v. LaJeunesse, 175 F.3d 68, 74 (1st Cir. 1999) (proclaiming that "[s]ubstantive due process is not a license for judges to supersede the decisions of local officials and elected legislators"). For more general background, see, e.g., Wood v. Strickland, 420 U.S. 308, 326 (1975) (emphasizing that "the system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members").

140. *See supra* note 31 and accompanying text. Indeed, the federal courts' discretionary decision to deny supplemental jurisdiction for ancillary state claims in these bullying cases accounted for many of the inconclusive rulings for districts, because they were implicitly or explicitly without prejudice. To the extent that we found no evidence of corresponding subsequent decisions in these cases in state courts, these 4's arguably should have counted as 5's, thus increasing the aforementioned, *supra* note 126, dramatic disparity.

E. Outcomes Disaggregated by Legal Basis

The majority (62%) of the claim rulings were on federal legal bases, led by Title IX, Fourteenth Amendment due process, and Fourteenth Amendment equal protection.[141] The outcomes clearly favored the district defendants across all of these federal bases, but—aside from the relatively infrequent and marginal IDEA claim rulings—the parents fared best under Title IX. This proclivity for Title IX is apparently attributable to *Davis v. Monroe County Board of Education*,[142] in which the U.S. Supreme Court ruled that Title IX provided the basis for liability for peer harassment based on gender but only upon meeting a rather uphill set of standards.[143] The high bar plaintiffs must clear for a conclusive Title IX ruling is apparent; only four Title IX rulings were conclusive for the plaintiff, and three of those four rulings were appeals of a lower court decision.[144]

Substantive due process occupied second-place in terms of frequency but its particularly pro-district position in terms of outcomes comports with (a) its generic applicability in comparison to the protected-groups orientation of Title IX and other civil rights bases and (b) the courts' disinclination to use it as a license to second-guess school district actions and decisions.[145] Equal protection claims were in third place, with a frequency not much lower than that for substantive due process claims, and the outcomes were similarly skewed in favor of the district defendants. In these cases, courts often cited a lack of evidence that the schools' response to reported bullying was based on disparate treatment of the victim due to membership in a protected class.[146]

Conversely, the state legal bases accounted for not much more than one

141. *See supra* Table 1.

142. Davis v. Monroe Cnty Bd. of Educ., 526 U.S. 629 (1999).

143. The standards, in addition to the requisite connection to gender, include (1) severity, pervasiveness, and objective offensiveness amounting to denial of access to educational opportunities and benefits, (2) actual knowledge by decision-making officials, and (3) deliberate indifference. *Id.*

144. *See supra* note 94 and accompanying text.

145. *See, e.g.*, Broaders v. Polk Cnty. Sch. Bd., No. 8:10-CV-2411-T-27EAJ, 2011 WL 2610185, *5 (M.D. Fla. Apr. 19, 2011) (concluding that "a mere failure [of] Defendant to direct more resources toward student safety and protection will seldom, if ever, be cognizable under the due process clause"); Risica v. Dumas, 466 F. Supp.2d 434, 440 (D. Conn. 2006) (reasoning that "a school's failure to prevent the bullying from continuing does not rise to the level of a constitutional violation"); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123 JCS, 2000 WL 33376299, *11 (N.D. Cal. Apr. 17, 2000) (explaining that "mere failure to act cannot be a basis for liability under the Due Process Clause").

146. *See, e.g.*, Kirby v. Loyalsock Twp. Sch. Dist., 837 F. Supp. 2d 467, 475-76 (M.D. Pa. 2011); Roe v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1024 (E.D. Cal. 2009); Barmore v. Aidala, No. 04-CV-0445, 2006 WL 1978449, *11 (N.D.N.Y. Jul. 12, 2006); Snelling v. Fall Mountain Reg'l Sch. Dist., No. CIV. 99-448-JD, 2001 WL 276975, *9 (D. N.H. Mar. 21, 2001).

third of the claim rulings and the seemingly less pronounced skew in favor of district defendants is largely limited to the rulings conclusively favoring defendant (49% v. 71%).[147] Tempering this difference is the relatively high proportion of state-based rulings inconclusively favoring the defendant, largely attributable to the discretionary denial of supplemental jurisdiction in federal court for ancillary state claims. Combining the conclusive and inconclusive rulings favoring the defendant for the state legal bases yields a proportion of 70% in favor of the district defendants, which is much closer to the combined 75% for the federal legal bases. Yet, these comparisons are only tentative due to the high, albeit incomplete, correlation between legal basis and judicial forum[148] and the intersecting skew of differential publication rates for the federal and state judicial forums.[149] Within the state bases, negligence and state codes were the most frequent and among the most plaintiff-favorable, but the balance was still in the defendants' favor and the impact for both of these theories of anti-bullying laws was notably negligible.[150] The primary reasons for this low impact are likely the absence of a private right of action in such statutes[151] and the apparent difficulty of using the alternate theory of negligence per se.[152]

Although many states adopted anti-bullying laws in recent years,[153] very few claim rulings were based on a state anti-bullying law. Their paucity is attributable to their lack of a private right of action. Unless and until state legislatures provide for such a bridge to litigation, it appears that the only theories available to plaintiffs would be to argue that the statute provides the basis for the legal duty element of negligence, whether the breach is accepted as negligence per se or is proven as one of the additional elements. Notably, none of the 166 cases in this study tested this possible avenue for liability. While these laws did not provide a significant basis for litigation, they may promote a more proactive approach for school districts to reduce the incidence of bullying, thereby potentially mitigating bullying-related litigation.

147. *See supra* Table 2.

148. Because diversity of citizenship usually does not apply in such K-12 litigation, the usual avenue for access to federal courts is based on federal questions, with any state claims having only ancillary status.

149. *See supra* note 119 and accompanying text.

150. *See supra* notes 101-102 and accompanying text.

151. *See, e.g.*, Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639 (Conn. Super. Ct. Sept. 26, 2008) (denying claims under state anti-bullying statute because it contained no private right to action).

152. *See, e.g.*, O'Dell v. Case Grande Elementary Sch., No. CV-08-0240-PHX-GMS, 2008 WL 5215329 (D. Ariz. Dec. 12, 2008) (declining ancillary jurisdiction for negligence per se claim premised on state anti-bullying statute, reasoning that "the state court is best situated to decide [such] novel state law claims").

153. *See supra* notes 37-40 and accompanying text.

F. Overall and Longitudinal Outcomes Distribution for Most Plaintiff-Favorable Claim

Finally, reconfiguration of the outcomes on a decision-by-decision basis based on the most plaintiff-favorable claim ruling in each case results in a reduced but not reversed pro-district skew both longitudinally and for the twenty-year period overall. This less pronounced balance in favor of district defendants appears to confirm the plaintiffs' "spaghetti strategy of throwing everything against the wall and hoping something sticks."[154] The success here in terms of sticking to the wall for liability purposes extends beyond the 5% of decisions with conclusive rulings for the plaintiffs and, in part to the 5% split rulings to at least 34% of the cases with rulings inconclusively in their favor.[155] Only 41% of rulings were conclusive for the defendants, so the plaintiffs effectively could choose to continue litigation in 59% of cases. The reason is that these inconclusive rulings provide leverage for obtaining a settlement that yields at least part of the damages sought, particularly for district insurers who primarily base their calculations on transaction costs rather than the objective odds of an ultimate decision in the defendants' favor. To the extent that this leverage applies to the particular circumstances of the case, it may also extend—albeit on a less weighty basis—to the rulings inconclusively in favor of the defendants. However, the proportion of these cases resulting in settlement and the nature of these settlements are subject to speculation, being in the layer of the litigation iceberg[156] that is well beyond the generally available databases.

Using this study as a springboard of stimulus, further research is warranted, including (1) follow-up analyses with disaggregation for demographic features (e.g., grade level and other possible correlates of both the victims and the perpetrators) and/or jurisdictional features (e.g., states or circuits); (2) extensions of this methodology to suits where the plaintiffs are the bullies (e.g., where they challenge disciplinary consequences based on constitutional defenses) or where the bullying intersects with another major national concern—student suicide; (3) qualitative studies of the perceptions of the direct and indirect (e.g., other members of the school community) participants; (4) impact studies in terms of the knowledge, attitude, and practices resulting from such court decisions; and (5) traditional legal analyses of this litigation, the related legislation, and their interaction.

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154. Zirkel & Lyons, *supra* note 72, at 346. The ratio of claim rulings to decisions in the Zirkel & Lyons analysis of liability litigation concerning restraints of students with disabilities was 5.1, whereas the corresponding ratio here was 4.5. *See supra* note 86.

155. *See supra* note 110 and accompanying text.

156. For the use of this metaphor, *see, e.g.*, Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & EDUC. 483, 486-88 (2012).

VI. CONCLUSION

In any event, the increasing frequency but persisting pro-district outcomes of bullying liability litigation confirms that bullying continues to be a serious issue for K-12 schools and that the solutions should not be based on sensationalized or hyperbolic threats of liability. Carefully crafted legislation has its proper place, but it too is limited for several reasons, including (1) the lack of funding and enforcement in most of the anti-bullying laws to date;[157] and (2) the intersecting problem of the bewildering panoply of laws that apply to K-12 schools.[158] The results of this study suggest that additionally – or even alternatively – the solution primarily rests on the educational mission and expertise of K-12 schools. Thus, rather than legal liability, the key consideration arguably is determining and institutionalizing best practices for effective school climate that engenders a proactive approach to mutual respect for individual differences and dignity among students.[159]

157. Whether to add a private right of action depends at least in part on the interpretation and assessment of the results of this systematic study of the litigation to date. Other considerations include whether implementation is readily feasible. *See, e.g.*, Leslie Brody, *Anti-Bullying Task Force Says Principals Need More Leeway*, THE RECORD, Feb.1, 2013, http://www.northjersey.com/news/189330121_Antibullying_task_force_says_principals_need_more_leeway.html.

158. *See, e.g.*, James Self, *Report: Most SC Schools Fail to Comply with State's Sex Ed Law*, THE STATE, Jan. 31, 2013, http://www.thestate.com/2013/01/31/2611990/report-most-sc-schools-fail-to.html.

159. This "a-legal" approach requires well-trained personnel, effective rewards for exemplary conduct, and—in light of the most common factual theme in these court cases—particular attention to student behavior relating to gender orientation.