BULLYING

You are not alone, you didn’t do anything wrong, you didn’t do anything to deserve being bullied, and there is a whole world waiting for you. . . .

—President Barack Obama

Despite fond memories of childhood, each of us has either experienced or witnessed bullying, or maybe we were the bully. It is a problem that has been around since we began defining ourselves and those whom we view as different. It will likely be around forever, but we have a duty to take a stand and protect those who cannot protect themselves. This article will examine ways of holding schools accountable for failing to protect their students, various avenues that might be available for relief, and emerging problems and challenges in cyberbullying.

There are many definitions of bullying, but generally it is considered to be unwanted and aggressive behavior that is repeated or has the potential to be repeated. Bullying can take many forms, including making threats, spreading rumors, physically or verbally abusing someone, and purposefully isolating someone from a group.

According to National Center for Education Statistics in 2015, at least one in four children report having been bullied. We know that the actual number is even higher because at least 64 percent of students do not report when they have been a victim of bullying. But these numbers are only half of the story. Being bullied is not only painful, it has been linked to mental and physical health problems as well as general behavior disorders that could be lifelong.

In the modern age of global interconnections and 24-hour access, bullying can happen anywhere, at any time, and to anyone. Technology has made our lives easier in many ways, but it has left our youth vulnerable to a new form of bullying. There are no certain factors that determine whether a student will be the victim of bullying, but studies have shown that socially isolated students; lesbian, gay, bisexual, and transgender students; and students with disabilities are at a higher risk of being victims of bullying. According to Tara Kuther, Associate Professor of Psychology at Western Connecticut State University, “bullying gets so much more sophisticated and subtle in high school . . .” (tinyurl.com/jhktvl). It is during these years, when adolescents can be their worst without thinking about the consequences of their actions, that our society must put measures in place to help protect against the dangers of bullying.

By Mario A. Sullivan and Joachim Marjon
PROTECTING CHILDREN ON SCHOOL GROUNDS

Our journey began when a young woman and her parents came to the office of one of the authors to ask for help. The young woman had made pleas to her principal’s office to take action against bullies, but no action was taken. Like a leak in your roof, bullying gets worse if not addressed. One day the young woman was assaulted by her tormentors, and her family contacted Joachim Marjon for counsel. After researching causes of action, we discovered that, despite all 50 states having statutes dealing with bullying in schools, bullying remains a problem that is poorly addressed. The majority of the state statutes that address bullying do not create a cause of action against schools that fail to comply. Schools are no different than most bureaucratic entities—without some motivating force, such as monetary liability, a simple proclamation of intent rarely leads to results. Without a defined cause of action to overcome the state’s high hurdle of sovereign immunity, plaintiffs must be creative in their approach to hold a school liable for failing to protect its students. The two ways we observed that bullying has been addressed are through 42 U.S.C. Section 1983 civil rights actions and through state tort claims.

For Section 1983 actions, a plaintiff’s bullying must be related to a constitutionally protected category, such as free speech or equal protection. Using a theory of free speech, one could bring a claim under the First Amendment if (1) the victim student was attempting to say something that would be protected under free speech; (2) school officials retaliated by bullying this student themselves; and (3) the school was bullying this student because of the speech of the student. In our case with the young woman, a free speech claim was not viable because the school had not played an active role in the bullying and there was no protected speech involved.

For an equal protection claim under Section 1983, plaintiffs must prove (1) they were selectively treated differently by the school based on some protected trait, such as race, gender, or sexual orientation; (2) this different treatment resulted in plaintiff’s injuries; and (3) the different treatment was done in bad faith by the school. There have been very large verdicts won on cases using this cause of action, but it takes very specific facts to prevail over summary judgment. Our case did not involve discrimination by the school but rather just the standard, indiscriminate negligence that put the whole student population in danger; thus, an equal protection claim did not appear to fit our facts.

Given the narrow scope of Section 1983 action claims, much of the bullying plaguing our nation’s schools is not protected. This leaves only claims in which the state has waived its sovereign immunity to be sued. In our case, we attempted to breach sovereign immunity through an exception with regard to maintenance of public property. These exceptions to sovereign immunity are common among states in order to provide an avenue of relief to those injured on public property as a result of dangerous conditions such as uncovered holes or exposed electrical wires. This avenue does not require the same constitutional elements to be proven as do the Section 1983 actions, nor does it require the school to affirmatively act to cause the bullying; rather, the standard is one of negligence. Through this exception, we alleged that the bullying that took place at the school was an unaddressed dangerous condition such as having students exposed to asbestos over time.

We used the state anti-bullying statute, the school’s policy on bullying, and statements from public figures claiming they were fixing the problem of bullying to evidence the school’s knowledge that bullying was a dangerous condition and notice of the fact that it was a problem requiring immediate attention.

Just because we could touch the school did not mean that a claim was going to provide a desirable remedy. Under most state tort claim acts there are no punitive damages available. This made it difficult because the school was treating our case as if it were a slip-and-fall and only wanted to negotiate in the standard three-times medical damages range, which does not work for most bullying victims, who do not have large medical bills. In order to make the case viable, we had to demonstrate that bullying takes a cumulative effect and that the real damages may not manifest for years. We hired a professor from the University of New Mexico who was able to identify and explain injuries caused by bullying that could be observed in our client, as well as the long-term problems one might expect from such injuries. While I cannot discuss the specifics surrounding the outcome of our case, hiring an expert moved the debate for damages from being fought in the realm of bumps and bruises to the cost of long-term psychological harm.

A NEW AGE OF BULLYING: CYBERBULLYING

In the age of smartphones and social media, bullying has taken on a new form, outside the classroom and off-campus. It is difficult for our generation to relate to this type of bullying; what we endured or witnessed as students usually remained
on school grounds. Cyberbullying has brought the sense of being alone, different, and self-disappointed into the home, the one previously safe space.

Cyberbullying is bullying that takes place using electronic technology, including text messages or e-mails, posts on social networking sites and websites, and fake profiles. It is more difficult to detect and to protect against because of the ease of access to technology and the anonymity it provides a bully. According to the Cyberbullying Research Center (cyberbullying.org), about 20 percent of children ages 11 to 18 have been victims of cyberbullying. The i-SAFE Foundation (isafe.org) reported that more than half of teenage students have either experienced or engaged in cyberbullying.

We have seen the difficulties in obtaining relief when bullying occurs on school grounds; it becomes even more challenging with cyberbullying. Because students have the ability to send messages, e-mails, and texts or to post comments from any device, from anywhere, and anonymously, schools have little ability to address or discipline a student for cyberbullying.

Any regulation of a student’s speech faces First Amendment challenges, including disciplinary actions for cyberbullying, and only in certain circumstances can a school or state regulate off-campus speech. The U.S. Supreme Court has held that not all student speech is protected and has set forth several exceptions, with hurdles to overcome, in which a student’s speech may be regulated. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court held that a school could discipline a student for off-campus speech that is intentionally directed at the school community and is reasonably understood to be threatening, harassing, and intimidating. Additionally, the Court has held that a school can discipline a student for off-campus speech that is found to be obscene. In Miller v. California, 413 U.S. 15 (1973), the Court set forth several factors to determine when speech will not receive First Amendment protection because it is obscene. Even with these exceptions, schools or legislatures attempting to protect students from cyberbullying must carefully draft and narrowly tailor their regulation and disciplinary actions so that they do not restrict protected speech.

In addition, given the nature of cyberbullying and the virtual anonymity it provides, it can be difficult to establish the school’s knowledge of and deliberate indifference to such bullying, or that the bullying was of such a nature that it altered the educational condition of the student, in order to establish a cause of action for violation of other federal statutes, including Title IX of the Education Amendments Act, the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, or the Americans with Disabilities Act (ADA).

Outside of looking for redress for cyberbullying through school policies, one could seek civil actions directly against the bully for defamation or intentional infliction of emotional distress. Each such action has its own difficulties to overcome depending on the type of cyberbullying and circumstances. For example, it is difficult to make a claim for defamation with text messages or e-mails sent only to the victim because they are central and generally not words published to others. In addition, because of the anonymity of certain types of cyberbullying, it can be difficult to prove who the offender is. Finally, in the case of a young bully, you will probably try to make the bully’s parents liable, which can create many additional issues.

Threats of violence or explicit photos can turn the matter into a criminal offense and should be reported as such to the authorities; the criminal justice system is still available if matters have progressed that far. Finally, many cell phone providers and social media sites have policies against content that is considered to be cyberbullying, so notifying them might lead to their blocking the activity from continuing.

As technology continues to improve our access to others and the anonymity of our communications, protecting our children from the harms of cyberbullying will become ever more difficult. Each of us has a duty to bring an end to bullying in all its forms; we can reach out to students, share our stories, and help those victims who are suffering from bullying.

CONCLUSION

Creating a safe place where no one ever gets hurt feelings is likely impossible, but we have a duty to take basic precautions to protect children from the emotional terrorism caused by bullying. As cyberbullying becomes more and more prevalent, it is ever more important for us to look at various avenues to fight back. We, as attorneys, can work together to make a difference by ensuring that schools are providing actual avenues of protection for their students, both on and off the school grounds; by enacting anti-bullying programs and policies; and by seeking laws that allow redress for victims of bullying. We encourage you to visit the ABA Section of Civil Rights and Social Justice’s Bullyproof Committee website (americanbar.org/crsj) to learn more about what you can do to help bring an end to bullying. ■

Mario A. Sullivan (marioasullivan@yahoo.com) is a principal of Johnson & Sullivan Ltd., in Chicago, Illinois. Joachim Marjon (jmarjon@gmail.com) is the principal of Marjon Law P.C. in Santa Fe, New Mexico, and recently relocated to Rochester, Minnesota.