

BULLYING: CASE STUDIES ON COMPREHENSIVE REPARATION OF DAMAGE

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SUMMARY: Bullying is a type of behavior that has been studied more from psychological and sociological perspectives, but little has been done about the legal consequences that generate this type of illegal act. In Mexico, there are special laws in some states, but there is no genuine public policy that provides a mechanism of redress for the victim. Therefore, this investigation conducted a study of comparative law on the treatment given to bullying in the United States. This article also presents a study of the legal system that punishes the administrative form of bullying in Mexico, highlighting the most advanced states such as Coahuila, Jalisco, Nuevo León, Oaxaca, Quintana Roo, Veracruz, Yucatán and Zacatecas. This article also makes an assessment of bullying and its treatment to identify gaps in legislation and the failure of public policies to protect the best interests of the children. In these cases, the Federal Supreme Court of Justice (SCJN) rulings on these cases are analyzed and compared to the damage suffered by those affected and the need for comprehensive reparation.

KEY WORDS: *Bullying, the best interests of the children, comprehensive reparation of damage, right to education, moral damage.*

ABSTRACT: *El bullying es un tipo de conducta que se ha estudiado más desde la psicología y sociología, pero poco en cuanto a las consecuencias jurídicas que provoca este tipo de acto ilícito. En México existen leyes especiales en algunos estados del país, pero sin una verdadera política pública que prevea mecanismos de reparación para la víctima; por ello la investigación realiza un estudio de derecho comparado sobre el tratamiento que en Estados Unidos se le da al bullying; así también transita por un estudio del sistema jurídico que sanciona de forma*

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administrativa el bullying en México, destacando los Estados más avanzados tales como: Coahuila, Jalisco, Nuevo León, Oaxaca, Quintana Roo, Veracruz, Yucatán y Zacatecas. Así también se hace una valoración sobre el bullying y su tratamiento para definir los vacíos legislativos y el fracaso de las políticas públicas para la protección del interés superior de la niñez en estos casos, analizando así la solución que ha dado la Suprema Corte de Justicia de la Nación (SCJN) frente al daño sufrido por los afectados y su necesaria reparación integral.

PALABRAS CLAVE: *Responsabilidad civil, reparación integral, bullying, justa indemnización, daño moral.*

TABLE OF CONTENTS

I. INTRODUCTION	133
II. BULLYING: LEGAL CONSIDERATIONS CONCERNING THIS PSYCHOLOGICAL AND SOCIAL PHENOMENON	134
III. BULLYING IN COMPARATIVE LAW	136
1. United States	137
2. Legal Framework for Bullying in Mexico: Analysis of the States	139
A. Definition and Competent Authorities to Resolve Cases of Bullying in the Different States of Mexico	142
B. Sanctions in State Laws.....	142
C. Penalties for School Personnel in Case of School Violence....	144
D. Types of Abuse Among Schoolchildren	145
IV. A CASE STUDY: INTER-AMERICAN COURT OF HUMAN RIGHTS RULING.....	146
V. IMPLEMENTATION OF THE PRINCIPLE OF CONVENTIONALITY BEFORE THE DAMAGE CAUSED BY BULLYING IN MEXICO	149
1. Best Interests of the Child in Front of Bullying: Reasons for the Supreme Court to take Bullying Cases.....	150
2. Reinforced Protection of the Rights of the Child	151
3. Moral Damage.....	151
4. Evaluation of the Evidence in the Case of Bullying.....	152
5. The Negligence of the School and its Teaching Staff.....	153
6. Causal Link Between the Conduct and the Damage.....	154
7. Economic Situation of the Victim in the Compensation for Moral Damage	154
8. Resolution of the Case.....	155
VI. CONCLUSIONS	156

I. INTRODUCTION

Relationships among children and youth are the product of the lives of adults, including the forms of coexistence in their homes; This context produces acts of violence by the minors. However, according to Mexican law so-called bullying has been treated from a psychological perspective and only in special cases results in administrative sanctions against the aggressors or school representatives. In Mexico, different states in the country have laws that address the issue, but there is no legislative harmonization for dealing with bullying.

The scope of these laws does not cover the victims' human rights such as the right to life, to physical and moral integrity, and ultimately to the dignity of the person. This is because in terms of bullying, the legal system in Mexico is reduced to recommendations that only punish the aggressor's behavior, obviating comprehensive reparation on the basis of the best interest of the child.

The general objective of this research is to make a comparative study of laws on school bullying in the country and their understanding to identify legislative gaps and the flaws of the public policies that exist to protect the best interests of children in these cases. This is done by analyzing Supreme Court of Justice of the Nation (SCJN) resolutions regarding the damage suffered by the victim and the necessary comprehensive redress.

For this research, the contemporary methods of comparative studies on law, legal policy and case studies have been used.¹ The socio-political context of this article is found in the Constitutionalization of Civil Law, in a number of trends that are calling for the need to rethink the paradigms of legal positivism in force even now, in the twenty-first century. In the case of school bullying in Mexico, this article demonstrates the inconsistency and ineffectiveness of laws that are not supported by genuine public policy.

The research is also conducted on the basis of a comparative study of laws in the United States and the judicial treatment given to school bullying. Subsequently, we analyzed the legal system that penalizes administrative forms of school bullying in Mexico, highlighting the most advanced states in the country such as Coahuila, Jalisco, Nuevo León, Oaxaca, Quintana Roo, Veracruz, Yucatán and Zacatecas. Finally, a study was performed in a model case of damage caused by bullying at an educational institution in the State of Mexico and the opinion issued by the Mexican Supreme Court of Justice.

¹ GISELA MARÍA PÉREZ FUENTES and KARLA CANTORAL DOMÍNGUEZ, *Retos de la Investigación Jurídica en los Posgrados de Calidad. Mitos que Conspiran en Contra*, in TEMAS ACTUALES DE ESTUDIOS JURÍDICOS 23-56, (Tirant lo Blanch ed., 2016).

II. BULLYING: LEGAL CONSIDERATIONS REGARDING THIS PSYCHOLOGICAL AND SOCIAL PHENOMENON

Bullying is a behavior presented by children or adolescents in educational institutions and adults are responsible for preventing such behaviors. The socio-legal path can be through appropriate institutional devices, dialogue, and prevention, as well as disciplinary sanctions.²

Bullying or school bullying is used as a synonym in Mexico and is defined as specific forms of aggression that carries an imbalance of power between peers, who possess more real or figurative power and uses said power to inflict damage intentionally, systematically and repeatedly on those who are perceived as weaker.³

Bullying is an English word of Dutch origin, whose current meaning dates from the late seventeenth century.⁴ For purposes of this article dedicated to the field of educational institutions, some authors maintain that it implies any form of psychological, verbal or physical abuse produced among schoolchildren repeatedly over a certain period of time.⁵

In Mexico, in the opinion of the SCJN, what is important is the result of the violation to the dignity of the child because of its aggressive attitude.⁶ Bullying is identified as a specific aggressive behavior in which a person is abused when exposed, repeatedly and over time to negative actions by one or more person(s).

In Spain, it is stipulated that in the case of bullying, there is a dichotomy in the disciplinary regulations in damages laws for the same legal reality, depending on whether the offense is of a criminal or civil nature. The law is the same for minors regardless of whether the bully is under the age of fourteen or between fourteen and eighteen.⁷ Bullying manifests itself in behavior that involves a complex legal-social event in terms of its consequences by involv-

² See JUAN ANTONIO SEDA, *Responsabilidad en la Convivencia Escolar*, in BULLYING: RESPONSABILIDADES Y ASPECTOS LEGALES EN LA CONVIVENCIA ESCOLAR 17, (Noveduc ed., 2014).

³ ALEJANDRO JOSÉ MENA and ADRIANE XAVIER ARTECHE, *Bullying en Guatemala y Brasil: Una Problemática en Contextos Diferentes*, volume 48, no. 2, REVISTA INTERAMERICANA DE PSICOLOGÍA 166-171, Inter-American Society of Psychology (2014).

⁴ Oxford Living Dictionary available at: <https://en.oxforddictionaries.com/definition/bully>.

⁵ MARIA TERESA MENDOZA ESTRADA, *LA VIOLENCIA EN LA ESCUELA: BULLIES Y VÍCTIMAS* 9 (Trillas ed., 2011).

⁶ BULLYING ESCOLAR. ELEMENTOS QUE CONFORMAN SU DEFINICIÓN, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta, Décima Época*, tomo II, October 2015, Tesis 1a. CCXCVIII/2015, page 1638 (Mex.).

⁷ See ANA MARÍA PÉREZ VALLEJO and FATIMA PÉREZ FERRER, *BULLYING, CIBERBULLYING Y ACOSO CON ELEMENTOS SEXUALES: DESDE LA PREVENCIÓN A LA REPARACIÓN DEL DAÑO* 145-160, (Dykinson ed., 2016).

ing the battered child, other children who watch and do not say anything, the children's parents, teachers, and school representatives.

The 2006 World Report on Violence against Children⁸ exposed the impact of all forms of aggression suffered by children in schools. According to a recent Organization for Economic Co-operation and Development (OECD) study,⁹ 20% of 15-year-olds in Mexico are bullied at least once a month. In addition, as indicated by The National Institute of Statistics and Geography (its acronym in Spanish, INEGI) to achieve effectiveness in public policies it is essential to obtain data and statistics that makes it possible to classify the diverse cases involving violence against children and teenagers,¹⁰ among which are cases of school bullying.

The complex phenomenon called bullying is not only an act of aggression that consists of behaviors that can be described as harassment, but also has legal implications and responsibilities. Olweus, one of the pioneers in the study of victimization in school environments, offered a definition of school bullying, considering it as a physical and / or psychological persecution conducted by one student against another whom he chooses as a victim of several attacks, from which the victim finds it difficult to leave on their own.¹¹ Olweus's study indicates that the aggressor/harasser can be an individual or a group.

Bullying has been generally identified as having the following characteristics:¹²

1. With intent to harm, being understood as such that it does not constitute an isolated event and is directed to a specific person to turn that person into a victim. It has been considered that certain jokes can reach the degree of bullying, but the context needs to be assessed in terms of the discrimination that it may engender and whether it has affected the victim's or intended subjects' dignity.
2. Imbalance of power; this means that there is an inequality between the aggressor and victim that may be physical, psychological or social, so that an imbalance of forces in interpersonal relationship is generated.

⁸ UNICEF, WORLD REPORT ON VIOLENCE AGAINST CHILDREN, prepared by PAULO SERGIO PINHEIRO, 2006, available at: [http://www.unicef.org/lac/Informe_Mundial_Sobre_Violencia_1\(1\).pdf](http://www.unicef.org/lac/Informe_Mundial_Sobre_Violencia_1(1).pdf)

⁹ OECD, PROGRAMME FOR INTERNATIONAL STUDENT ASSESSMENT PISA 2015 RESULTS, STUDENT'S WELL BEING, 133-147, vol. III, 2017, available at: http://www.oecd-ilibrary.org/education/pisa-2015-results-volume-iii_9789264273856-en;jsessionid=100se8uodlvt5.x-oecd-live-03.

¹⁰ INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA [National Institute of Statistics and Geography], VIOLENCE AGAINST CHILDREN AND ADOLESCENTS: CONCEPTUAL, METHODOLOGICAL AND EMPIRICAL CONSIDERATIONS FOR THE CASE OF MEXICO, booklet number 6, 2016 at 29-30.

¹¹ DAN OLWEUS, CONDUCTAS DE ACOSO Y AMENAZA ENTRE ESCOLARES 24-25 [BULLYING BEHAVIORS AND THREATS AMONG SCHOOLCHILDREN] (Morata Ed., 2004).

¹² See ANA MARÍA PÉREZ VALLEJO AND FATIMA PÉREZ FERRER 53, *supra* note 7.

3. Personal helplessness, this is to say that the affected person is in a situation that results in a loss of hope.
4. Passive observation; third parties generally know of such situations of harassment, turn a blind eye toward the aggression.

We argue that in order to assess bullying the impact on the dignity of teenagers (male/female) should be legally considered whether the bullying was physical, psychological or social. This implies that harassment may manifest itself in different ways, such as: social marginalization, verbal aggression, humiliation, direct or indirect physical aggression, intimidation (that can occur through threats), blackmail or even unwanted image publications on technological devices.

These aggressive attitudes provoke psychological, social and legal consequences for both the victim and the aggressor. In case of the victim, it can imply failing at school, psychological trauma and a risk for its balanced development that affects a person's dignity.

In the case of the aggressor, it may be the beginning of future anti-social behaviors. However, it must be addressed civilly along with those displaying these attitudes. In most Mexican civil codes regulate the damage caused, in which the one responsible for causing the damage must repair it, unless that the responsibility falls on the people of him in charge.¹³

With regard to evidence of bullying, the Supreme Court of Justice¹⁴ has stated that proof of intent is extremely difficult to obtain and unnecessary as the damage to the victim is caused regardless of the aggressor's intent. However, schools must have some means of inquiry, which is what in traditional civil law is known as an analogy of a good parent.

III. BULLYING IN COMPARATIVE LAW

To understand the judicial treatment that has prevailed in situations of bullying in Mexico we first examine some key cases in the United States, as well as their legal consequences. Even if the legal system follows the common law tradition, the influence it has had on some Mexican institutions that deal with matters like bullying cannot be ignored. Later, the Mexican states with special laws to punish bullying in the administrative field are examined.

¹³ In this regard, see Article 2029 of the Código Civil de Tabasco (Tabasco Civil Code) published in the Periódico Oficial del Estado (State Official Gazette) on April 9, 1997, last reform: January 13, 2016 and Article 1911 of the Código Civil de la actual Ciudad de México (Civil Code of the present City of Mexico), published in the Diario Oficial de la Federación (Federal Official Gazette) on May 26, 1928, last reform published on December 8, 2016.

¹⁴ BULLYING SCOLAR. ESTÁNDAR PARA ACREDITAR LA NEGLIGENCIA DE UN CENTRO ESCOLAR, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, November 2015, Tesis 1a. CCCXXIII/2015, page 955 (Mex.).

1. *United States*

In US law, the Supreme Court has played a major role in shaping public policies and in the decisions of public authorities because the US Constitution establishes that it is a Federal Republic. This means that from a judicial standpoint there are fifty different systems –one for each state that makes up the Union. Organized into what is known as a system of federal courts, the judiciary consists of the Supreme Court, the Courts of Appeals and district courts.¹⁵

In order to assess the judicial treatment given to bullying, some cases that occurred in the United States of America are highlighted below.

Case 1

Fifteen-year-old Phoebe Prince¹⁶ of Irish origin, resident of the United States, hanged herself on January 2010, after months of being tormented by her classmates. When the news of Phoebe's death reached the students who harassed her, they continued to ridicule Phoebe on social networks. One of them responded to Phoebe's suicide by updating her Facebook status to "Mission accomplished."

Phoebe had started dating a 17-year-old boy. Shortly after, the boy left her for another girl. Along with a group of friends, this girl began stalking Phoebe at South Hadley High School.

The group of nine teenagers, 7 women and 2 men, cornered Phoebe in school halls, in the library, in the cafeteria and on her way home. They verbally insulted her, shoved her, knocked books out of her hand and sent her threatening text messages. One day on leaving the school, they threw a can at her. She went home and committed suicide. Two of the student aggressors were sentenced to one year's probation and one hundred days of community work.

Case 2

In Connecticut, an elementary school student sued the district school for negligence after the student was mocked every day for four years. The parties finally settled out of court and issued a joint statement that included an apology from the school district and a promise to revise their anti-bullying policy.¹⁷

There are similar cases of teachers and school staff encouraging or even participating in acts that intimidate students. In this type of lawsuits, the

¹⁵ MARIO MELGAR ADALID, *LA SUPREMA CORTE DE ESTADOS UNIDOS* 283-284, (Porrúa Ed., 2012).

¹⁶ JESSICA BROOKSHIRE, *Civil Liability For Bullying: How Federal Statutes And State Tort Law Can Protect Our Children*, *CUMBERLAND LAW REVIEW* 6,8 (2014-2015).

¹⁷ *Id.*

plaintiff can prove that the individuals are personally responsible for their intentional acts. Bullying is a constantly evolving phenomenon and claims for damages can arise in different scenarios. Some victims of rumors and similar types of harassment may, for example, sue for defamation, but these defamation claims can be complicated because they raise constitutional questions regarding First Amendment rights.¹⁸

Case 3

Vicky, a high school freshman, moved to a new high school in November.¹⁹ During her first week there, she meets Bertha in the cafeteria. Bertha insults her, criticizing Vicky's choice of clothes, hairstyle and appearance. Bertha encourages her friends to echo these comments. Vicky begins to avoid the cafeteria and tells her mother about Bertha, but does not complain to the school staff.

Bertha is annoyed because Vicky no longer eats at the cafeteria, so she seeks Vicky out, physically abuses her and throws her books. After the incident, Vicky has cuts on her hands and knees. She goes to the school nurse who asks how she got hurt. The nurse files a report of the incident with the assistant school principal. Vicky returns to the nurse four times with more and more serious injuries over the following weeks.

The assistant principal pulls both girls out of class and questions them about Vicky's injuries. Vicky accuses Bertha while Bertha denies any intentional behavior, claiming that Vicky is clumsy and wants to blame her because Vicky does not like her. The assistant principal tells both girls to behave more respectfully towards each other and sends them back to class. Vicky tells her parents what happened and says she is afraid of going to school. Her parents let her stay home for a couple of days.

When Vicky returns to school she is terrified by a series of anonymous notes left in her locker. The notes are drawings of an executioner with her name under them. She goes to the principal's office and asks if she can call her parents. The school secretary listens to her and asks Vicky to talk to the assistant principal again, which she does.

Bertha shoves Vicky against a bus, resulting in a concussion. Vicky's parents call the assistant principal to discuss the matter. He says Vicky has had difficulty socializing and low grades while Bertha is popular at school. Vicky's parents are not able to convince the assistant principal.

Three days after Vicky goes back to school, she is severely injured when her head pushed against her locker, resulting in head and neck lacerations

¹⁸ See JESSICA BROOKSHIRE, *Civil Liability* 7, *supra* note 16.

¹⁹ J.D. PAYNE AND ANNE M., *AMERICAN JURISPRUDENCE TRIALS*, vol. 111 number 123, 11-13 (2009).

requiring stitches and permanent damage to an ear. This case shows us the lack of sensitivity in some schools where they minimize bullying and do not measure the consequences, which can be fatal.

Therefore, in the case of trials filed against schools for bullying stemming from administrative personnel conduct (teachers or students in the educational institution), the following elements must be taken into account: nature and type of aggression, age and maturity of the victim, and the degree of the school's intervention in the behavior of the people in charge.

Case 4

Jessica Logan²⁰ sent a naked photo to her boyfriend. In a short time, the photo was sent to hundreds of students in at least seven high schools in the Cincinnati area. Classmates began to insult Jessica verbally calling her “porn queen”. Jessica began to miss school to avoid verbal insults, but at home she received cyber-attacks regarding the naked photo. Despite the problem Jessica graduated from high school, but the harassment did not end. After the relentless and hateful mockery of classmates, friends and even strangers, Jessica Logan hanged herself in her room. The Logans sued the Sycamore Community School Board for deliberate indifference to sexual harassment. The Logans alleged that the school and the school resource officer did not do enough to help Jessica. The parties reached an out-of-court settlement of \$154,000 for Jessica's family and \$ 66,000 for attorney's fees.

A school should address bullying cases that are known or should reasonably have known about as part of its duties of reasonable care. Harassment among classmates that occurs in corridors, classes, extracurricular activities or on the school bus presents sufficient evidence to make the school aware of it. The potential civil liability charges can be a way for school districts to make changes so that they may become aware of the legal implications of handling or dismissing harassment situations.²¹

As we can see, there are few cases in the United States condemning the redress of harassment damages in schools, perhaps due to the fact that the small number of cases brought to the appeal stage has not involved full reparation.²²

2. Legal Framework on Bullying in Mexico: An Analysis of Mexican States

The legal system that sanctions school harassment or bullying in Mexico is based on the following:

²⁰ See JESSICA BROOKSHIRE, *Civil Liability* 12, *supra* note 16.

²¹ *Ibidem*, 18-19.

²² See J.D. PAYNE, AND ANNE M., *AMERICAN JURISPRUDENCE TRIALS* 63-64, *supra* note 19.

-Political Constitution of the United Mexican States: Articles 1, 3 and 4 of the Federal Constitution, which protects the *homine principle*. This refers to the broad protection of the rights of the person, the right to education as a fundamental right and safeguarding of the best interests of children.²³ As the Mexican Supreme Court has held, these articles and the international treaties to which Mexico is a party coincide in that every person has the right to education. The content of basic education should be aimed at enabling the autonomy of the holders of this right and at helping them become members of a democratic society. The State must guarantee that basic education is mandatory, universal, free and accessible to all without discrimination. Moreover, parents are granted the right to choose the type of education given to their children and the individuals to impart that education, as long as they follow the basic requirements of that right.²⁴

Education is an intrinsic human right and an indispensable means of enjoying other human rights.²⁵ The right to education must cultivate a sense of dignity of the human person and fight against discrimination and inequality. To protect children's rights, the State must ensure that education is provided equally, in integrated, safe and violence-free spaces where children can develop their skills and competencies and learn the values that will allow them to coexist in society.²⁶ In this sense, the institution providing educational service is obligated to protect children's rights to dignity, integrity, education and non-discrimination, regardless of whether it is a public or private school.

-The Federal government has tried to develop a public policy for a bullying-free school through the National School Coexistence Policy,²⁷ which is based on educational and conciliatory principles to avoid possible cases of school violence. However, the program does not provide any solution for cases with negative effects on the affected child, which implies a lack of legal policy for

²³ Articles 1, 3 and 4 of the 1917 Mexican Constitution, *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

²⁴ FUNDAMENTAL RIGHT TO EDUCATION. ITS NORMATIVE REFERENCE IN THE MEXICAN JURIDICAL SYSTEM. First Chamber of the Supreme Court of Justice of the Nation [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Judicial weekly of the Federation and its Gazette, tenth epoch, book 37, December 2016, Thesis 1a. CCLXXXIV/2016, page 368 (Mex.).

²⁵ General comment No. 13 "The Right to Education", implementation of the International Covenant on Economic, Social and Cultural Rights, twentieth session, 1999, point 1.

²⁶ Sentence issued in the direct *amparo* number 35/2014 dated on May 15, 2015 by the First Chamber of the SCJN.

²⁷ The National School Coexistence Program is a preventive and formative educational program that is implemented on the basic education level so as to promote the creation of environments of school coexistence that contribute to prevent situations of harassment in public basic education schools, see <https://www.gob.mx/escuelalibredeacoso/articulos/programa-nacional-de-convivencia-escolar>.

such cases. On the other hand, there is a legal system of an administrative nature that tries to address bullying, as discussed below.

-General Education Law.²⁸ It does not define the bullying, but only refers to the fact that the education provided by State agencies should promote non-discrimination, peace and non-violence in all of its expressions.²⁹ Article 8 establishes the obligation to implement state public policies guided by the transversality of criteria in the three branches of government to eliminate cases of violence.

In the case of educational authorities in their respective fields, their activities will include the implementation of a program to reinforce the prevention of school violence from home and respect for teachers.³⁰ Education regulations also stipulate that measures must be taken to preserve physical, psychological and social integrity of the students when teaching thus showing respect for the rights of personality while leaving the procedure open to legally specify such protection. The law recommends social and psychological training for teachers and staff working at schools.³¹

-General Law of Protection of the Rights of Children and Adolescents.³² A specific chapter is devoted to the right to education, in which the federal and local authorities must develop protocols for action in situations of bullying or school violence. These protocols are directed at personnel and those exercising the parental authority, guardianship or custody of children. Based on this General Law, adjustments have been made to state laws for the protection of children. For the purposes of this article on bullying, the sanctions imposed on this conduct will be analyzed.

In addition, decisions taken by administrative authorities in areas like education should be assessed on the basis of the best interest of the children, as well as on all the implemented measures since consideration of the higher interest as something paramount requires awareness of the importance of their interests in all measures. Moreover, it is important to have the will to prioritize those interests in all circumstances, as determined by the Mexican Supreme Court.³³

²⁸ Published in the Federal Official Gazette on July 13, 1993, whose last reform was published on March 22, 2017.

²⁹ Article 7, section VI of the Ley General de Educación, [General Law of Education], as amended, Diario Oficial de la Federación [D.O.], 13 de Julio de 1993 (Mex.).

³⁰ Article 33 of the Ley General de Educación, [General Law of Education], as amended, Diario Oficial de la Federación [D.O.], 13 de Julio de 1993 (Mex.).

³¹ Article 42 of the Ley General de Educación, [General Law of Education], as amended, Diario Oficial de la Federación [D.O.], 13 de Julio de 1993 (Mex.).

³² Published in the Federal Official Gazette on December 4, 2014, last reform published on June 23, 2017.

³³ DERECHOS DE LAS NIÑAS, NIÑOS Y ADOLESCENTES. EL INTERÉS SUPERIOR DEL MENOR SE ERIGE COMO LA CONSIDERACIÓN PRIMORDIAL QUE DEBE DE ATENDERSE EN CUALQUIER DECISIÓN QUE LES AFECTE. Segunda Sala de la Suprema Corte de Justicia de la nación [S.C.J.N.] [Second

*A. Definition and Competent Authorities to Resolve Cases
of Bullying in the Different States of Mexico*

State laws that incorporate administrative penalties for bullying have been studied for this investigation.

School harassment is defined in the state of Coahuila as repetitive and intentional behavior, by any means, in which one or more students seek to intimidate, subdue, intimidate and/or frighten, either emotionally or physically, one or more students at any level of a public or private school, for the purpose of (a) causing physical or emotional harm, or damage to property; (b) placing the victim(s) in a situation of reasonable fear of having harm done to their person(s), dignity or property; (c) creating for the victim(s) a hostile environment within the school; (d) violating victims' rights at school; and (e) materially and substantially altering the education process, as well as a school's peaceful and proper running.³⁴

In the same sense, in its State Education Act the state of Jalisco defines violence or bullying as harassment and intimidation among students, and refers to a systematic, physical, verbal, psychological, and written sexual act by means of signs or touching, generated among students.³⁵

In its special law on bullying, the state of Nuevo Leon also contemplates the concept: understanding as a form of psychological, physical, verbal, sexual or cybernetic aggression or abuse inside or outside public and private educational institutions, in which one student receives from one or more other students repeatedly and without apparent provocation on behalf of the recipient. Such aggression or abuse attacks their dignity and disrupts their school performance, social integration alone or within groups, as well as their participation in educational programs, impairing their willingness to participate or take advantage of the educational programs or activities at the school, causing a feeling of reasonable fear of suffering harm of any kind.³⁶

B. Sanctions in State Law

The most interesting aspect of these special laws is ultimately the legal solution imposed on school bullying, in the sense of coercing unlawful acts and

Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, Libro 38, Enero 2017, Tesis 2a. CXLI/2016, Page 792 (Mex).

³⁴ Ley para la prevención, atención y control del acoso escolar para el estado de Coahuila de Zaragoza [Prevention, Care and Control of School Harassment Act for the State of Coahuila de Zaragoza], as amended, *Periodico Oficial [P.O.]* November 13, 2015 (Mex.).

³⁵ Article 175 de la Ley de Educación del Estado de Jalisco [Education Act for the State of Jalisco] as amended *Diario Oficial [D.O.]*, September 6, 1997.

³⁶ Article 3 of the Ley para prevenir, atender y erradicar el acoso y la violencia escolar del estado de Nuevo León [Law to Prevent, Address and Eradicate Harassment and School Violence in the State of Nuevo León], as amended *Diario Oficial [D.O.]*, July 1, 2013.

resolving administratively. However, the prescribed sanctions do not reflect the protection to be given to the victim and therefore there is no comprehensive reparation mechanism. This can be seen in the following examples of the types of sanctions that appear in the special state laws.

- I. Private reprimand: A verbal warning and a preventive written report to the instigator or accomplice about the consequences of his conduct, and the measures applicable to a future recurrence;
- II. Treatment and/or specialized treatment: The obligation of the instigator or accomplice to comply with remedial action when appropriate;
- III. Class Suspension: Temporary cessation of class attendance, accompanied by assignments that, according to the current study program, must be completed during a period of time to be determined by the school principal in accordance with the relevant regulations; and
- IV. Transfer to another school: Definitive relocation of the school where the perpetrator or accomplice is located, when the previous sanctions have been exhausted and there is a recurrence of their conduct. They will be directed to the education system for relocation.³⁷

The special laws are not homogeneous in terms of the procedure for imposing such sanctions. For example, the states of Nuevo Leon,³⁸ Oaxaca³⁹ and Yucatán⁴⁰ stand out because they guarantee a hearing and due process in dealing with the identification of bullying. Other laws stipulate that the

³⁷ Article 32 of the *Ley para la prevención, atención y control del acoso escolar para el estado de Coahuila de Zaragoza* [Prevention, Care and Control of Bullying Act for the State of Coahuila de Zaragoza]; Article 46 of the *Ley para prevenir, atender y erradicar la violencia entre estudiantes del Estado de Quintana Roo* [Law to Prevent, Address and Eradicate Violence Between Students for the State of Quintana Roo], as amended *Diario Oficial* [D.O.], November 17, 2015; Thus, also Article 44 of the *Ley de prevención y atención del acoso escolar para el Estado de Veracruz de Ignacio de la Llave*, [Prevention and Care of School Harassment Act for the State of Veracruz of Ignacio de la Llave], as amended *Diario Oficial* [D.O.], January 8, 2016; Article 38 of the *Ley para la prevención, combate y erradicación de la violencia en el entorno escolar del Estado de Yucatán* [Law to Prevent, Combat and Eradicate Violence in the School Environment of the State of Yucatán] as amended *Diario Oficial* [D.O.], July 26, 2012; As well as Article 77 of the *Ley para prevenir, atender y erradicar el acoso escolar en el Estado de Zacatecas*, [Law to Prevent, Address and Eradicate School Harassment in the State of Zacatecas,], as amended *Diario Oficial* [D.O.], June 12, 2014.

³⁸ Article 76 of the *ley para prevenir, atender y erradicar el acoso y la violencia escolar del estado de Nuevo León*, [Law to Prevent, Address and Eradicate School Harassment and Violence for the State of Nuevo León], as amended *Diario Oficial* [D.O.], July 1, 2013.

³⁹ Article 45, Section XII of the *Ley contra la violencia y acoso entre iguales del Estado de Oaxaca* [Law against Violence and Harassment between Equals of the State of Oaxaca] as amended *Diario Oficial* [D.O.], February 9, 2015.

⁴⁰ Article 38 of the *Ley para la prevención, combate y erradicación de la violencia en el entorno escolar del Estado de Yucatán* [Law to Prevent, Combat and Eradicate Violence in the School Environment for the State of Yucatán] as amended *Diario Oficial* [D.O.], July 26, 2012.

sanction should be imposed directly on the schools by the Ministry of Education.⁴¹

In Nuevo León it is the school brigades that resolve the cases of harassment through the necessary measures to carry out preventive actions of this figure, using prior mediation, when it is not possible to reach an agreement between the parties, the determinations of the Brigade will be adopted by majority vote of its members and disciplinary measures may be applied to the actors of the unlawful acts of harassment.⁴²

In some states, the authority of the educational institution (generally the director) imposes the sanctions as stipulated in the States of Coahuila,⁴³ Jalisco,⁴⁴ Veracruz⁴⁵ and Zacatecas.⁴⁶

C. Penalties for School Personnel in Case of School Violence

In the state of Coahuila, school personnel is subject to a penalty when: (a) they tolerate or consent to school harassment or retaliation; (b) do not take steps to prevent and intervene in cases of bullying or retaliation; (c) use force against a student without justification; (d) hide from the parents or guardians of the perpetrators, accomplices or victims, cases of bullying or retaliation; (e) provide false information or withhold information from the authorities about acts of violation to this law; (f) commit another act or omission contrary to this law; and (h) violate any provisions of the Law on the Responsibilities of State and Municipal Public Servants of the State of Coahuila of Zaragoza.

⁴¹ For example, Article 42 of the Law to Prevent, Combat and Eradicate Violence in the School Environment for the State of Yucatán stipulates that when the educational institutions repeatedly fail to comply, the school can be closed down. Article 48 of the Veracruz special law also stipulates possible closure due to recidivism. In the case of Quintana Roo, the Ministry of Education may penalize school personnel who fail to comply and, where appropriate, dismiss school principals, see Article 11, section VIII.

⁴² Articles 26, 27, 28, 29, 68 and 69 of the *Ley para prevenir, atender y erradicar el acoso y la violencia escolar del estado de Nuevo León*. [Law to Prevent, Address and Eradicate Harassment and School Violence for the State of Nuevo León], as amended Diario Oficial [D.O.], July 1, 2013.

⁴³ Articles 33 and 34 of the special law of Coahuila, which establishes that the school principals or their designees are responsible for enforcing the corresponding sanction, after due investigation, and respecting the student's right to be heard himself or through his/her parents. Where the seriousness of bullying has criminal consequences, it will be handled according to the intervention plan and the competent authority will be informed.

⁴⁴ Article 180 of the *Ley de Educación del Estado de Jalisco*, [Education Act of the State of Jalisco], as amended Diario Oficial [D.O.], September 6, 1997.

⁴⁵ Article 8, sections XIII, XIV and XV of the Law to Prevent and Address Bullying for the State of Veracruz of Ignacio de la Llave,

⁴⁶ Article 30, sections XV and XVI of the Law to Prevent, Address and Eradicate School Harassment in the State of Zacatecas.

The following sanctions apply to school personnel who fail to comply: (a) a report in their personal file; (b) suspension from teaching or administrative duties for up to one year without pay and without being counted for seniority purposes; (c) disqualification from holding any school staff office for one year or more, or permanently. The secretariat may privately warn the educational institution that fails to comply with the obligations of this law, publically admonish it when repeated non-compliance occurs, or proceed to its closure when the two previous sanctions have been insufficient to remedy the non-compliance.⁴⁷

In the case of Nuevo León, disciplinary measures against educational institution workers in cases of bullying will be penalized according to that established in the provisions of the State Education Act. The State Ministry of Education will sanction, in case of recidivism and when it deems necessary, the individuals who provide the education service. In addition to that established in Education Law of the State of Nuevo Leon, the following measures may be enforced: (a) written reprimand; or (b) a fine of up to three thousand five hundred times the general minimum daily wage in force in the geographical area, the amount of which will depend on the seriousness of the offense and the date when the offense is committed. Fines imposed may be doubled in the event of recidivism.⁴⁸

The law of Nuevo León stresses that the imposition of sanctions against public servants, as well as disciplinary measures for students, does not exclude the possibility of civil, labor or penal actions that may be appropriate.⁴⁹

D. *Types of Abuse Among Schoolchildren*

According to the special laws of the different states of the country, like those in the state of Coahuila,⁵⁰ the types of bullying among schoolchildren are considered the following:

- I. Physical: When there is assault or physical damage to a student or his or her property.
- II. Verbal: When there is emotional harm to a student through insults, contempt or ridicule in public or in private.

⁴⁷ Articles 35 and 36 of the Prevention, Care and Control of School Harassment Act for the State of Coahuila de Zaragoza. These penalties concur with that stated in Article 48 of the Prevention and Care of School Harassment Act for the State of Veracruz of Ignacio de la Llave.

⁴⁸ Article 71 and 72 of the Law to Prevent, Address and Eradicate Harassment and School Violence for the State of Nuevo León.

⁴⁹ Article 75 of the Law to Prevent, Address and Eradicate Harassment and School Violence for the State of Nuevo León.

⁵⁰ Article 10 of the Prevention, Care and Control of School Harassment Act for the State of Coahuila of Zaragoza.

- III. Psychological: Where there is intimidation, harassment, blackmail, manipulation or threat against a student.
- IV. Cybernetics: That done through the use of any electronic means like the Internet, web pages, social networks, blogs, emails, messages, images or videos on cell phones, computers or other digital technologies.
- V. Sexual: All discrimination and violence against another student related to his or her sexuality, as well as sending messages, images or videos with erotic or pornographic content through digital technologies.
- VI. Social exclusion: When the student victim is excluded and isolated, or threatened with being so, from school coexistence on the grounds of discrimination of any kind.

In view of the various types of abuse that arises from bullying, we can affirm that reparation for the victim must be claimed through a civil trial for moral damage against the persons who committed the wrongful act in which the existence of psychological and sociological effects stemming from this act of aggression must be demonstrated. The ways in which the consequences of bullying are manifested include: depression, low grades, and low self-esteem, among many others. Moreover, when the aggression takes place in a school environment, bullying can produce civil responsibility for other people's actions.

IV. CASE STUDY: INTER-AMERICAN COURT OF HUMAN RIGHTS RULING

The presence of the principles of solidarity and equality is assumed in the full spectrum of comprehensive reparation of damage under the consideration that it is oriented at a person's full development. That is why the interpretation of contemporary civil responsibility as a fundamental right is based on comprehensive reparation that includes an equitable, but not quantified valuation, and is based on the principle of constitutional solidarity.⁵¹ Compensation is not fair when it is limited by obstacles or fees, instead of it being the judge who quantifies compensation based on criteria of reasonableness; it is the legislator who arbitrates.

The following analyzes a case regarding the form of assessing damage and the recognition of the right to the comprehensive reparation as ruled by the Inter-American Court of Human Rights. It will allow us to understand forms of reparation in situations of bullying. School bullying can also be expressed

⁵¹ PIETRO PERLINGIERI, *THE CIVIL LAW IN THE CONSTITUTIONAL LEGALITY ACCORDING TO THE ITALO-COMMUNITY SYSTEM OF THE SOURCES* 728 and SS., (translated and coordinated by AGUSTÍN LUNA SERRANO and CARLOS MALUQUER DE MOTES Y BERNET, Madrid, ed. Dykinson, 2008).

through discriminatory gestures that promote rejection and exclusion due to illness, as is the case explained.

The reports and resolutions issued by the Inter-American Commission⁵² and the Inter-American Court of Human Rights have reiterated the fact that the State is obligated to prohibit the use of corporal punishment as a method of disciplining children and adolescents under the custody and protection of schools.⁵³ In addition to the situation of vulnerability in which they find themselves, it is necessary to guarantee the new paradigm of the right to an integral reparation, where the compensation for the damage caused by school bullying is not limited to an amount fixed by law, but this integral reparation admits example, the establishment of mechanisms of non-repetition to avoid serious violations derived from the harassment and physical and intellectual mistreatment of infants.

The Inter-American Court of Human Rights ruled on the following case against Ecuador in 2015. The events forming the basis of this case took place in 1998:

On June 20, 1998, Talía, a three-year-old girl, had a nosebleed that would not stop. Her mother took her to the Catholic University Hospital, a private health institution located in Azuay, Cuenca. Talía was in the hospital for two days and was later taken to the Pablo Jaramillo Foundation Humanitarian Clinic (“Humanitarian Clinic”), a private health institution located in Cuenca. At the Humanitarian Clinic, Talía was diagnosed with thrombocytopenic purpura (a blood disorder characterized frequently in different parts of the body) by Dr. PMT, a Red Cross doctor, who informed Teresa Lluy that Talía urgently needed a transfusion of blood and platelets.⁵⁴

This medical treatment ended up harming Talía’s life project. Due to the Red Cross staff’s lack of care, one of the blood transfusions was contaminated with the HIV virus or AIDS because one of the donors had the virus without knowing it and the hospital did not verify the blood until the day after the donation and after Talía had already received the transfusion. As a result of the incident, the girl’s family filed both criminal and civil proceedings. Despite the evidence proving the causal nexus –that is to say that Talía had been specifically infected by a donor’s blood and that the viruses found in the blood of both the donor and Talía were genetically identical– the criminal trial was declared that the action had prescribed. The civil trial was declared null in the absence of a criminal conviction.

⁵² Inter-American Commission on Human Rights, Report on Corporal Punishment and Human Rights of Children and Adolescents, Organization of American States, adopted by the Commission at its 135-8th regular Session, 2009, pp. 17-19.

⁵³ Brothers Gómez Paquiyañuri, 2004, Inter-Am. Ct. H.R., (ser.) (C) No. 110, at. 124 (Jul 8, 2004), as well as “Juvenile Re-education Institute”, 2004, Inter-Am. Ct. H.R., (ser.) (C) No. 112, at. 311 (Sep 2, 2004).

⁵⁴ Case of Gonzales Lluy et al. v. Ecuador, 2015, Inter-Am. Ct. H.R., (ser.) (C) No. 298, at. 75 (Sep 1, 2015).

On the other hand, the child was discriminated against at school and a difference was made in the school's treatment because she had HIV. The educational authorities suspended and dismissed Talía on the grounds that the best interests of the children in the school needed to be safeguarded.

As a result, the Inter-American Court of Law declared Ecuador responsible for the violation of the rights to life, personal integrity, education, guarantee and judicial protection. So the Court ordered a form of reparation that included measures of rehabilitation (medical, psychological or psychiatric treatment, and free medicine) and satisfaction (a public apology, a scholarship for university and postgraduate studies for Talía). Moreover, housing and compensation for pecuniary and non-pecuniary damage were awarded.

In the case of pecuniary damage, the Court established, in equity, in favor of Teresa and Iván Lluy, the sum of US \$50,000.00 (fifty thousand dollars of the United States of America) each. For non-pecuniary damage, the court ordered a compensation equivalent to US \$350,000.00 (three hundred and fifty thousand dollars from the United States of America) for Talía Gonzales Lluy; US \$30,000.00 (thirty thousand dollars of the United States of America) for Teresa Lluy, and US \$25,000.00 (twenty-five thousand dollars of the United States of America) for Iván Lluy.⁵⁵

In the case of the violation of the right to education the following elements were considered:⁵⁶

1. The school authorities: her teacher, the principal of the school and the deputy secretary of education, instead of providing Talía with specialized attention in view of her vulnerable situation, assumed she was a risk for the other children and suspended and then expelled her.
2. The educational authorities did not take measures to combat the prejudice concerning Talía's inadvertently contracted disease, in order to avoid discrimination and stigma in all areas against people suffering from HIV/AIDS.
3. The obstacles Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. Talía's case illustrates that HIV-related stigmatization does not affect everyone the same way and that the impact is more severe on members of vulnerable groups.

As seen in the above case, the comprehensive reparation includes compensation of both pecuniary and non-pecuniary damage: a criterion that can be applied by analogy to reparation in case of scholar bullying. The Inter-American Court of Human Rights has said that the reparation of damage to

⁵⁵ Gonzales Lluy et al., 2015, Inter-Am. Ct. H.R., (ser.) (C) No. 298, at. 409 and 416 (Sep. 1, 2015).

⁵⁶ Gonzales Lluy et al., 2015, Inter-Am. Ct. H.R., (ser.) (C) No. 298, at. 262, 263 and 290 (Sep. 1, 2015).

the person cannot be affected by existing or future fiscal considerations. So it must be paid to the beneficiaries in full, as stipulated in the judgment.⁵⁷ This case is analyzed particularly because bullying is a form of violence and is related to discrimination because it is also a form of violence based on unequal treatment, which as we have seen in the resolution, the elements for a integral reparation are applied.

V. IMPLEMENTATION OF THE PRINCIPLE OF CONVENTIONALITY IN VIEW OF DAMAGE CAUSED BY BULLYING IN MEXICO

In Mexico, even if there are specific laws on bullying, civil, criminal or administrative regulations also apply. With the use of the control of conventionality, a judge can rule on specific cases regarding legal actions of reparation for non-pecuniary damage and establish the parameters for compensation based on the principles of equality and non-discrimination⁵⁸ when the bully is a child or teenager.

This is because Article 1 of the Federal Constitution establishes the parameters for legal operators to interpret the laws in accordance with the principles recognized in the international human rights treaties to which the Mexico is a party, and specifically to protect the right to dignity, physical integrity and childhood education from bullying-related behaviors. This article makes it possible to set parameters for comprehensive compensation for the affected party.

Mexican case law recognizes full reparation of damage or fair compensation, as an important paradigmatic change because in accordance with the criteria issued by the Inter-American Court of Human Rights, the right to comprehensive reparation allows, as far as possible, to annul all the consequences of the offense and restore the situation that should have existed in all probability, if the act had not been committed, and if this were not possible, it is appropriate to pay fair compensation as a compensatory measure for the damage caused, which in no way should imply generating gain for the victim. Hence the modern tort law looks at the nature and extent of the damage to the victims and not the perpetrators. Thus, the damage caused is that which

⁵⁷ “Juvenile Re-education Institute”, 2004, Inter-Am. Ct. H.R., (ser.) (C) No. 112, at. 337 (Sep 2, 2004).

⁵⁸ PASOS A SEGUIR EN EL CONTROL DE CONSTITUCIONALIDAD Y CONVENCIONALIDAD EX OFFICIO EN MATERIA DE DERECHOS HUMANOS, Suprema Corte de Justicia de la Nación, [S.C.J.N.] [Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo I, December 2011, Tesis P. LXIX/2011, page 552 (Mex.). See CONTROL DE CONSTITUCIONALIDAD Y CONVENCIONALIDAD EX OFFICIO. CONDICIONES GENERALES PARA SU EJERCICIO, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo I, February 2016, Tesis 1a./J. 4/2016, page 430 (Mex.).

determines the compensation. Its nature and amount depend on the damage caused.⁵⁹

The following is a case study on bullying that was ruled on by the Mexican Supreme Court, asserting its jurisdiction due to the interest and importance of the issue in Mexico.

1. *Reasons for the Supreme Court to take Bullying Cases*

During the 2009-2010 school year, a 7-year-old boy started second grade. He began to express discontent with the way his Spanish teacher treated him—shouting at him and leaving him without recess. The boy's refusal to attend his school in the State of Mexico led his classmates to act aggressively against him.⁶⁰

Considering the state of things, the boy's mother met with the Spanish teacher without reaching any solution. In January 2011, the parents of the child by their own right and on behalf of their son appeared before a civil judge and sued the school and the teacher for moral damage. However, the defendants were acquitted because physical and psychological abuse against the child was not proven. The second hearing confirmed this criterion. Then, in a second petition the child's parents sought a direct *amparo* trial to obtain an *amparo* for to reset the procedure so that the court of origin would receive the minor's opinion.

The civil judge issued a new resolution, in which he acquitted the defendants of the claims. So, the child's parents petitioned for another appeal. In its sentence of October 2, 2013, the Second Civil Chamber of the Superior Court of Justice of the State of Mexico ruled that the plaintiffs did not present conclusive evidence to show that the child had experienced bullying and discriminatory behavior at the hands of the teaching staff at the Institute.

The plaintiffs petitioned again for an *amparo* trial. In view of the interest and importance of the trial, the Supreme Court of Justice of the Nation (SCJN) exercised its authority to assert jurisdiction. The First Chamber issued a resolution, the sources of which will be analyzed in terms of civil liability in cases of bullying.

The SCJN began its study of the moral damage by placing the valuation of civil responsibility and comprehensive reparation of the damage in context, considering that while the existing laws in the country have developed public policy through special laws and action protocols, all aim at addressing,

⁵⁹ DERECHO FUNDAMENTAL A UNA REPARACIÓN INTEGRAL O JUSTA INDEMNIZACIÓN. SU CONCEPTO Y ALCANCE, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo I, April 2017, Tesis 1a./J. 31/2017, Page 752 (Mex.).

⁶⁰ Sentence issued in the direct *amparo* number 35/2014 with dated on May 15, 2015, by the First Chamber of the SCJN.

combating and eradicating bullying by considering it same as a psychological figure or defining certain distinctive traits for bullying. However, these policies are based on the fact that bullying is a recent legal figure, when it is really an attitude that affects the best interests of children in specific cases. Therefore, judicial intervention is justified.

2. Enhanced Protection of the Rights of Children

Children's safety at school is a fundamental basis for exercising the rights to dignity, integrity and education; and to ensure their permanence in an educational system. The principle of higher interest orders all state authorities to ensure that the protection of the rights of the child is carried out by means of strengthened measures to combat discrimination.⁶¹

The attitude of bullying can cover discriminatory treatment when it is the reason that the victim belongs to a specially protected group in Article 1 of the Federal Constitution. One example of this is when a child is harassed because of his or her race, economic situation, sexual preference, or disability.⁶² In the case of children, reinforced measures are applied in terms of dignity. This means it is possible to design a fundamental plan and for it to be determined according to their own desires, as well as to have the minimum material conditions that guarantee a person's existence.

3. Non-Pecuniary Damage

The SCJN developed a test to evaluate the civil liability in cases of bullying. If a person in a bullying case is charged for acts of aggression, the following must be corroborated: 1. the existence of bullying 2. physical or psychological harm; and 3. the causal link between bullying and harm. When the school is sued, it must also prove 4. the school's negligence.⁶³

⁶¹ BULLYING ESCOLAR. MEDIDAS DE PROTECCIÓN REFORZADA PARA COMBATIR LA DISCRIMINACIÓN, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta, Décima Época*, tomo II, October 2015, Tesis 1a. CCCIV/2015, Page 1641 (Mex.).

⁶² INTERÉS SUPERIOR DEL MENOR. USO JUSTIFICADO DE LAS CATEGORÍAS PROTEGIDAS EN EL ARTÍCULO PRIMERO CONSTITUCIONAL, EN LAS CONTIENDAS QUE INVOLUCRAN LOS DERECHOS DE LOS NIÑOS, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta, Décima Época*, tomo I, March 2014, Tesis 1a. CVII/2014, Page 546 (Mex.).

⁶³ BULLYING ESCOLAR. CARGA DE LA PRUEBA PARA DEMOSTRAR LA EXISTENCIA DEL DAÑO MORAL, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta, Décima Época*, tomo I, November 2015, Tesis 1a. CCCXXXIV/2015, Page 951 (Mex.).

In the event that a student or teacher is sued and is found responsible, the school must answer for the damages. If the school is negligent and is sued for wrongful acts or harmful conduct, the school is liable.

In the legal sphere, the complexity of bullying and its relationship with children's rights justify a series of presumptions and differentiated standards for weighing the facts. Therefore, it was deemed appropriate to apply a diminished standard both for the attribution of responsibility and for the evaluation of the acts constituting bullying.

Moral damage is a consequence of the violation of the rights of the person.⁶⁴ The SCJN held that in order to update the right to compensation for non-pecuniary damage in the event of bullying, the defendant's responsibility must be credited, which may be of contractual or non-contractual origin, which can in turn be subjective or objective.

Cases of bullying are subjective in nature as the aggressor's conduct or the school's negligence is important.⁶⁵ In order for a fact or omission to cause damage and so indicate responsibility, it is necessary for it to be illegal and for the other elements of responsibility to be defined. Responsibility in cases of bullying can stem from both positive behaviors and omissions in child care. When liability for an action is claimed, the damage is attributed to a specific aggressor, who is charged with a series of acts of aggression against the child. If the behavior is proven to be the one that harmed the victim's dignity, physical and moral integrity, the harmful act will be the aggressor's or bully's behavior (a minor or a specific teacher).⁶⁶

In order to determine the type of liability in the event of bullying, the generator of liability shall be analyzed, or, if an aggression was demanded by the action of one or more persons in particular, or if the school's care duties are not complied with.

4. Assessment or Valuation of the Evidence in Case of Bullying

Bullying consists of any repeated act or omission that physically, psychologically, emotionally affects a child or adolescent, his belongings or the child or adolescent is sexually assaulted when under the care of a public or private

⁶⁴ See GISELA MARÍA PÉREZ FUENTES AND KARLA CANTORAL DOMÍNGUEZ, *DAÑO MORAL Y DERECHOS DE LA PERSONALIDAD DEL MENOR* 25-31 (Ed. Tirant lo Blanch 2015).

⁶⁵ *BULLYING ESCOLAR. CONSTITUYE UN CASO DE RESPONSABILIDAD CIVIL EXTRA CONTRACTUAL DE NATURALEZA SUBJETIVA*, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo II, October 2015, Tesis 1a. CCCXII/2015, page 1636 (Mex.).

⁶⁶ Sentence in the direct amparo number 35/2014 dated 15 May 2015 by the First Chamber of the SCJN, p. 44.

school institution. The SCJN breaks with the doctrinal feature of extended time to identify bullying as it is a complex legal fact: If a case can prove repeated verbal or physical aggression, it will be valid to presume that it is a situation of harassment.⁶⁷

Determining liability for bullying is done by means of three fundamental tests: psychological evaluations, sociological opinions, and hearing the victim's opinion. The evidence in the above case showed that the child was physically and psychologically abused at school, as a result of mockery, ill treatment and commentaries on behalf of his peers and teachers.

5. Negligence by the School and its Teaching Staff

When a school is sued, another element of school negligence should be tested. In order to hold the school responsible, it is necessary for the damage caused to be accompanied by a duty of care of the person responsible for the victim, that is, civil liability for external acts, known thus in common law doctrine as vicarious *responsibility* which is a figure found in US law.

Wrongfulness may derive from two different sources: 1. that the person responsible has been obligated to act according to a standard and failed to comply with that legal obligation, or 2. that the person responsible failed to comply with a generic duty of care that requires the provision of a service. These duties are generated and evaluated in the light of the best interests of children. In cases of bullying, schools must diagnose, prevent, intervene and positively modify coexistence at the school.

The ruling in the above case considered that once it was demonstrated that bullying occurred in a situation under the control of the school, the educational center would have to show that it fulfilled the due diligence required for providing educational services. In this way the burden of proof is reversed and placed on the representative of the school center. The SCJN argues this position attending the principles of "Ease of probation" and the difficulty for the victim to prove a negative act.⁶⁸ It is legally understood that it is a manifestation of reinforced measures in the case of the best interests of children.

⁶⁷ Sentence in the direct amparo number 35/2014 dated 15 May 2015 by the First Chamber of the SCJN, p. 49.

⁶⁸ BULLYING ESCOLAR. LOS CENTROS ESCOLARES TIENEN LA CARGA DE LA DEBIDA DILIGENCIA, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta, Décima Época*, tomo I, November 2015, Tesis 1a. CCCXXXI/2015, Page 958 (Mex.).

6. *Causal links between behavior and damage*

Bullying can generate both property and non-property damages,⁶⁹ which can in turn, be present or future.⁷⁰ Evidence of the moral damage to the child caused by bullying is provided when a number of assaults, whether minor in themselves or on separate occasions, end up damaging moral integrity by their repeated, systematic and habitual execution.⁷¹

In case of liability for bullying by students or teachers, the causal link between school harassment and the physical or mental harm done to the victim should be proven. On the other hand, liability for negligence is proven when there is evidence that the fulfillment of the duty of care would have prevented the victim's rights from being affected. Moral damage was originated by the aggression and the neglect that the child suffered, that is to say, the causal link between the behaviors and the damage is supported by evidence that the civil liability falls on both of the Spanish teachers in the particular institution in question.

7. *Economic Situation of the Victim in Compensation for Moral Damage*

In a broad sense, moral damage can lead to two types of consequences: non-property or property damage. Compensation for the non-property damage derived from moral damage is mitigated since it cannot be simply restored by financial compensation. Injuries to the nature and intensity of the victims' affections, feelings or psyche have to be taken into account.

In the compensation of the property damages arising from moral damage, trying to redress the victims' economic losses is necessary (valid) whether said

⁶⁹ Bullying can include physical injuries and economic losses arising from the harassment, such as tuition payments, medical fees, and therapy sessions, among others. Sentence issued in direct *amparo* number 35/2014, p. 73.

⁷⁰ DAÑO MORAL. SU CLASIFICACIÓN ATENDIENDO AL MOMENTO EN QUE SE MATERIALIZA, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo I, June 2014, Tesis 1a. CCXXXIII/2014, Page 449 (Mex.). "Moral damage has two types of projections: present and future. In all of them the judge must assess not only the current damage, but also the future; therefore, in addition to the economic or extra-economic nature of the consequences derived from moral damage in a broad sense, these can also be distinguished according to the moment in which they materialize. Thus, the damage is current when it is already produced at the time of sentencing. This damage includes all the losses actually suffered, both material and extra-patrimonial; in the latter, the disbursements made for the care of the damage would enter. On the other hand, the future damage is one that has not yet occurred when the judgment is issued, but it is presented as a foreseeable prolongation or aggravation of a current damage, or as a new future impairment, derived from a situation of the current event. For future damage to result in reparation, the likelihood that the benefit will occur must be real and serious, and not a mere illusion or conjecture of the victim's mind."

⁷¹ Sentence issued in direct *amparo* number 35/2014, p. 78.

damage is present or future. If, as in the case of moral damage, the victim is in need of psychological therapy, the current and future cost of treatment should be considered as compensation to comprehensively repair the moral damage.

Mexican law has evolved, says SCJN, from one that imposed well assessed limits on the redress of damage or established it through fixed formulas⁷² to one that considers the need for just and comprehensive reparation.⁷³ In this case law evolution, it is seen in the case of analyzing bullying.

8. Case Resolution

When the sentencing determines that the amount of compensation must concur with the defendant's degree of responsibility, which must also be assessed, as well as the social aspect of the damage caused; that is, the importance or social implications the wrongful act may have. In this case, it is the school that in addition to its negligent acts must financially respond for the teacher's wrongful conduct.

In the trial a serious level of involvement was attributed to the case as the child's social behavior altered, deeply affecting family and school life. To define the compensation for property damage derived from the moral damage in this specific case, the cost of psychological therapy every two weeks was taken as a basis. The resulting total stood at MXP \$64,800.00 (sixty-four thousand eight hundred Mexican pesos) since this therapy would be required for a three-year period.

With regard to compensation for moral damage, the serious impact on the child's dignity, the high degree of the teacher's and school's responsibility, and the average economic capacity of the latter was taken into account. Therefore, the *amparo* was granted so that the TSJ Chamber of the State of Mexico could issue a new sentence in which the school was obligated to pay the amount of MXP \$500,000.00 (five hundred thousand Mexican pesos)

The First Chamber of the SCJN considers bullying is a complex phenomenon that needs to be addressed as a process consisting of different stages. Thus, it is necessary to design a strategy to combat bullying, although for the purposes of the *amparo* trial, the last considerations of the sentence in the sense of "recommendations to address the phenomenon of bullying school," are not strictly part of the nature of the judgment.⁷⁴ The truth is that this

⁷² Amparo in Review 75/2009, resolved on March 18, 2009, by the First Chamber of the SCJN.

⁷³ Direct *amparo* in Review 1068/2011, resolved on October 19, 2011, by the First Chamber of the SCJN.

⁷⁴ Concurrent vote formulated by the Minister Jorge Mario Pardo Rebolledo in the direct *amparo* 35/2014.

criterion⁷⁵ corroborates our position on the failure of public policies that exist to protect the best interests of children in the event of bullying.

VI. CONCLUSIONS

Bullying is a complex phenomenon that initially manifests itself in a person's or group's aggressive behavior in a school bullying setting that harms the dignity of the injured person (a minor in this case) who suffered the physical and/or psychological aggressions. Repeated aggression is assessed to define the degree of damage to the injured.

In the Mexican legal system, the interpretation of the *pro persona* principles and the best interest of children, protected by the Federal Constitution according to the parameters established in international treaties, such as the Convention on the Rights of the Child, as well as the American Convention on Human Rights, that recognize legal mechanisms to punish the conduct of persons who bully or allow bullying.

The inconsistency in the special laws of the States in the study of bullying cases shows that the administrative solution is insufficient and limited to the actors of the damage without mentioning the protection of the victim. Therefore, it has been necessary to apply the conventionality principle in the judgments issued by the Mexican Supreme Court of Justice to establish fair compensation that manifests itself through comprehensive reparation of the damage in proportion to the effects.

For the reparation of moral damage, the legal good put at risk by negligent conduct; the degree of negligence and any aggravating factors; the social importance of the duties unfulfilled in the light of the type of activity performed by the party responsible, and other factors should be weighed.

Legal reparation mechanisms for bullying have made it possible to guarantee the best interests of children. This is because in the case study in Mexico, the obligation of educational establishments to protect the children's and adolescents' rights to dignity, integrity, education and non-discrimination has been established, regardless of whether the institution is public or private.

⁷⁵ The judgment states: the First Chamber cannot overlook the need for the competent authorities to create clearer and more specific policy instruments, on which public and private schools can design methods of prevention, intervention and combating bullying.