

STICKS AND STONES: HOW SCHOOL-BASED PEER MEDIATION CAN REDUCE BULLYING IN PUBLIC SCHOOLS

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I. INTRODUCTION

When asked about their formative years, many Americans call to mind cherished memories created at school. Unfortunately for some of today's children, those memories are likely to be tainted, due to the significant prevalence of bullying in schools.¹ Studies estimate that over 5.7 million children, roughly 30% of the youth in the United States, are involved in bullying, either as the bully, victim, or both.² Bullying can be defined as repeated (or potentially repeated), unwanted, aggressive behavior involving a real or perceived power imbalance among two or more persons.³ The bullying behavior can be: 1) verbal, such as name-calling or teasing, 2) social, like deliberately excluding someone from an activity or group, 3) physical, such as hitting, kicking, or spitting, or 4) cyber, which includes characteristics of verbal bullying but is done completely through electronic means.⁴ In response to the rise in bullying, students, parents, teachers, administrators, and lawmakers have collaborated to combat its effects. The successful use of mediation in legal disputes has encouraged the implementation of school-based peer mediation programs as a form of bullying intervention, which this paper will address.

Part I of this paper describes the early inception of school-based mediation as a method of resolving conflicts, including the

¹ See *Bullying Statistics 2010*, BULLYING STATISTICS <http://www.bullyingstatistics.org/content/bullying-statistics-2010.html> (last visited November 24, 2018) (providing statistics demonstrating the prevalence of bullying and its detrimental effects on society).

² Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools* 9 NEV. L. J. 545, 547 (2009).

³ *What is bullying?*, STOPBULLYING.GOV <https://www.stopbullying.gov/what-is-bullying/index.html> (last updated July 26, 2018).

⁴ *Id.*

evolution of peer mediation and the process involved in establishing a program. Part II analyzes the evolution of anti-bullying legislation and its impact on school-based mediation programs. Part III suggests the use of peer mediation as part of a larger framework to combat bullying at the secondary level, including an outline of several points included within the establishment of such a program that are worthy of thoughtful consideration. This section also addresses concerns surrounding peer mediation, including the belief that mediation may not be an appropriate choice for bullying intervention and a look at the Uniform Mediation Act as a potential solution to these issues. The paper concludes briefly by summarizing and looking at what the future may hold for peer mediation programs.

II. THE RISE OF SCHOOL-BASED PEER MEDIATION PROGRAMS

Peer mediation programs have not always been present in American schools. In the past twenty years, however, the increased instances of school violence, coupled with the emphasis on bullying as a factor in these tragedies and a sharp spike in teen suicide rates, have asserted a compelling need for solutions.⁵ This demand, in conjunction with changes in the national perspective on bullying and its effects, has been a major catalyst for the incorporation of mediation as an anti-bullying approach.⁶

A. *A Brief History of Peer Mediation*

The roots of school-based mediation are linked to the success of community-based mediation programs initiated in the 1970's.⁷

⁵ See Bullying Statistics 2010, *supra* note 1 (“...revenge for bullying is one of the strongest motivations for school shootings, according to recent bullying statistics.” “...there is a strong connection between bullying, being bullied, and suicide, according to a new study from the Yale School of Medicine”).

⁶ Mary M. Chittooran & Gaileen A. Hoenig, *Mediating a Better Solution*, COUNSELING 101, March 2005, at 11, 11.

⁷ William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 HARV. NEGOTIATION L. REV. 213, 220-21 (1998).

These programs were successful in facilitating realistic solutions to community problems that might not otherwise have had any legal recourse, and created a means for preserving, rather than ending, relationships.⁸ Similarly, the early school-based versions of these programs, such as the New York-based Children’s Creative Response to Conflict (“CCRC”), focused on incorporating peace education as part of the school curriculum.⁹ The program used Quaker teachings, which centered around nonviolent conflict resolution techniques, to promote its cause among students.¹⁰

In the 1980’s, a group called Educators for Social Responsibility (“ESR”) was also established in Massachusetts in order to encourage students to become involved within their respective communities.¹¹ Similar to the CCRC, the ESR also promoted community involvement and peace education as its goals. One smaller branch of the group, the Resolving Conflicts Creatively Program (the “RCCP”), became known for promoting peer mediation and conflict resolution, and helped establish similar programs across the nation.¹² Another group, School Mediation Associates (“SMA”), which was connected to yet another New York community-based mediation program, also stressed the importance of involving students in their own dispute resolutions.¹³ SMA founders, however, felt more strongly about the concept of mediation itself as a solution, rather than its incorporation into any curriculum, and thus focused mainly on dispute resolution techniques rather than community involvement.¹⁴

Society, rather than pedagogy, prompted the most recent evolution in school-based mediation programs. Escalating school violence throughout the 1990’s reached its peak with the mass shooting at Columbine High School in 1999, requiring a shift in conflict resolution in order to address the growing problem.¹⁵

⁸ *Id.* at 221.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Haft & Weiss, *supra* note 7, at 222.

¹⁴ *Id.*

¹⁵ JAANA JUVONEN, SCHOOL VIOLENCE: PREVALENCE, FEARS, AND PREVENTION, 1–2 (RAND Corp. 2001) https://www.rand.org/pubs/issue_papers/IP219.html.

While student empowerment remained a critical aspect, the former emphasis on community responsibility was replaced by the importance of reducing instances of student violence and safeguarding the nation's schools.¹⁶

B. Project Outreach: A Case Study in the Implementation of Peer Mediation in Response to Conflict

As part of the response to the increase in violent conflicts taking place at school, the American Bar Association launched its own peer mediation program in 1996.¹⁷ Prior to the implementation of its program, the American Bar Association (“ABA”) had already established a presence in school districts with its myriad opportunities for attorneys to mentor students through mock trial, moot court, and debate teams.¹⁸ As the attorneys became more involved with the student groups and noted absences resulting from school violence, they turned to mediation as a potential source of aid.¹⁹

Volunteers from the ABA began training groups of students to utilize conflict resolution skills and facilitated the implementation of school-based peer mediation programs.²⁰ School districts in thirteen major cities, including Atlanta, Chicago, and Philadelphia, initially participated in the program. “Project Outreach” garnered attention and support from state legislatures and attorneys across the nation, including then-Attorney General Janet Reno and Supreme Court Justice Sandra Day O’Connor.²¹ Project Outreach set forth detailed guidelines to facilitate success for those looking to start a program in their district or school. The guidelines stressed the initial importance of gaining administrative support, then collaboratively developing a coordinating committee consisting of

¹⁶ Haft & Weiss, *supra* note 7, at 22.

¹⁷ See Mark Hansen, *Mediation—Not for Adults Only*, 83 AMER. BAR ASSOC. J. 104 (April 1997) (providing a general overview of the purpose and intent of Project Outreach).

¹⁸ Jack C. Hanna, *Lawyers March for School Peace: The Attorney’s Role in Peer Mediation*, 5 DISP. RESOL. MAG. 27 (1998).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

an attorney volunteer, school administration representatives, teachers and a school counselor in order to oversee the program.²²

The next, most challenging step was to have the committee select and train the student mediators. The guidelines suggested that the committee maintain a ratio of one mediator for every thirty-five to forty students in a building.²³ Further, mediators needed to be representative of the student body populations—taking race, ethnicity, gender, and age in to consideration—and shouldn't be limited to those students with specific academic or extracurricular achievements.²⁴ Training would consist of a two-day in-service instruction session for both the coordinating committee and the student mediators, led by the attorney volunteer from the coordinating committee.²⁵ Participants would learn the theory, principles, and process of mediation, then apply their knowledge in practical situations through monitored role-play with debriefing and questions after each session.²⁶ Another critical aspect of the training was stressing the importance of confidentiality and its limits. This conversation would lend itself to creating the scope of the program and determining the types of disputes mediators would be able to handle.²⁷ The committee and mediators would also set a schedule and location for the mediations to take place.²⁸

The final, and arguably most important, step in the process was marketing the program as a tool for resolving conflict, both throughout the school and the greater community.²⁹ The driving principle behind this integration was to create and unify a network responsive to conflict and supportive of the mediation process.³⁰ Further, the more sessions mediators were able to take on, the more practiced they would become.³¹ The intended result was a

²² *Id.* at 28.

²³ *Id.*

²⁴ Hanna, *supra* note 18, at 28.

²⁵ *Id.* at 28-29.

²⁶ *Id.* at 29.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Hanna, *supra* note 18.

³¹ *Id.*

community-wide effort directed at reducing violence among adolescents, with the distinct purpose of facilitating realistic solutions for those who were the biggest stakeholders.³²

Though not all programs strictly adhered to the above described model, by 1998 the general use of peer mediation as an alternative form of dispute resolution had spread. Project Outreach and its brethren had established 8,500 programs in schools nationwide—about 10% of public schools at the time.³³ A more recent study conducted in 2009 indicated that the estimated number had grown to between 15,000—20,000 recognized programs and had expanded to encompass the issue of bullying, which had just begun to eclipse violent conflict as one of the leading concerns of schools nationwide.³⁴

III. STATE LEGISLATIVE EFFORTS ATTEMPT TO ADDRESS A NATIONAL PROBLEM: A LOOK AT ANTI-BULLYING MEASURES

As of the date of this paper, there is no federal legislation specifically directed at bullying.³⁵ Individual states, however, have passed anti-bullying statutes meant to protect students and support the intervention efforts being introduced. In 1999, Georgia became the first state to pass such legislation.³⁶ The law included a

³² *Id.*

³³ *Id.*

³⁴ See generally Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 647 (2007) (proposing mediation as an equitable alternative to suspension), quoted in Matthew D. Decker, Comment, *Unexcused Absence: A Review of the Need, Costs, and (Lack of) State Support for Peer Mediation Programs in U.S. Schools*, 2009 J. OF DISP. RESOL. 485, 496 (2009).

³⁵ There is no specific federal law directed at bullying. However, it is sometimes so pervasive as to be encompassed under federal civil rights laws. For a general description of these circumstances, see U.S. Department of Health and Human Services, Laws and Policies, Federal Laws, STOPBULLYING.GOV <https://www.stopbullying.gov/laws/federal/index.html> (last updated Mar. 31, 2014).

³⁶ See BULLY POLICE USA, <http://www.bullypolice.org> (last updated Dec. 2017) (listing and describing individual states' anti-bullying laws, dates of passage, and dates of amendments, if applicable).

provision mandating age-appropriate consequences for bullies, including counseling, and required the state department of education to maintain a list of entities which would provide anti-bullying materials and training programs for schools.³⁷ Other states soon followed suit in passing anti-bullying legislation and by 2015 all fifty states would have some form of law in place.³⁸ Several state legislatures included provisions mandating or suggesting peer mediation programs as part of a solution: Alaska required a peer mediation program for every school in the state; Pennsylvania passed legislation stating that peer mediation would become a mandatory part of its curriculum; in Tennessee, the Schools Against Violence in Education Act required district-wide school safety teams which were empowered to create mediation programs in order to deter violent conflict.³⁹

Though well-meaning, the anti-bullying legislation's implementation has been problematic since it was initially passed, especially in relation to peer mediation programs. First, the statutes lack any so-called "teeth." Typical language included within the statutes requires schools to create a policy that defines and prohibits bullying; however, the statutes mostly do not require schools to implement to their own policies.⁴⁰ The laws also fail to set standards for schools regarding the critical aspects of anti-bullying and peer mediation programming, including training employees and students in preventing and reporting incidents.⁴¹ As a result, the statutes "fail, for the most part, to require the processes that are critical to effective prevention, leaving schools the option of creating anti-bullying policies, but not anti-bullying cultures."⁴²

³⁷ *Id.* (citing GA. CODE ANN. § 20-2-751.4 (West, 2018)).

³⁸ *Id.*

³⁹ See Decker, *supra* note 34, at 497-99 (first citing ALASKA STAT. § 14.33.120(a)(7) (West, 2018); then citing 24 PA. STAT. AND CONS. STAT. ANN. §§ 13-1302-A, 13-1303.1-A (West, 2018); and then citing TENN. CODE ANN. § 49-6-805 (West, 2018)).

⁴⁰ See Christensen, *supra* note 2, 556-57 (suggesting that reform for state-level anti-bullying legislation is necessary).

⁴¹ See *id.* 557-58.

⁴² *Id.* 555-56 (citing Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 673 (2004)).

Theoretically, this legislative vagueness might have been meant to provide flexibility for schools in adopting programs that fit their particular demographic needs, but it has also created glaring inconsistencies among schools and resulted in a piecemeal response to a serious problem.

Further, even if mediation programming is state-mandated, few legislatures have actually put parameters in place to account for proper funding of such programs. Estimates suggest that establishing a program may cost as little as a few hundred dollars, or as much as \$40,000, depending on available resources.⁴³ California law established grants to provide schools with \$5,000 or districts with \$10,000 in order to help alleviate any costs.⁴⁴ Similarly, Delaware, Tennessee, and West Virginia also funded grants in unspecified amounts that would offset the costs of creating mediation programs within their schools.⁴⁵ While these states' efforts are praise-worthy, the implications of absent funding are twofold: First, the lack of funding creates discrepancies in the quality and extent of peer mediation programming offered. Theoretically, funding shouldn't be problematic because each program might differ in order to meet the needs of a particular demographic; however, without it, some programs are unable to obtain even necessary basic training for mediators and advisors, as well as other critical resources, rendering them ineffective or unable to provide services to meet demand.⁴⁶ Second, without funding for state-mandated mediation programs, school districts might be forced to appropriate money from other areas in order to meet their requirements. Instead of resolving conflict, peer mediation would create more of the same when funds were taken from other groups to provide for a mediation program.

Though anti-bullying legislation exists it is not necessarily

⁴³ Decker, *supra* note 34, at 499 (citing RICHARD COHEN, STUDENTS RESOLVING CONFLICT: PEER MEDIATION IN SCHOOLS 82-83 (2d ed. 2005)).

⁴⁴ See Decker, *supra* note 34, at 497-99 (citing CAL. EDU. CODE §§ 32228-32228.5 (repealed 2016)).

⁴⁵ See Decker, *supra* note 34, at 497-99 (citing DEL. CODE ANN. TIT. 14, § 1605(7)(b)(8) (West, 2018); also citing TENN. CODE ANN. § 49-6-4302(c)(1) (West, 2018); and then citing W. VA. CODE ANN. § 18-2C-5 (West, 2018)).

⁴⁶ Decker, *supra* note 34, at 496.

curing the evils of school bullying, nor is it facilitating solutions, such as peer mediation, that will rectify the problem. It appears that districts are still left largely to their own devices in determining how to respond to bullying, resulting in a disjointed approach that barely skims the surface of a much more deeply rooted national problem.

IV. SCHOOLS SHOULD CONSIDER THE USE OF PEER MEDIATION AS PART OF A LARGER CONFLICT RESOLUTION CURRICULUM FRAMEWORK IN ORDER TO COMBAT BULLYING

Concerns for students' health and safety, coupled with questions of school liability in bullying litigation, have left districts wondering which approach to bullying issues is correct. Studies have demonstrated that peer mediation programs, when used in conjunction with a school-wide anti-bullying dialogue, are effective in reducing bullying in schools.⁴⁷ As programs differ, due to factors such as the divergent composition of student bodies and the disparate resources available to each school, supportive empirical evidence has been somewhat difficult to gather and thus allowed critics to detract from the successes of peer mediation programs.⁴⁸ Proponents of peer mediation can respond to these criticisms, however, by promulgating better understanding and accessibility to mediation as a whole and employing guiding principles already in place, such as the Uniform Mediation Act, to affect positive change in the way schools approach bullying situations.

⁴⁷ See Angelique Palmer, *Room for Me? – An Analysis of Whether Mediation is a Viable Solution to School Bullying*, 16 CARDOZO J. CONFLICT RESOL. 221, 231-35 (2014) (citing John Braithwaite, *Education, Truth, Reconciliation: Comment on Scheff*, 67 REV. J. U.P.R. 609 (1998) (citing DENISE GOTTFREDSON, SCHOOL-BASED CRIME PREVENTION, IN PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (Lawrence Sherman, et al. eds., 1996); also citing Dan Olweus, *Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171-90 (1993)).

⁴⁸ See Haft & Weiss, *supra* note 7, at 218, 261-62 (suggesting that peer mediation and legal mediation face comparable scrutiny).

A. Properly Implemented Peer Mediation can be an Effective Anti-Bullying Tool

In 1999, Columbine High School seniors Dylan Klebold and Eric Harris shot and killed twelve of their classmates and one of their teachers.⁴⁹ After the tragedy it was revealed that the shooters had been victims of bullying, and observers immediately theorized that the attacks were the by-product of mistreatment by classmates and the failure of administration to resolve the issues.⁵⁰ It is important to note that this bullying theory was later determined not to be the *only* catalyst for the attacks;⁵¹ however, at the time, the media and the public latched on to the idea that preventing bullying would prevent a horrific event like this from happening again. As a result, however, school bullying was propelled to the forefront of both media and public attention.⁵²

As suggested above, the concept of bullying itself is not new, but the shift in the collective societal attitude toward bullying is. In the past, students who were bullied often did not speak up, and those that did were told to “toughen up” or that bullying built their character.⁵³ In contrast, the post-Columbine approach to bullying highly encouraged students to report instances and “let the adults

⁴⁹ See Steven Arthur Provis, *Bullying (1950-2010): The Bully and the Bullied* (2012) (unpublished Ph.D. dissertation, Loyola University Chicago) https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1380&context=luc_diss (citing BROOKS BROWN & ROB MERRITT, *NO EASY ANSWERS: THE TRUTH BEHIND DEATH AT COLUMBINE* (Herndon: Lantern Books, 2002) (describing the incidents surrounding the school shooting at Columbine High School in Littleton, Colorado)).

⁵⁰ *Id.*

⁵¹ See David Brooks, *The Columbine Killers*, NY TIMES, Apr. 24, 2004; see also Peter Langman, *Columbine, Bullying, and the Mind of Eric Harris*, PSYCHOLOGY TODAY, May 20, 2009 <https://www.psychologytoday.com/us/blog/keeping-kids-safe/200905/columbine-bullying-and-the-mind-eric-harris>.

⁵² Palmer, *supra* note 47, at 221.

⁵³ Provis, *supra* note 49, at 2 (citing Deborah Carpenter and Christopher R. Ferguson, *History of Bullying - Dealing with Bullies*, (last visited April 16, 2011) <http://www.netplaces.com/dealing-with-bullies/what-is-bullying/history-of-bullying.htm>).

handle it.”⁵⁴ While the emphasis on reporting is absolutely necessary, the suggestion that bullying should be handled only by adults is somewhat misguided. Some commenters posit that the rise in bullying has been exacerbated because fewer children are being taught how to effectively resolve conflict.⁵⁵ While it is imperative that an adult is informed of a potential bullying situation, research suggests that adolescents may be better equipped to solve such problems because of their ability to view conflict and resolutions more creatively.⁵⁶ Further, adolescents might be more likely speak candidly with a peer as opposed to an adult. For these reasons, a comprehensive “whole-school” approach⁵⁷ that promotes dispute resolution education, in conjunction with a peer mediation program, is a viable solution for reducing instances of bullying and serving the interests of all involved.

The whole-school model begins not with anti-bullying messages, but by harkening back to the origins of peer mediation to incorporate aspects of ethics, morals, and civility into general education. A well-planned curriculum might take a year or more to develop prior to its actual execution within the school and require the time and collaboration of an entire staff, including: Research and investigation into the cost estimate for such a program, and then securing the necessary funding; administrative efforts to create space within the school day to implement lessons; a planning committee to design a program appropriate for each age level; and, ultimately, a venue through which the learning would take place. An illustrative example of the educational aspect of the

⁵⁴ See Decker, *supra* note 34, at 489-90.

⁵⁵ See Jon M. Philipson, *The Kids are not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14 *CARDOZO J. CONFLICT RESOL.* 81, 88 (2012) (citing Chris L. Nix & Claudia Hale, *Conflict within the Structure of Peer Mediation: An Examination of Controlled Confrontations in an At-Risk School*, 24 *CONFLICT RESOL. Q.* 327, 328-29 (2007)).

⁵⁶ *Id.*

⁵⁷ Palmer, *supra* note 47, at 232 (“Research to date suggests that comprehensive bullying prevention efforts which involve the entire school community hold the most promise for changing the norms of behavior and the prevalence of bullying in schools”).

whole-school approach exists in Norway.⁵⁸ The “Olweus” program blends students, administration, teachers, parents, and non-teaching staff together, creating a committee responsible for developing a school-wide anti-bullying culture.⁵⁹ The committee administers surveys and conducts research in order to target not only the larger issues, but also more individualized concerns affecting students in their personal lives.⁶⁰ The committee also sets forth rules and the consequences for failure to conform.⁶¹ Classroom teachers are responsible for conducting weekly “meetings” to discuss peer relations and implementing a curriculum that promotes alternative solutions to conflict.⁶² If bullying is taking place, staff members meet with individual bullies to administer punishment and create plans for future improvement and monitoring.⁶³ Olweus’s general success indicates that a comprehensive approach beginning with a visible, direct, universal message that condemns negative behavior and promotes positive conflict resolution skills is a key component in minimizing bullying situations.⁶⁴

Educational and cultural shifts alone, however, will not alleviate the immediate problem: Schools need to be able to stop bullying that is already taking place. While the Olweus method suggests a more punitive response, it should be noted that bullies frequently behave as they do because of some other factor in their personal lives which may not be addressed through punishment. Peer mediation integrated within the proposed curriculum focuses not only on resolving current bullying situations, but also on further promoting conflict resolution skills as a tool to reduce future instances.⁶⁵ At an elementary level, full-blown peer mediation might not be an appropriate choice, due to certain

⁵⁸ Philipson, *supra* note 55, at 98.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 98.

⁶⁴ Philipson, *supra* note 55, at 99.

⁶⁵ *See* Christensen, *supra* note 2, at 563 (suggesting that peer mediation which targets only bullying is less effective than creating an environment which disapproves of a bully’s behavior)

developmental limitations of young children.⁶⁶ However, encouraging students to apply the skills taught within the curriculum, in conjunction with a counselor or teacher overseeing the process, could introduce facilitative mediation and encourage self-determined resolutions at a younger age.

The secondary level—generally defined as ages eleven through eighteen⁶⁷—would be the ideal place to establish a peer mediation program as a viable solution for bullying situations. A system similar to that of the Project Outreach model mentioned above⁶⁸ would be encouraged in order to establish a mediation clinic. An administrative committee comprised of stakeholders from both within and without the school would select a diverse group of mediators to participate, alongside the committee, in an intensive two- to three-day training in which basic mediation skills, goals, and guidelines are taught and practiced. The mediator selection process would be thoughtful and deliberate: To the extent possible, mediators would represent not only the gender, racial, and ethnic composition of the student population, but also include other diversifying factors, such as socioeconomic status and academic and extra-curricular achievement. The committee would also serve as advisors for the school’s mediation clinic and, along with the mediators themselves, set parameters within which the program would operate. Finally, just as in the Project Outreach program, the committee and mediators would also gather a support network, incorporating stakeholders from both within and without the school itself to act as “cheerleaders” and offer support or services when necessary.⁶⁹

⁶⁶ *Id.* at 92.

⁶⁷ Though generally only high schools are considered secondary schools, education provided at the secondary level has been expanded to include ages eleven through eighteen. See *What is the Definition of Secondary School?* LEARN.ORG

https://learn.org/articles/What_is_the_Definition_of_Secondary_School.html (last visited Oct. 29, 2018).

⁶⁸ See *supra* pp. 4–7.

⁶⁹ Haft & Weiss, *supra* note 7, at 230, 257-58.

1. *Developing Key Components of Peer Mediation Programs Supports Their Successful Implementation*

While each peer mediation program may differ, according to the needs of its particular demographics, several key concepts should be established in order to promote greater effectiveness. These key concepts are often referred to as “best practices” in education and do not necessarily flow from a governing body, but from research and successful use in the classroom.⁷⁰ Similarly, no formal rules exist for peer mediation programs,⁷¹ but three components emerge as critical points of focus for a school attempting to establish a peer mediation program. First, programs should emphasize the development of a specific set of core mediator skills and techniques to be employed in practice. Next, clear parameters should be set to limit the scope of possible cases mediated and provide a basis of expectations for the peer mediators. Finally, the overarching goals of the program itself should be closely tailored to the process used in practice.

The available studies that have been conducted on school-based peer mediation programs suggest that they are centered around a facilitative style of mediation.⁷² This is likely due to the fact that facilitative mediation is highly interest-based, which is consistent with the goal of addressing the problem at the root of the bullying issue and not just the negative behavior.⁷³ Further, the opening statements associated with a facilitative mediation style can be cathartic, which might be beneficial for both the victim and the bully.⁷⁴ Evaluative and transformative mediation styles, in contrast, are probably not realistic or appropriate styles for youthful peer mediators. The inexperience of the adolescent conducting the mediation session, coupled with the inability to

⁷⁰ See Rebecca Alber, *Defining “Best Practice” in Teaching*, EDUTOPIA (May 29, 2015) <https://www.edutopia.org/blog/defining-best-practice-teaching-rebecca-alber>.

⁷¹ See *supra* Part II.

⁷² See Philipson, *supra* note 55, at 88-90 (“Peer mediation entails training students to serve as third party neutrals who facilitate conflict resolutions between disputing peers”); see also Christensen, *supra* note 2, at 569-74.

⁷³ See Christensen, *supra* note 2, at 571-72.

⁷⁴ *Id.*

enable complicated transformative mediation training in schools provide fairly persuasive arguments as to why these two mediation styles would be unsuccessful if implemented.

Another critical factor in a program's effectiveness is the ability to recognize its limitations. This means that prior to a session, a program advisor, counselor, or other administrator should skim each case to determine whether it is appropriate for peer mediation.⁷⁵ Parameters for case selection, established prior to program implementation, should generally center on the facts specific to each situation. Anecdotal reports from both scholars and participants suggest that cases involving physical bullying should not be eligible for peer mediation, due to the violent nature of such situations.⁷⁶ Further, types of cyber bullying cases, such as those involving sexting, should be removed because of possible criminal implications that are not within the scope of a peer mediator's capabilities to handle. This leaves verbal and social bullying cases as those mainly referred to peer mediation. These cases may then be further limited by additional factors, such as willingness to participate in peer mediation. Though limiting the scope of cases in this manner might seem counterintuitive to reducing bullying, it actually fosters the possibility of reaching realistic, lasting resolutions through the process of narrow tailoring and focused interventions.

Additionally, due to the sensitive nature of the cases and parties, peer mediators must also be particularly constrained by the need for privacy. The Model Standards of Conduct for Mediators provide an ethical framework from which programs might draw inspiration in constructing their own privacy guidelines.⁷⁷ Standard V provides that mediators "maintain the confidentiality of all

⁷⁵ Cases might be referred to mediation by students, teachers, or other staff, but not all cases are suggested for mediation. *See* Philipson, *supra* note 55, at 93 ("...peer mediation is ineffective where: 1) a high level of hostility exists between the disputants, 2) a significant psychopathology in the relationship exists in the disputants' relationship, or 3) most importantly, a power imbalance exists in the disputants' relationship").

⁷⁶ *Id.*

⁷⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS: PREAMBLE (AM. ARBITRATION ASS'N., AM. BAR ASS'N., & ASS'N. FOR CONFLICT RESOLUTION 2005).

information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law” in order to protect parties’ right to privacy.⁷⁸ Though it is clearly well-intentioned, a confidentiality standard this strict might actually undermine the authority of school administration and prevent important information from a mediation session from reaching the necessary audiences, such as a teacher or principal. Therefore, it would likely be better for a peer mediation program to alter the provision to require mediators to maintain the confidentiality of all information obtained in mediation, with the exception of a debriefing session between the mediator and one of the adults on the administrative committee or in the event that other exceptions—such as the possibility of physical harm or violence to another or oneself—are triggered. Such adaptations would still commit the mediator to maintaining the parties’ privacy but also allow critical facts to be reported.⁷⁹

Finally, the importance of specific goals and a clear connection between those goals and the mediation process cannot be understated. Most established peer mediation programs actually share more similarities than differences in their fundamental goals and approach to the process, which suggests that this component might be easier to study and replicate for schools looking to implement a new program.⁸⁰ Promoting better conflict resolution skills throughout the student body is a commonly held goal among programs, and its prominence is visible in the focus on self-determination in mediation. In one such program, a typical session

⁷⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS: STANDARD V. CONFIDENTIALITY (AM. ARBITRATION ASS’N., AM. BAR ASS’N., & ASS’N. FOR CONFLICT RESOLUTION 2005).

⁷⁹ The Model Standards of Conduct for Mediators can be read to allow this type of alteration: “[T]he parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations” MODEL STANDARDS OF CONDUCT FOR MEDIATORS: STANDARD V. CONFIDENTIALITY (D) (AM. ARBITRATION ASS’N., AM. BAR ASS’N., & ASS’N. FOR CONFLICT RESOLUTION 2005).

⁸⁰ See Decker, *supra* note 34, at 487 (citing Jerry Tyrrel, PEER MEDIATION: A PROCESS FOR PRIMARY SCHOOLS 18 (Marian Leibmann ed., Souvenir Press 2002)); see also Haft & Weiss, *supra* note 7, at 223 (noting that the differences among the numerous programs are largely irrelevant).

opens with the mediator greeting the students and verifying their willingness to mediate.⁸¹ As with other types of mediation, participation is voluntary, but here it is even more important to honor the students' wishes in order to encourage self-determination.⁸² The mediator then establishes their role as the neutral third party, explains that the session is a vehicle for conversation, and emphasizes the students' right to privacy, which is another critical point in promoting self-determination.⁸³ Finally, the mediator lays down ground rules, which may include no swearing, no blaming or name calling, and no interrupting.⁸⁴ Once students agree to the rules, the mediation can begin. Students take turns presenting their views of the conflict and discussing their thoughts and feelings. Once both sides have been heard, the mediator might ask each side to make a general list of the issues they feel are most important to resolve.⁸⁵ This allows the student parties to further take control, as they are essentially setting the agenda for mediation, and also helps the peer mediator focus on similar points of interest between the parties. At this point, students may also ask to meet privately with the mediator to discuss their lists or they may remain in the session together.⁸⁶ Either way, the discussion shifts to focus on creating possible solutions to the issues presented. Once the solutions have been generated, students work together—or come back together if they chose to meet privately—going through the list, rejecting those ideas that they cannot accept and beginning to compromise on those that they may.⁸⁷ The list is one basic approach the mediator might use to generate movement, however it is not the only tool she might employ. If the session does not produce any solutions, it is possible for students to return at another time and try mediation again.⁸⁸ If a resolution is reached, the mediator will guide the students in

⁸¹ See Decker, *supra* note 34, at 487.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 488.

⁸⁶ *Id.*

⁸⁷ See Decker, *supra* note 34, at 488.

⁸⁸ *Id.*

drafting an agreement. One study has suggested that having students write out their own agreement promotes a deeper understanding of the obligations and a connection with the terms, and thus encourages that student participants draft their own agreement.⁸⁹ Either way, the agreement memorializes the session and provides terms through which students are held accountable for their actions, and the process promotes the overarching goal because students have essentially solved the problem themselves.

Peer mediation is not a “one-size-fits-all” practice; therefore, each program will differ slightly in order to meet the needs of the student body which it serves. However, there are key elements that each program should address in order to foster its success. Encouraging and developing a facilitative mediation style, providing limitations in the form of case selection and mediator behavior, and employing a process that focuses on promoting clear goals will enable peer mediation programs to better serve the interests of their student constituents.

B. Addressing the Concerns Surrounding the Use of School-Based Mediation Programs in Connection with Anti-Bullying Efforts

Just as there are supporters of the use of school-based peer mediation programs in response to bullying, some critics have cautioned against its use. As indicated above, the basic mediation program model centers on facilitating conversation between parties that are at odds with one another. It has been suggested that treating bullying as simply a conflict to be resolved sends an inappropriate message to bullies and their victims that both sides are “partly right and partly wrong,” instead of flatly stopping the behavior.⁹⁰ This issue, coupled with the concern that mediation may further traumatize victims by forcing them to communicate face-to-face with their bullies, has led some groups to discourage

⁸⁹ *Id.*

⁹⁰ *Misdirections in Bullying Prevention and Intervention*, ANTI-DEFAMATION LEAGUE <https://www.adl.org/education/resources/tools-and-strategies/misdirections-in-bullying-prevention-and-intervention> (last visited November 8, 2018).

the use of peer mediation programs in schools.⁹¹ Further, the inconsistent success rates among schools that have implemented peer mediation programs has led to additional concerns about their validity and efficacy in preventing and reducing instances of bullying.⁹²

In addressing these issues, it is notable that they do not seem to account for the basic principles of mediation. For example, one of the core beliefs of mediation is that it is a voluntary process.⁹³ Parties come to the table of their own volition, not because they are being forced to communicate with one another. While court-mandated mediation is highly plausible in the legal system, peer mediation drastically differs in this respect and parties are simply encouraged, not forced, to come to the table.⁹⁴ Furthermore, one of the critical aspects of establishing a mediation program is setting parameters for the type of cases peer mediators handle.⁹⁵ In this respect, the program might further limit its scope by conducting pre-mediation interviews with potential parties in order to get a sense of whether the case is appropriate for mediation. Similar to the screening process suggested for domestic violence mediation cases,⁹⁶ pre-mediation interviews might minimize the possibility of perpetuating victimization and ensure parties' willingness to participate.

Additionally, the existence of inconsistencies among the approaches to peer mediation do not necessarily indicate that the concept should be abandoned altogether. A major issue in determining both the successes and shortcomings of peer mediation is the lack of funding for and difficulty of conducting

⁹¹ *See id.*

⁹² Palmer, *supra* note 47, at 221.

⁹³ *See* Christensen, *supra* note 2, at 564.

⁹⁴ *Id.*

⁹⁵ *See supra* p. 6.

⁹⁶ *See* N. Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 194-198 (2003) (excerpted in GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES* 526-27 (6th ed. 2012) (suggesting use of pre-mediation screening in divorce cases may allow for the use of mediation while also reducing the possibility of subjecting victims of domestic violence to further victimization)).

long-term or diverse studies on existing programs. The research that has been done, however, suggests that programs are actually more similar than not in key aspects, such as implementation and mediator selection processes.⁹⁷ This same research also implies that the difference setting programs apart lies not in their practices, but in their overall goals.⁹⁸ Thus, one program dedicated to promoting conflict resolution skills may appear vastly different from another that has a wider goal of reducing bullying overall. This slight distinction may result in the appearance that one program is more successful than the other, but the reality is that the two have different primary concerns and should not be compared as direct equals. To fully address the concerns over these discrepancies, better evaluation of existing programs is needed. The evaluation need not be comparative in nature but should attempt to group together schools whose programs have similar goals in order to better assess their effectiveness, and ultimately to respond to the argument that dissimilarities equate to dysfunction.⁹⁹

One additional, potential source of support in addressing the inconsistencies among peer mediation programs is the Uniform Mediation Act (“UMA”).¹⁰⁰ Introduced in 2002, the Act sought to establish rules to which mediators would adhere in order to provide a more unified experience.¹⁰¹ Provisions within the Act address issues such as mediator impartiality, training, privacy, and confidentiality of the parties.¹⁰² The UMA has been introduced to legislatures in New York and Massachusetts and formally adopted by twelve jurisdictions: District of Columbia, Hawaii, Idaho,

⁹⁷ Haft & Weiss, *supra* note 7, at 229-35.

⁹⁸ *Id.* at 256-57.

⁹⁹ Due to its limited scope, this paper will not address evaluative measures for peer mediation programs. See Haft and Weiss, *supra* note 7, at 261-70, for a discussion of research-based alternatives for evaluation.

¹⁰⁰ After a reasonable search, I was unable to locate any direct research or writing suggesting the use of the UMA in conjunction with the regulation of peer mediation programs.

¹⁰¹ James R. Coben, *My Change of Mind on the Uniform Mediation Act*, 23 DISP. RESOL. MAG. 6 (Winter 2017).

¹⁰² UNIF. MEDIATION ACT (NAT’L CONFERENCE OF COMM’R ON UNIF. STATE LAW 2003).

Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.¹⁰³ In order to replicate the cohesiveness promulgated by the UMA, these states might also encourage peer mediation programs to follow the Act's provisions by adding an amendment written specifically to standardize certain aspects of peer mediation.¹⁰⁴ Such a practice would be incredibly beneficial in terms of creating an evaluation system for peer mediation programs because it would not only give researchers an equal foundation from which to base their studies, but would also allow enough flexibility for schools to diversify their programs to appropriately meet the needs of their particular student body. Further, research suggests that the uniform applicability of UMA principles may provide guidance, even where a state has not formally incorporated the Act.¹⁰⁵ Optimistically, this might mean that the same will also be true of peer mediation, and programs not governed by the Act might attempt to follow suit and adopt its principles anyhow.

Overall, the concerns regarding victimization and program disparity appear to emerge from lack of education about mediation rather than empirical evidence. This fundamental misunderstanding further demonstrates the need for a comprehensive approach that emphasizes dispute resolution education with a supporting peer mediation program, that includes not only students, teachers and administration, but also parents and outside stakeholders as well.

V. CONCLUSION

The history of peer mediation demonstrates its ability to help resolve those conflicts that fall outside the standard legal framework. Its relative success in community disputes has led to the implementation of peer mediation programs in schools, and its

¹⁰³ *Id.*

¹⁰⁴ An amendment would be required because the UMA specifically excludes peer mediation from the application of its principles ("The Act also exempts mediations between students...because the supervisory needs of schools toward students...may not be consistent with the confidentiality provisions of the Act") UNIF. MEDIATION ACT §3(B)(4)(A) CMT. AT 5 (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAW 2003).

¹⁰⁵ See Coben, *supra* note 101, at 9 (addressing application of confidentiality principles in states that have not formally adopted the UMA).

subsequent use as an anti-bullying mechanism. Though legislation proposing anti-bullying measures has been passed in all fifty states, it has mostly been ineffective in achieving its goals. Where the law has failed to provide a solution for bullying, however, peer mediation can provide a realistic response that may help alleviate the problem. When incorporated as part of a larger, whole-school approach that includes educating students about dispute resolution, peer mediation programs can enable cultural change that encourages both bully and victim to see beyond their conflicts to similarities upon which a mutual agreement can be formed. Opponents argue that peer mediation perpetuates victimization and that programs are too dissimilar to be truly effective. These arguments have led to a negative perception of peer mediation and tempered its expansion in schools; however, both arguments imply a need for better dispute resolution education and appropriate regulation of peer mediation through evaluative measures. This also seems to perpetuate the need for schools to incorporate a whole-school, culture-based approach as their response to bullying, suggesting that peer mediation will continue to have place in public schools for the foreseeable future.