

# THE KIDS ARE *NOT* ALL RIGHT: MANDATING PEER MEDIATION AS A PROACTIVE ANTI-BULLYING MEASURE IN SCHOOLS\*

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Enclosed in his self-constructed tomb, he hung from the inner walls of his bedroom closet. Discovered by his mother and older brother, Jeff Johnston's torment had reached its end as his suicide note concluded, "I decided to commit suicide because my life is too hard . . . . It's just difficult to explain . . . . I hope none of you miss me. . . . I'm really sorry."<sup>1</sup> Jeff's suicide did not result from illegal drugs, alcohol, or any chemical depression but rather from a schoolyard bully.<sup>2</sup> The Cape Coral, Florida middle school honors student endured two years of constant torment from a child he barely knew, who spread rumors about Jeff's sexuality; posted blogs with obscene, false, and derogatory comments about Jeff; and ridiculed Jeff through instant messages.<sup>3</sup> Jeff was not alone. Almost 30%, or 5.7 million, of United States youth either bully or are the target of bullying, or both.<sup>4</sup> In fact, "[e]very seven minutes, a child is bullied,"<sup>5</sup> and among children aged seventeen or younger, almost one in five report being physically bullied and almost three

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<sup>1</sup> Margery D. Rosen, *Bullied . . . to Death*, LADIES' HOME J. 122, 124 (March 2006).

<sup>2</sup> *Id.* at 123–24.

<sup>3</sup> *Id.*; Julia Chang et al., *Mom's Campaign for Florida Anti-Bully Law Finally Pays Off*, ABC NEWS (May 2, 2008), available at <http://abcnews.go.com/GMA/story?id=4774894&page=1>.

<sup>4</sup> 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, 546 (2009) (citing the National Youth Violence Prevention Resource Center's Bully Facts and Statistics). However, teachers may not be aware of the prevalence of bullying in their schools. See Matthew D. Decker, Comment, *Unexcused Absence: A Review of the Needs, Costs, and (Lack of) State Support for Peer Mediation Programs in U.S. Schools*, 2009 J. DISP. RESOL. 485, 490 (citing a study showing that 70% of teachers believed they intervene almost always during bullying situations while only 25% of students concurred with this belief).

<sup>5</sup> Decker, *supra* note 4, at 490.

in ten report being teased or emotionally bullied in their lifetime.<sup>6</sup> More alarming, the United States Department of Justice reports that 77% of middle school students report that other children bully or threaten them.<sup>7</sup>

Three years after Jeff's death,<sup>8</sup> the Florida Legislature responded to these startling statistics with the Jeffrey Johnston Stand Up for All Students Act (the "Act"), mandating that all Florida public schools adopt anti-bullying policies and that distribution of "Safe School Funds"<sup>9</sup> be contingent on the adoption of a policy and on compliance with all reporting procedures.<sup>10</sup> Although the Act's legislative report notes that school districts may use "Safe School Funds" for conflict resolution strategies,<sup>11</sup> neither the Act nor the Florida Department of Education's policy mandate the use of or expressly fund conflict resolution strategies such as peer mediation.<sup>12</sup>

Despite the fact that the Safe School Proviso Language in every General Appropriations Act since the 1996–1997 session provides for conflict resolution strategies,<sup>13</sup> school districts, during

<sup>6</sup> *How Widespread is the Bullying Problem?*, FIND YOUTH INFO.GOV, [http://www.findyouthinfo.org/topic\\_bullying\\_widespread.shtml](http://www.findyouthinfo.org/topic_bullying_widespread.shtml) (last visited Feb. 19, 2011).

<sup>7</sup> Chang et al., *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> Safe School Funds is a categorical fund within the Florida Education Finance Program (FERP). The Florida Legislature appropriates funds through its General Appropriations Act and funds are distributed to school districts based on a formula that considers, among other factors, student population and the Florida crime index. STAFF OF H. POLICY AND BUDGET COUNCIL, HB 669 SCHOOL SAFETY 5 (FLA. 2008), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0669e.PBC.doc&DocumentType=Analysis&BillNumber=0669&Session=2008> [hereinafter POLICY AND BUDGET COUNCIL]. For a detailed history of the funding for the Safe Schools Program, see OFFICE OF SAFE SCHS., FLA. DEP'T OF EDUC., SAFE SCHS. APPROPRIATION EXPENDITURES REP. 2007–2008 SCH. YEAR, 28–32 (2010) (hereinafter OFFICE OF SAFE SCHOOLS).

<sup>10</sup> FLA. STAT. § 1006.147(4), (8) (2010). When Florida passed its anti-bullying measure, at least twenty-nine other states had already enacted anti-bullying legislation. POLICY AND BUDGET COUNCIL, *supra* note 9, at 3. As of June 2012, every state, with the exception of Montana, has promulgated an anti-bullying law. See Greg Toppo, *Should Bullies Be Treated as Criminals?*, USA TODAY (June 13, 2012) (providing a breakdown of the remedies various state statutes provide).

<sup>11</sup> POLICY AND BUDGET COUNCIL, *supra* note 9, at 5 (stating that Safe School Funds may be used for "other improvements to enhance the learning environment, including implementation of conflict-resolution strategies").

<sup>12</sup> See FLA. STAT. § 1006.147. *But see* FLA. STAT. § 1006.147(4)(j) (requiring that proposed anti-bullying policy include "[a] procedure to refer victims and perpetrators of bullying or harassment for counseling"). However, counseling does not equate to mediation and may serve fundamentally distinct purposes.

<sup>13</sup> See *supra* note 11; OFFICE OF SAFE SCHOOLS, *supra* note 9, at 28–32; FLA. SEN. & FLA. H. OF REP., THE FLA. EDUC. FIN. PROGRAM: FINAL CONF. REP. ON H. BILL 5001, 2 (2010), *availa-*

that same time frame have spent the majority of Safe School Funds on school safety and security program activities, such as school resource officers and school law enforcement officers.<sup>14</sup> In the 2007–2008 school year alone, school districts spent 87% of the Safe School Funds on safety and security program activities and less than 1% on instructional activities. Only six school districts expended funds for peer mediation programs.<sup>15</sup> This focus on security as an anti-bullying measure is more than understandable considering that according to media reports and a U.S. Secret Service report, the rash of school shootings in the 1990s were executed by students who felt “persecuted, bullied, or threatened by their peers.”<sup>16</sup> However, with Florida school districts still reporting that “controlling aggressive student behavior” and “controlling disrespect towards teachers and staff” as top priorities,<sup>17</sup> other measures must be explored—measures that emphasize empathy, interest-based discussions, and collaborative thinking. In sum, in the age of cyber-bullying<sup>18</sup> and student and teacher intimidation, Florida and other states must consider mandating the implementation of peer mediation programs as an anti-bullying measure.

Peer mediation, considered one of the most popular alternative discipline approaches,<sup>19</sup> is a standard mediation in which students as neutral third parties facilitate a conflict resolution between

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ble at <http://www.myfloridahouse.gov/filestores/Adhoc/Appropriations/GAA/2010-House/fefp.pdf>.

<sup>14</sup> OFFICE OF SAFE SCHOOLS, *supra* note 9, at 2.

<sup>15</sup> OFFICE OF SAFE SCHOOLS, *supra* note 9, at 2, 13, 27. One survey of states supporting peer mediation reported that support is often unfunded, creating programs of varied quality and characteristics. See Decker, *supra* note 4, at 496.

<sup>16</sup> Susan P. Limber, *Efforts to Address Bullying in U.S. Schools*, AM. J. OF HEALTH EDUC., Sept.–Oct. 2003, S-23, S-23 (hereinafter Limber, *Efforts to Address Bullying*); Susan P. Limber, Addressing Youth Bullying Behaviors, at the Am. Med. Ass’n: Educ. Forum on Adolescent Health: Youth Bullying 5, 5 (May 3, 2002), available at <http://www.ama-assn.org/ama1/pub/upload/mm/39/youthbullying.pdf> (noting that a U.S. Secret Service investigation of “41 school shooters involved in 37 incidents (including Columbine) revealed that two-thirds of the perpetrators described feeling persecuted, bullied, or threatened by their peers”) (hereinafter Limber, Educational Forum).

<sup>17</sup> OFFICE OF SAFE SCHOOLS, *supra* note 9, at 23.

<sup>18</sup> According to a National Institute of Child Health and Human Development study, 13.6% of a national sample of sixth to tenth grade students were involved in cyber-bullying in a two-month period. Jocelyn Ho, Note, *Bullied to Death: Cyberbullying and Student Online Speech Rights*, 64 FLA. L. REV. 789, 793 (2012) (citations omitted). Cyberbullying is a critical component of modern day bullying; however, this Article will focus on bullying in general. For more about cyberbullying and the First Amendment, see Ho, *supra* note 18.

<sup>19</sup> See, e.g., Susan K. Theberge & Orv. C. Karan, *Six Factors Inhibiting the Use of Peer Mediation in a Junior High School*, 7 PROF’L SCH. COUNSELING 283, 283 (2004); Kelly Rozmus, *Peer Mediation Programs in Schools: Resolving Classroom Conflict but Raising Ethical Concerns?*, 26

disputing peers.<sup>20</sup> However, peer mediation is not without its critics. Many question the inconsistency of mediation programs across schools,<sup>21</sup> the lack of true conflict resolution results due to the students' intellectual and emotional immaturity,<sup>22</sup> and the appropriateness of mediation to address bullying, which is defined by domination and control rather than interpersonal conflict.<sup>23</sup> Assessing the success rate of peer mediation programs, their criticisms, and alternative programs, this Article uses Florida as a model state to define the proper role for peer mediation as a proactive anti-bullying measure in schools.

Part I of this Article briefly details the current state of the bullying epidemic in America and the responding programs, other than peer mediation, which collectively have failed to empower students or failed to resolve underlying interpersonal conflicts. Part II explains peer mediation, addressing its processes, its effectiveness, and its weaknesses. Exploring further the criticism of peer mediation as inconsistent with relationships defined by dominance, Part III explores, in relation to mediation, the parallels between the culture of bullying and the culture of domestic violence. Concluding that peer mediation is not a panacea for resolving bullying, Part IV discusses the Olweus Bullying Prevention Program ("Olweus"), a successful anti-bullying program. Building on the Olweus program, Part V argues that Florida and other states should mandate peer mediation programs in schools as a complement to other successful anti-bullying programs and explains how to fund and structure the peer mediation programs. Part VI offers a brief conclusion.

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J. L. & EDUC. 69, 71 (1997). *But see* Decker, *supra* note 4, at 496 ("[I]n the United States . . . no more than fifteen percent of schools make peer mediation available to their students.").

<sup>20</sup> Rozmus, *supra* note 19, at 72.

<sup>21</sup> *Id.* at 85.

<sup>22</sup> 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, 339 (2007).

<sup>23</sup> Susan P. Limber, *Implementation of the Olweus Bullying Prevention Program in American Schools: Lessons Learned from the Field*, in BULLYING IN AMERICAN SCHOOLS: SOCIAL-ECOLOGICAL PERSPECTIVE ON PREVENTION AND INTERVENTION 351, 361–62 (Dorothy L. Espelage & Susan M. Swearer, eds., 2004); *see also* Daniel Webster, *The Unconvincing Case for School-Based Conflict Resolution Programs for Adolescents*, HEALTH AFFAIRS 126, 137 (Aug. 1994) (arguing that using conflict resolution programs as a solution to youth violence provides political cover to public officials when questioned about which, if any, anti-youth violence programs they have pursued).

## I. BULLYING IN AMERICAN SCHOOLS AND SUB-OPTIMAL RESPONSES

Bullying is “aggressive behavior that: (a) is intended to cause harm or distress, (b) occurs repeatedly over time, and (c) occurs in a relationship in which there is an imbalance of power or strength.”<sup>24</sup> No simple answer exists for why bullying occurs. The Olweus Bullying Prevention Program (“Olweus”), the leading anti-bullying program, cites research suggesting that causes may be personality characteristics, a student’s tendency to aggressive behavior, differences in strength, or environmental factors such as the behavior and attitudes of adults.<sup>25</sup>

Regardless of the cause, some may assume that bullying is a rite of passage<sup>26</sup>—a time-old tradition of adolescence; however, this conception of bullying fails to understand the short-term and long-term impacts of bullying on the bullied and the bullies. In the short-term, bullied students may suffer headaches and sleeping problems, fear going to school or to the bathroom, and suffer academically due to a loss of interest in school or an inability to concentrate.<sup>27</sup> For example, Jeff Johnston, due to bullying, transformed from an outgoing honors student with a girlfriend into an introvert clad in black clothes who became concerned about his appearance.<sup>28</sup> Furthermore, bullied students are more likely to abuse drugs or alcohol, suffer from depression, and skip school.<sup>29</sup> In the long-term, bullied students suffer from a lack of confidence, begin to accept the teasing as the truth, and attempt or commit

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<sup>24</sup> Limber, Educational Forum, *supra* note 16, at 6 (citing Dan Olweus, the father of bullying research); see also DAVID P. FARRINGTON & MARIA M. TFOFI, THE CAMPBELL COLLABORATION, SCHOOL-BASED PROGRAMS TO REDUCE BULLYING AND VICTIMIZATION 9 (2010) (“The definition of school bullying includes several key elements: physical, verbal, or psychological attack or intimidation that is intended to cause fear, distress, or harm to the victim; an imbalance of power (psychological or physical), with a more powerful child (or children) oppressing less powerful ones; and repeated incidents between the same children over a prolonged period. . . . Bullying primarily involves imbalance of power and repeated acts.”). Bullying is different from other kinds of aggression because: (1) “negative behaviors are intentionally targeted at a specific individual;” (2) it is repetitive in nature; and (3) a power imbalance exists between the students. OLWEUS BULLYING PREVENTION PROGRAM, BULLYING FREQUENTLY ASKED QUESTIONS, available at <http://www.hazelden.org/web/public/document/olweusfaq.pdf>.

<sup>25</sup> OLWEUS BULLYING PREVENTION PROGRAM, *supra* note 24.

<sup>26</sup> Rosen, *supra* note 1, at 124 (quoting Nancy Mullin-Rindler, the director of the Project on Teasing and Bullying at Wellesley Centers for Women).

<sup>27</sup> OLWEUS BULLYING PREVENTION PROGRAM, *supra* note 24.

<sup>28</sup> Rosen, *supra* note 1, at 124.

<sup>29</sup> Kathleen Sebelius & Arne Duncan, *We Must Protect Kids from Bullying*, HOUS. CHRON., Oct. 9, 2010, available at <http://www.chron.com/disp/story.mpl/editorial/outlook/7239697.html>.

suicide.<sup>30</sup> Thus, for these students, the schoolyard becomes a prison yard for emotional and physical abuse.

With regard to the bullies, a study revealed that male junior-high bullies, by the age of twenty-four, “were four times more likely to have been convicted of three or more criminal acts than boys who did not bully others.”<sup>31</sup> Bullies are also more likely to drop out of school, abuse drugs, and carry weapons.<sup>32</sup> These effects of bullying do not end at the schoolhouse door but travel physically and temporally through the lives of those involved.

In 2009, recognizing a bullying epidemic, the United States Department of Education and Department of Health and Human Services, working with four other departments, launched a national task force.<sup>33</sup> Since its inception, this task force has held the National Bullying Summit that gathered 150 state, local, civic, and corporate stakeholders<sup>34</sup> and has launched [www.bullyinginfo.org](http://www.bullyinginfo.org) to gather federal resources on bullying.<sup>35</sup> Additionally, the Department of Education established the new Safe and Supportive Schools grant program.<sup>36</sup>

Besides the more recent federal efforts, states have been attempting to address the bullying epidemic for a number of years. However, some states’ efforts are less than optimal. They fail to address the de-humanizing effect of bullying that strengthens with the repetitive acts of dominance by one student over another.<sup>37</sup> Rather than attempting a student-centered restorative approach that develops an anti-bullying culture, many states engage in solely punitive anti-bullying policies.<sup>38</sup>

<sup>30</sup> OLWEUS BULLYING PREVENTION PROGRAM; *supra* note 24; *see also* Limber, Educational Forum, *supra* note 16, at 11 (detailing the effects of bullying on victims from various studies). Additionally, bystanders who witness repeated bullying become emotionally immune to it, feeling less empathy for the bullied. OLWEUS BULLYING PREVENTION PROGRAM; *supra* note 24; *see also* Limber, Educational Forum, *supra* note 16, at 12 (citing a study that found that “38% of fourth through sixth graders reported that they ‘did nothing’ when they observed bullying because they felt it was none of their business”). This lack of empathy is a major concern that mediation addresses directly.

<sup>31</sup> OLWEUS BULLYING PREVENTION PROGRAM; *supra* note 24.

<sup>32</sup> Limber, *Efforts to Address Bullying*, *supra* note 16, at S-23–24.

<sup>33</sup> Sebelius & Duncan, *supra* note 29.

<sup>34</sup> For a partial recording of these proceedings, see *Dep’t of Educ.’s Bullying Prevention Summit*, C-SPAN 3 (Dec. 30, 2010), <http://www.c-span.org/Events/Department-of-Educations-Bullying-Prevention-Summit/10737418459-2/>.

<sup>35</sup> Sebelius & Duncan, *supra* note 29.

<sup>36</sup> *Id.*

<sup>37</sup> *See* Christensen, *supra* note 4, at 547–48.

<sup>38</sup> *Id.* at 555–56.

Georgia, for example, statutorily mandates a three-strike rule that requires a student in grades six through twelve to be transferred to an alternative school if the child commits a third bullying offense.<sup>39</sup> Other states employ a zero tolerance policy requiring suspension or expulsion for bullying.<sup>40</sup> Critics of these school exclusion policies argue that: (1) they may be ineffective as they are overbroad, including students who are engaged in one time acts of aggression rather than a culture of bullying;<sup>41</sup> (2) they may deter reporting for fear of severe sanctions, thus defeating one of the purposes of legislation such as Florida's;<sup>42</sup> and (3) they may exclude bullies from being around positive social role models.<sup>43</sup> Additionally, bullies may revel in this harsh sanction. Jeff Johnston's bully, upon being charged with bullying, posted to his blog, "I've been charged with bullying myself. lol," and upon being threatened with out-of-school suspension, posted, "don't care." If bullies do not accept the punishment as serious, the punishment has a limited, if any, deterrent effect, and is a suboptimal alternative.

Another suboptimal alternative is group therapeutic treatment. This treatment focuses on anger management, empathy building, and improvement of the bully's self-esteem.<sup>44</sup> Although this alternative provides the positive aspect of empathy building that mediation offers, it fails to realize that bullies do not typically suffer self-esteem concerns.<sup>45</sup> Instead, the group therapy setting may increase the confidence of bullies, and bullies may learn new techniques from each other and reinforce one another's behaviors.<sup>46</sup> Therefore, because school exclusion is too harsh of a remedy and group therapy too coddling of a remedy, a prime alternative is peer mediation, which provides a potential for conflict resolution while empowering both parties to engage in empathetic discussion of their interests and concerns.

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<sup>39</sup> Limber, *supra* note 23, at 361–62.

<sup>40</sup> Limber, *Efforts to Address Bullying*, *supra* note 16, at S-26.

<sup>41</sup> Limber, Educational Forum, *supra* note 16, at 13 (noting that 20% of all elementary school children admit to bullying their peers).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 13.

<sup>45</sup> *Id.* at 8 (noting studies showing that bullies have an average or above average self-esteem).

<sup>46</sup> Limber, *supra* note 23, at 361.

## II. PEER MEDIATION: ITS EFFECTIVENESS AND LIMITATIONS

A. *The Peer Mediation Structure*

Peer mediation entails training students to serve as third party neutrals who facilitate conflict resolutions between disputing peers.<sup>47</sup> Consistent with mediations among adults, peer mediations among students do not focus on who is right or who is wrong but rather emphasize a confidential process that empowers students, with the aid of their peers, to develop conflict resolution strategies and to solve problems.<sup>48</sup> Scholars argue that peer mediation, a student-centered approach, is effective because it empowers children to engage in problem solving without a mandate from an adult or a limitation by an adult regarding how the children are to communicate with each other.<sup>49</sup>

Regardless of the variations among peer mediation programs across schools, each maintains a core set of principles: “extensive training of mediators; outreach to students, school staff and parents to ensure everyone understands the availability and function of peer mediation; confidentiality and trust; full support of staff and administration; and an emergency system capable of quick action.”<sup>50</sup> Within these core principles, schools adapt their program to fit their needs institutionally. Based on these institutional needs, schools determine who will serve as a peer mediator and what the school will allow peer mediators to mediate.

Two schools of thought exist when determining which students should serve as peer mediators—the “cadre approach” and the school-wide approach or the “cross-section approach.”<sup>51</sup> Through the “cadre approach,” school administrators select a small number of students with identifiable leadership qualities, high social status, and effective communication skills.<sup>52</sup> An alternative approach is either to implement the mediation program school-wide in which students rotate serving as mediators regardless of leadership skills, or to select students from a cross-section of “cliques” or cultural or

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<sup>47</sup> Hilary Cremin, *Pupils Resolving Disputes: Successful Peer Mediation Schemes Share Their Secrets*, 17 SUPPORT FOR LEARNING 138, 138 (2002).

<sup>48</sup> Lawrence T. Kajs et al., *The Use of Peer Mediation Programs to Address Peer-to-Peer Student Conflict in Schools: A Case Study*, 146 EDUC. LAW REP. 605, 607 (2000).

<sup>49</sup> Nix & Hale, *supra* note 22, at 328–29.

<sup>50</sup> Rozmus, *supra* note 19, at 71.

<sup>51</sup> Stephen P. Smith et al., *Conflict Resolution and Peer Mediation in Middle Schools: Extending the Process and Outcome Knowledge Base*, 142 J. SOC. PSYCHOL. 567, 584 (2002).

<sup>52</sup> *Id.*

racial backgrounds within the school, which may include students that are not necessarily traditional leaders in their classes.<sup>53</sup> An advantage of the “cross-section approach” is that it prevents disputants from avoiding mediation based on a fear that the mediator will be of a different culture or race and thus perceived as biased.<sup>54</sup> However, a disadvantage of this varied social strata approach is that teachers may be uncooperative because the peer mediation program may require students struggling academically to miss class to mediate conflicts.<sup>55</sup> Under either approach, teachers and administrators may select students exclusively or with the aid of student nominations and elections.<sup>56</sup>

After selection, peer mediators receive training in the conflict resolution process. The hours of training may vary by school. For example, the Peer Assistant Leader program in Texas requires a forty-hour training process on understanding anger, conflict, and communication techniques.<sup>57</sup> Once trained, a peer mediator may receive mediation referrals through self-referrals, referrals by teachers or other school officials, or referrals by friends.<sup>58</sup> During a referred peer mediation, there may be two student mediators serving as the third party neutral and a supervisor may be present.<sup>59</sup>

Both peer mediators are expected to keep strictly to the script provided to them during their training. Similar to adult mediations, the peer mediators introduce themselves, inquire if the par-

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<sup>53</sup> *Id.*

<sup>54</sup> Theberge & Karan, *supra* note 19, at 288.

<sup>55</sup> Telephone Interview with Catherine M. Boek, Manager, Substance Abuse and Violence Prevention, Polk County, Fla. Pub. Schs. (Feb. 16, 2010) (explaining that as a peer mediation coordinator, she faced challenges when she included students with academic problems as mediators because some teachers were unwilling to allow the students to miss class) (notes on file with author). Additionally, although students from different social strata receive the same training, they still may not interact with one another outside of the mediation setting. *Id.* (noting that the mediators from different “cliques” did not significantly interact beyond the mediation training, such as in the lunchroom).

<sup>56</sup> *See, e.g.,* Kajs et al., *supra* note 48, at 609–10 (describing a selection process).

<sup>57</sup> *Id.* at 610. Other peer mediation programs focus on accepting and respecting different opinions, active listening, and diffusing a volatile situation. They also utilize simulations and problem exercises for training purposes. *See* Alexandra Blitz, Note, *Peer Mediation Programs: An End to School Violence?*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 2 (2002), <http://cojcr.org/vol4no2/notes01.html> (discussing various peer mediation training methods and noting that programs that train teachers may be more successful because of student turnover).

<sup>58</sup> Nix & Hale, *supra* note 22, at 330. Schools may create separate rooms or a designated classroom for peer mediation and may set designated times, such as recess or lunch hour, where disputes are more likely to be witnessed. Rozmus, *supra* note 19, at 79 (noting that programs vary regarding whether adult supervision is present during a peer mediation).

<sup>59</sup> Blitz, *supra* note 57.

ties wish to attempt to resolve the conflict, set ground rules for the mediation, and seek the disputants' agreement to the rules.<sup>60</sup> After the preliminary steps, the peer mediators discuss the conflict, encourage empathy, and explore possible solutions through group brainstorming.<sup>61</sup> If the parties reach a resolution, the mediators draft an agreement and the parties sign it.

Peer mediation, as an alternative to other school discipline measures, addresses limited topics due to the mediators' emotional immaturity and cognitive abilities. For example, peer mediators may handle personal differences, such as disputes between boy-friends and girlfriends, accidents, gossip, teasing, and name-calling.<sup>62</sup> However, peer mediation does not resolve acts of violence or more serious offenses.<sup>63</sup>

### B. *Effectiveness of Peer Mediation Programs on Disputants and Mediators*

According to scholars, successful peer mediations can serve various purposes, including providing a structure for students to resolve conflicts, developing communication and conflict resolution skills among students, facilitating greater sensitivity and empathy among students, and building a better learning environment.<sup>64</sup> Peer mediation may also have positive secondary effects on bullying and school conflicts: various studies found that peer mediation significantly reduced discipline problems, reduced the frequency of bullying reports, increased empowerment among students, increased negative attitudes towards bullying, and increased available teaching time due to less time dispensing with punishment or addressing disciplinary issues.<sup>65</sup>

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<sup>60</sup> These rules may include "no name-calling, no physical fighting, and honesty always." Nix & Hale, *supra* note 22, at 330. As well, rules may include restating the problem in "your own words" and no interrupting. Rozmus, *supra* note 19, at 79.

<sup>61</sup> Nix & Hale, *supra* note 22, at 330; Decker, *supra* note 4, at 487.

<sup>62</sup> Kajs et al., *supra* note 48, at 605; Rozmus, *supra* note 19, at 76–77. These particular topics, if left unaddressed, can percolate into bullying and violent situations. See Decker, *supra* note 4, at 495–96.

<sup>63</sup> Kajs et al., *supra* note 48, at 605; Rozmus, *supra* note 19, at 76–77.

<sup>64</sup> Kajs et al., *supra* note 48, at 607–08.

<sup>65</sup> See *id.* at 610–11; Smith et al., *supra* note 51, at 581; Cremin, *supra* note 47, at 139; Robert D. Harris, *Unlocking the Learning Potential in Peer Mediation: An Evaluation of Peer Mediator Modeling and Disputant Learning*, 23 CONFLICT RESOL. Q. 141, 148 (2005). Despite these remarkable results, many of these studies suffered from limitations, such as program size or variance among test schools' implementation of the proposed studies. As well, some studies use

Beyond the schoolyard, studies found that students who received conflict resolution and peer mediation training were able to use those skills in non-school conflicts in the home or in spontaneous incidents.<sup>66</sup> As Professors David Johnson and Roger Johnson explain, “When students are involved in long-term, ongoing relationships, the most important conflict strategy for them to use is integrative negotiations in which joint benefit is considered over personal gain. Students who have not received conflict resolution and peer mediation training rarely use such a strategy.”<sup>67</sup> However, peer mediation’s benefits are not limited to mediators. Some studies reported that, in conflicts that were mediated, resolutions were achieved in 85% of the cases.<sup>68</sup> Another study showed that disputants, by observing mediators’ conflict resolution skills, gained new knowledge, attitudes, and skills that aided them in resolving future conflicts.<sup>69</sup> Therefore, not only does peer mediation resolve conflicts, it alters students’ conflict resolution behavior.

### C. *Limitations of Peer Mediations*

To determine the significance of peer mediation studies that show high conflict resolution rates and positive effects on bullying, one must evaluate what those resolutions entailed and what subject matter was mediated. In multiple studies with high-resolution percentages, researchers found that the resolution was simply that the parties avoid each other or merely stop their offending behavior with no particular requirements.<sup>70</sup> Such results are inconsistent with mediation’s theoretical purpose and are often difficult, or impossible, to implement realistically.

Mediation, at its core, consists of an integrative framework focused on developing joint remedies that resolve conflicts and sat-

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meta-analysis, which, due to its aggregative function, conceals inconsistencies and statistical errors.

<sup>66</sup> David W. Johnson & Roger T. Johnson, *Conflict Resolution and Peer Mediation Programs in Elementary and Secondary Schools: A Review of the Research*, 66 REV. OF EDUC. RESEARCH 459, 479 (1996). More importantly, Professors Johnson and Johnson reported continual retention of negotiation skills up to eight months after training. *Id.* at 478.

<sup>67</sup> *Id.* at 476.

<sup>68</sup> Harris, *supra* note 65, at 141.

<sup>69</sup> *Id.* at 148, 160–61.

<sup>70</sup> Smith et al., *supra* note 51, at 581–82; Johnson & Johnson, *supra* note 66, at 485; Nix & Hale, *supra* note 22, at 337 (asserting that the “avoid each other” solution seemed to be integrated as part of a standard mediation script in mediations observed).

isfy the underlying interests of the parties; thus, creating a durable resolution.<sup>71</sup> By merely agreeing to avoid each other or to stop behavior without specifics, the students fail to engage in empathetic discussions that enhance their relationships. Mere learning of conflict resolution skills is not enough if students do not effectively employ these skills. It is analogous to teaching a child how to play basketball, and when the child enters the game, the first thing he does is run with the basketball up the court instead of dribbling it.

Just as a child running with a basketball realistically cannot occur in a game, neither can mutual avoidance among students within the same classroom or playground. Even if children agree to avoid each other, the disputants are still walking the same hallways, sitting in the same classrooms, and playing on the same playgrounds.<sup>72</sup> Professors Nix and Hale illustrate this dilemma in their study, noting in mediations observed, “Avoidance strategies proved to be omnipresent and even pernicious in that the solutions for many disputes were artificially constricted by the mediators given their apparent expectation that avoidance was the perfect solution.”<sup>73</sup> Therefore, although a high-resolution rate seems appealing, if the resolution is avoidance, then the peer mediation does not serve its core function.

In reality, a percentage of mediations resolved are mediated without resorting to avoidance, and those mediations concluding with an avoidance “solution” may be due to three major criticisms of peer mediations: a peer mediators’ cognitive immaturity, a peer mediator’s inconsistent or inadequate training due to a lack of a school-wide commitment, or the incompatibility of peer mediation with hostile conflicts.<sup>74</sup>

With any mediation, peer or otherwise, the mediator is limited to his or her skill set and the mediation’s subject matter. As young mediators, students are relatively inexperienced, lack the ability to keep abreast of the newest mediation techniques and approaches, and lack the knowledge of various fields that mediators address

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<sup>71</sup> See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 4 (2d ed. 1991).

<sup>72</sup> According to one peer mediation coordinator, she challenged the parties about the reality of mere avoidance and encouraged them to dig deeper to find alternative ways they thought could resolve their dispute. Telephone Interview with Catherine M. Boek, *supra* note 55.

<sup>73</sup> Nix & Hale, *supra* note 22, at 339.

<sup>74</sup> *But see supra* note 65 and accompanying text (listing the benefits of peer mediation on bullying).

such as socio-psychological issues.<sup>75</sup> Notwithstanding this limited knowledge, studies have found that peer mediators are more successful in using mediation skills as they gain experience.<sup>76</sup> Therefore, rather than focusing on the lack of mediation skills among peer mediators, interested stakeholders should focus on implementing peer mediation earlier in a child's education.

An additional criticism of peer mediation is the inconsistency in training of mediators and in the commitment by teachers and administrators to the peer mediation program. A peer mediator's skills are developing constantly and must be improved continually through lessons and discussions. However, with the current demands of standardized testing in schools and the financial constraints on school district budgets, the time needed for training is a luxury. Moreover, if faculty and administrators do not support or respect the program or seek a community-wide commitment to it, students and parents have no reason to view it as a reliable alternative to disciplinary measures or feel a need to sustain it.<sup>77</sup>

The greatest concern for critics of peer mediation, however, is the nature of the disputes mediated. Studies illustrate that peer mediators are ineffective when: (1) a high level of hostility exists between the disputants, (2) a significant psychopathology exists in the disputants' relationship, or (3) most importantly, a power imbalance exists in the disputants' relationship.<sup>78</sup> The one conflict that contains all of these elements is bullying. Thus, even the founder and director of School Mediation Associates, Richard Cohen, discourages the use of peer mediation in bullying situations because of the frequent reoccurrence of this hostile dispute.<sup>79</sup> This

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<sup>75</sup> Gary Richard Hattal & Cynthia Morrow Hattal, *Battling School Violence with Mediation Technology*, 2 PEPP. DISP. RESOL. L.J. 357, 376, 382 (2002).

<sup>76</sup> Harris, *supra* note 65, at 156 (finding "[p]eer mediators with three to eight years of experience received significantly better ratings for their use of the mediation process and mediation skills than peer mediators with two years [of] experience or less").

<sup>77</sup> See Rozmus, *supra* note 19, at 80–81 (discussing some of the institutional impediments to peer mediation programs); Cremin, *supra* note 47, at 139 (citing research emphasizing the "importance of teachers understanding and valuing the principles behind peer mediation" and the maintenance of a high profile for the program among staff and the embedding of the program in school life); Theberge & Karan, *supra* note 19, at 287–88 (noting studies showing that teachers and adults failed to necessarily model or encourage peer mediation and noting studies showing the ineffectiveness of organizing the peer mediation program through the disciplinary dean's office).

<sup>78</sup> See Johnson & Johnson, *supra* note 66, at 485–86 (citing various studies for support).

<sup>79</sup> Richard Cohen, *Peer Mediation Insights from the Desk of Richard Cohen: Stop Mediating these Conflicts Now!*, THE SCH. MEDIATOR, Feb. 2002, available at [http://www.schoolmediation.com/newsletters/2002/2\\_02.html](http://www.schoolmediation.com/newsletters/2002/2_02.html) (hereinafter Cohen, *Stop Mediating*). Cohen limits his conclusion by arguing that peer mediation may serve as a second or third option if "1. The harasser's

potential for a hostile reoccurrence also explains why Professors Farrington and Ttofi found that “work with peers was associated with an increase in victimization.”<sup>80</sup>

Beyond the potential for repetition, scholars are even more concerned about the underlying power imbalance that exists. As Professors Hattal and Hattal explain, peer mediation “has a long success record for dealing with relatively mundane day-to-day problems and conflicts that must be addressed to keep peace and harmony flowing on campus;” however, a distinction exists between hurt feelings and “premeditated revenge strategies . . . resulting in extreme violence and mortality.”<sup>81</sup> Other scholars elaborate that bullying is a form of victimization, making it difficult for the bullied, due to the power imbalance, to confront the aggressor in the mediation.<sup>82</sup> In other words, because mediation is based on equal power and not blaming, the tormentor is able to avoid blame for his bullying and dominate the mediation through unspoken intimidation.<sup>83</sup>

This unspoken intimidation may be the reason why some disputants are quick to accept avoidance as a solution, fearing that substantive changes may result in greater bullying as a punishment. In reality, regardless of the mediated outcome, the mediation still subjects the victim to further victimization. For example, Jeff Johnston, prior to his suicide, attended a peer mediation; however, according to his mother, the session “left the bully feeling

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behavior has been addressed by adult authority, and 2. The victim sincerely wants to speak directly with the harasser.” *Id.* As well, Cohen still supports peer mediation as a tool for providing educators with a process for resolving conflicts and students the ability to convert disputes into opportunities for growth rather than as a tool for a school-wide changing mechanism. Richard Cohen, *Peer Mediation Insights from the Desk of Richard Cohen: No, Peer Mediation Does Not Change Schools*, THE SCH. MEDIATOR, Apr. 2002, available at [http://www.schoolmediation.com/newsletters/2002/4\\_02.html](http://www.schoolmediation.com/newsletters/2002/4_02.html) (hereinafter Cohen, *No, Peer Mediation*).

<sup>80</sup> FARRINGTON & TTOFI, *supra* note 24, at 67–68 (conducting a meta-analysis review of various anti-bullying programs). However, this conclusion is limited because the study involves meta-analysis, which due to its aggregative function conceals inconsistencies in studies and statistical errors. As well, the form of peer work may vary by study.

<sup>81</sup> Hattal & Hattal, *supra* note 75, at 375.

<sup>82</sup> Limber, *supra* note 23, at 360–61. Professor Limber explains that in the bullying context, the wrong message is “You are both partly right and partly wrong. We need to work out this conflict between you.” Instead, the message should be that the victimized “do not deserve to be bullied and that the adult at the school will do everything they can to see that it comes to an end.” *Id.*

<sup>83</sup> *Id.*; see also Theberge & Karan, *supra* note 19, at 286 (“Students who feel wounded and hurt may seek revenge or want to withdraw rather than meeting face to face with the person who humiliated them.”).

empowered and her son feeling victimized again.”<sup>84</sup> In short, mediation in bullying situations often does not involve interpersonal conflict but rather domination and control. More pointedly, as one peer mediation supervisor capturing the situation, explained, “Would it make any sense to put a rape victim and her assailant in a room together to ‘come up with a plan that will work for you’?”<sup>85</sup>

Rather than using peer mediation in bullying situations, scholars and program supervisors emphasize that adult intervention is a necessary and effective deterrent to bullying.<sup>86</sup> This finding is consistent with statutory rules that inhibit the use of mediation when a history of domestic violence exists.<sup>87</sup> In fact, a bullying culture and its relationship to mediation parallels the same victimization and mediation concerns that exist in a domestic violence culture.

### III. PARALLEL CULTURES: DOMESTIC VIOLENCE AND SCHOOLYARD BULLYING AND THE HARMS OF MEDIATION<sup>88</sup>

Bullying, similar to domestic violence, occurs repeatedly over time rather than as a single incident, creating a culture of bullying like the culture of domestic battering.<sup>89</sup> The “culture of battering,” a culture of dominance and control, entails three components: (1) abuse itself, (2) abuse folded into a systematic pattern of control and domination by the abuser, and (3) tendency by the victim and abuser to conceal, deny, or minimize the abuse and the abuser’s

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<sup>84</sup> Leslie Postal, *Anti-Bullying Law Gives Jeffrey Johnston’s Grieving Mom Hope*, ORLANDO SENTINEL, May 6, 2008, at A1.

<sup>85</sup> E-mail from Catherine M. Boek, Manager, Substance Abuse and Violence Prevention, Polk County, Fla. Pub. Schs. (Feb. 3, 2011, 16:02 EST) (on file with author).

<sup>86</sup> *Id.*; Cohen, *Stop Mediating*, *supra* note 79 (“Research has shown that adult authority is the single most effective deterrent to bullying.”).

<sup>87</sup> See FLA. STAT. § 44.102(2)(c) (2010) (“Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.”).

<sup>88</sup> For analytical purposes, this Article addresses the parallels between the cultures of domestic battery and bullying, illustrating similar behavior patterns by perpetrators and victims. However, this Article does not equate bullying with the seriousness and effects of domestic battery on its victims and society.

<sup>89</sup> See Limber, Educational Forum, *supra* note 16, at 6.

domination.<sup>90</sup> These three components parallel those of a culture of bullying.<sup>91</sup>

First, abuse is a necessary, but not sufficient, element when identifying a culture of battering and a culture of bullying.<sup>92</sup> The abuse, whether it is physical, emotional, or verbal, only lays the foundation for each culture. It is when a systematic pattern of domination and control ensues that the second cultural component develops. In the second component, battered women, similar to the bullied students, attempt to follow the established pattern of domination and control.<sup>93</sup> For the battered women, it may mean either being forced to perform sexual acts or menial tasks; for the bullied student, it may mean suffering physical beatings or incessant scandalmongering. Each knows if he or she breaks the rule, the punishment of violence will only be more severe. Similarly, the batterer and the bully solidify this domination through social isolation.<sup>94</sup> Each engages in public ridicule of the victim; the victim, humiliated, succumbs further to the domination in fear of repercussions. Each victim knows if he or she rebels (evidence of the perpetrator's power being threatened), each will receive greater explicit abuse.<sup>95</sup> For the battered women, it may be rape; for the bullied student, it may be a physical beating in front of the schoolyard or a blast email or post on the Internet. Eventually, the victims reach

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<sup>90</sup> Karla Fischer et al., *Procedural Justice Implication of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2120 (1993).

<sup>91</sup> Researcher Barbara Coloroso identifies three similar markers of bullying: (1) imbalance of power, (2) intent to harm, and (3) threats of further aggression. Additionally, if bullying is unabated, it reaches the fourth marker of bullying—terror. At the terror stage, the “bully can act without fear of recrimination or retaliation.” BARBARA COLOROSO, *THE BULLY, THE BULLIED, AND THE BYSTANDER: FROM PRESCHOOL TO HIGH SCHOOL—HOW PARENTS AND TEACHERS CAN HELP BREAK THE CYCLE OF VIOLENCE* 13–14 (2004).

<sup>92</sup> Fischer et al., *supra* note 90, at 2125–26.

<sup>93</sup> *See id.* at 2131.

<sup>94</sup> *See id.* at 2132.

<sup>95</sup> *See id.* at 2133. This is the “terror” stage to which Coloroso refers. *See supra* note 90 and accompanying text. As well, Coloroso’s definition of bullying captures the contempt the perpetrator exudes, describing bullying as:

conscious, willful, and deliberate hostile activity intended to harm, induce fear through threat of further aggression, and contempt—a powerful feeling of dislike toward somebody considered to be worthless, inferior, or undeserving of respect. *Contempt comes packaged with three apparent psychological advantages that allow students to harm another human being without feeling empathy, compassion or shame.* They include a sense of entitlement, intolerance toward differences, and a liberty to exclude a person deemed not worthy of respect or care.

FLA. DEP’T OF EDUC., TECHNICAL ASSISTANCE PAPER: GUIDANCE RELATED TO THE DEV. OF A DIST. POLICY AGAINST BULLYING AND HARASSMENT 5 (2008) (emphasis added).

the third component, one of shame and embarrassment.<sup>96</sup> In the third component, battered women stay inside until wounds heal and avoid public interaction; bullied students avoid school and become more reclusive.<sup>97</sup>

Trapped in their respective cultures, battered women and bullied students enter mediation suffering from an imbalance of power. Overwhelmed by the perpetrators' domination and control, the victims fear upsetting the perpetrators. Additionally, because of their shared history with the perpetrators, idiosyncratic methods of communication exist—words, gestures, or expressions with clear meanings of intimidation that mediators will be unable to capture.<sup>98</sup> Thus, even in the mediation, the abusers utilize their culture of domination to ensure resolutions favorable to them. This may be a partial reason why so many peer mediations conclude with an “avoidance” resolution.<sup>99</sup>

Even if a mediator attempts to utilize private caucusing, the victims will still suffer from the perpetrators' psychological and emotional control because the respective cultures have instilled in the victims a constant fear of the perpetrators' domination and control and the belief that they cannot speak their needs without facing more severe punishment.<sup>100</sup> Rather than seeking help, the victims will deny, minimize, or hide the abuse. Thus, mediation will not provide victims a remedy. As Professor Limber concluded,<sup>101</sup> stopping violence is never an appropriate topic for mediation as it only enhances the power imbalance between the parties.<sup>102</sup>

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<sup>96</sup> See Fischer et al., *supra* note 90, at 2134.

<sup>97</sup> See *id.*; Limber, Educational Forum, *supra* note 16, at 10 (listing signs of victimization such as the student has unexplained cuts, bruises, and/or scratches; has few, if any, friends; appears afraid of going to school; and appears sad, depressed, and moody). Many of these signs parallel those of battered women.

<sup>98</sup> See Fischer et al., *supra* note 90, at 2119, 2169 (indicating that a mere scratch of the nose or facial change may be an idiosyncratic sign of domination).

<sup>99</sup> See *supra* notes 70–73 and accompanying text.

<sup>100</sup> See Fischer et al., *supra* note 90, at 2163; see also Sarah Krieger, Note, *The Danger of Mediation in Domestic Violence*, 8 CARDOZO WOMEN'S L.J. 235, 250 (2002) (“[P]ermitting mediation where a victim not only fears her abuser but also fears the prospect of denouncing him essentially forces a victim to acquiesce to her batterer's demands, further increasing her fear of the system itself.”).

<sup>101</sup> Limber, Educational Forum, *supra* note 16, at 13 (explaining that mediation sends the wrong message to bullies because the message must be—“Your behavior is inappropriate and won't be tolerated”).

<sup>102</sup> See Fischer et al., *supra* note 90, at 2153; see also Krieger, *supra* note 100, at 250 (“A victim whose abuser remains unpunished is in no way equal in power to that abuser.”). Further,

#### IV. IF PEER MEDIATION CANNOT RESOLVE BULLYING, WHAT CAN?

Accepting the premise that peer mediation alone may be antithetical to curing a culture of bullying, one must seek some solution that systematically alters this counter-culture. A leading program focused on systematic change in school cultures is the Olweus Bullying Prevention Program (“Olweus”). The father of anti-bullying research, Dan Olweus, developed Olweus in Norway after the reported suicide of three children due to severe bullying.<sup>103</sup> The program’s systematic approach entails reduction and prevention efforts, targeting risk factors such as lack of supervision, lack of parental warmth and involvement, lack of clear and consistent rules, and harsh punishment.<sup>104</sup> Unlike other programs, Olweus is a school-wide program requiring the participation of administrators, teachers, parents, and nonteaching staff. It is also an individual-oriented program, focusing on not only school-wide bullying issues but also specifically addressing concerns of individual students. Moreover, the program is research-based and not time-limited, requiring schools to integrate continually its principles so that the program embeds itself in the school.<sup>105</sup>

In terms of specific program features, Olweus forms a bullying prevention committee to plan and to coordinate the program, administers anonymous questionnaires about bullying to assess its prevalence at the school, develops school-wide anti-bullying measures, uses appropriate consequences for following and not following rules, engages parents in efforts, and fortifies “hot-spots” for bullying.<sup>106</sup> On the classroom level, the program requires weekly classroom meetings to discuss issues related to bullying and peer relations in order to improve social relations and to inform teachers about issues among the class. On an individual basis, staff members meet with bullies to administer appropriate punishment and warnings of future monitoring and meet with the bullied to develop safety plans and provide emotional support.<sup>107</sup>

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the victims should never have to give something up in order to end the culture of intimidation and control.

<sup>103</sup> Limber, *supra* note 23, at 353.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 354. For additional features of the program, *see id.* at 354.

<sup>107</sup> *Id.* For an alternative approach, the Social Inclusion Approach, which incorporates a restorative justice model-based program, *see* Christensen, *supra* note 4, at 565–74.

Olweus has a proven success rate, with significant reductions in the reporting of bullying and victimization and increased perceptions of positive school climate. It emphasizes that its success is based on a long-term commitment to school-wide implementation, administrative support, and community involvement.<sup>108</sup> These requirements match the federal government's list of effective strategies, including the use of a comprehensive approach, the involving of the entire community, the adopting of a long-term time frame, the focusing on creating a school-wide environment and climate that discourages bullying, and the promoting of classroom activities that encourage discussions of bullying issues.<sup>109</sup> Additionally, besides a program's duration and intensity, the federal government notes that two of the most effective program methods to decrease bullying are (1) using disciplinary methods to provide consequences for bullies and (2) involving parents in the program. Olweus employs both of these methods.<sup>110</sup> Therefore, to cure bullying in schools systematically, a comprehensive program, such as Olweus, provides the most direct medicine. However, it may not be the only preventive measure.

#### V. PEER MEDIATION REVIVED: A PREVENTIVE MEASURE TO BULLYING BEHAVIOR

One should address a systemic disease, such as bullying, by curing through diverse means its symptoms and its underlying causes and attributes. Although systematic programs such as Olweus provide strong macro-level corrective solutions and preventive efforts directed at the culture of bullying, peer mediation might complement these efforts in non-bullying conflicts. For example, peer mediation focuses on the individual's conflict skills, the lack of which is a key risk factor for the development of bullying behavior. By instilling students with conflict resolution skills during peer mediations of non-bullying conflicts, schools may help stem the formation of a bullying culture, which depends on repetitive actions.<sup>111</sup>

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<sup>108</sup> Limber, *supra* note 23, at 354–57, 362.

<sup>109</sup> *Bullying: What are the Effective Strategies to Prevent and Respond to Bullying*, FIND YOUTH INFO.GOV, [http://www.findyouthinfo.org/topic\\_bullying\\_effectiveStrategies.shtml](http://www.findyouthinfo.org/topic_bullying_effectiveStrategies.shtml) (last visited Feb. 19, 2012).

<sup>110</sup> *Id.*

<sup>111</sup> Telephone Interview with Catherine M. Boek, *supra* note 55 (stating that early mediation in simple altercations, such as “he said, she said” ones, have better outcomes); *see also* Decker,

Although peer mediation, because of its core principles of equal power and no blaming, is inconsistent with resolving an altercation arising from a bullying culture, it may still provide tools for students so that they are less likely to reach that power imbalance.<sup>112</sup> As Richard Cohen explains, “[E]xperience has taught me that peer mediation’s ability to influence change is most clearly felt not on the institutional, but on the inter- and intra-personal levels.”<sup>113</sup> Cohen also cites positive changes from peer mediation, such as: (1) enabling children to manage life’s challenges more skillfully because of improvements in skills, attitudes, and understanding and (2) enabling children to learn to resolve conflicts peacefully and to take responsibility for mistakes and forgive themselves and other persons.<sup>114</sup> Additionally, Professor Harris’ study found these interpersonal and intrapersonal skills only strengthened with years of experience.<sup>115</sup> Thus, students, utilizing peer mediation for non-bullying conflicts over time, will learn skills such as empathy, active listening, and interests-based discussion techniques.

Developing these conflict resolution skills is critical to addressing risk factors for a bullying culture. For example, after Jeff Johnston’s death, his bully declared, “I said [to Jeff’s mom] I was sorry for her loss, but even in his passing, I’m not sorry for why I said it.”<sup>116</sup> The bully’s statement illustrates a lack of empathy—a major risk factor for bullying that early-age implementation of peer mediation may address. Therefore, peer mediation may serve as a potential bullying prevention program when utilized for proactive prevention rather than reactive intervention.

Accepting the premise that peer mediation instills in children conflict resolution skills that strengthen over time with continued use, Florida and other states should mandate peer mediation beginning in elementary schools as a part of a comprehensive ap-

*supra* note 4, at 496 (noting that peer mediation may address topics that may simmer and overflow into full-blown disciplinary problems and violence, if left unaddressed).

<sup>112</sup> See Cohen, *No, Peer Mediation*, *supra* note 79 (supporting peer mediation not as a school-wide changing mechanism but rather as a tool for providing educators with a process for resolving conflicts and providing students with the ability to convert disputes into opportunities for growth).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*; see also E-mail with Catherine M. Boek, *supra* note 85 (citing numerous studies showing peer mediation programs’ usefulness in conflicts, disputes, and simple altercations between peers and showing peer mediation programs’ peer modeling, social skills training, and conflict resolution training positively impacting school climate and academic achievement).

<sup>115</sup> See *supra* note 76 and accompanying text.

<sup>116</sup> Chang et al., *supra* note 3.

proach to address risk factors for bullying. Peer mediation will serve as a continual vaccine for children, instilling the anti-bodies of empathy, active listening, and understanding to fight off the risk factors for bullying. Scholars agree that peer mediation is most effective when it is implemented at an early age.<sup>117</sup>

At the elementary-school level, schools may introduce simple conflict resolution strategies that promote empathy, such as by addressing “put-downs” and how they make a student feel. Instructing students through examples will allow them to develop skills that promote empathetic behavior, stifling certain bullying triggers. As students grow older, schools can incorporate more traditional peer mediation because schools and their students first constructed the building blocks of empathy and conflict resolution skills at an earlier age. For example, schools may incorporate peer mediation to resolve disputes during physical education classes and after-school sports.<sup>118</sup> This potential for the integration of conflict resolution skills into a curriculum is not limited to sports as schools can incorporate these conflict resolution skills into the classroom through simulations in civics classes, history classes, and even English classes. For example, using peer mediation, students may attempt to resolve the long-debated dispute between the Capulets and Montagues or resolve debates over pending legislation in Congress. In other words, rather than funding a separate conflict resolution class, schools, instead, may weave peer mediation skills into classes, and thus make conflict resolution an integral part of a student’s education.

Therefore, by employing early implementation, peer mediation programs embed themselves within the school curriculum. As Professor Cremin describes it, “[C]onflict resolution skills are like a second skin—they grow with each child, becoming more sophisticated as the child moves into ever more complex relationships.”<sup>119</sup>

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<sup>117</sup> See, e.g., Thelberge & Karan, *supra* note 19, at 289–90 (“[C]onflict resolution and mediation skills need to be taught and encouraged in elementary school, beginning with the primary grades, a time when students are more open to learning common strategies for interacting with peers.”).

<sup>118</sup> A prime example of the marriage between conflict resolution and sports is the University of Oregon’s Competition Not Conflict program, which promotes alternative dispute resolution in the athletic setting. UNIVERSITY OF OREGON COMPETITION NOT CONFLICT, <http://adr.uoregon.edu/cnc/> (last visited Feb. 19, 2012).

<sup>119</sup> Cremin, *supra* note 47, at 142.

Three major concerns, however, exist regarding implementation—incorporation of the program into curriculum, funding,<sup>120</sup> and training consistency. In the age of test score-accountability, teachers must dedicate significant classroom time to standardized test preparation, leaving less time for alternative teaching methods. However, as explained previously, this is not a barrier to integrating conflict resolution skills into the classroom. Studies integrating conflict training into a two-week high school English unit required students to study a novel, learn negotiation procedures, and role-play major conflicts from that novel using integrative negotiation procedures.<sup>121</sup> These students scored higher on achievement tests than a controlled group.<sup>122</sup> Thus, teaching conflict resolution in the classroom is not only possible, but may improve test scores.

Regarding funding, currently peer mediation programs are currently unfunded in Florida after the federal government, in the 2010 federal budget, cut the Federal Safe and Drug Free Schools program's state grant portion.<sup>123</sup> Without this funding, Florida schools' resources are little to none. Florida's Safe School Funds, for example, is dedicated predominately to security concerns and because of immediate safety concerns should not be jeopardized.<sup>124</sup>

Other states facing funding concerns for peer mediation programs have found alternative sources of funding. One possible solution is for Florida and other states to seek out the leaders in alternative dispute resolution, such as their local and state bar associations, for financial support for peer mediation programs. In Kansas, for example, the Kansas Bar Foundation, through its Interest on Lawyers Trust Accounts (IOLTA), funds mini-grants to Kansas schools to develop peer mediation programs.<sup>125</sup> Local and state bar associations can follow this lead by adopting schools in

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<sup>120</sup> The implementation costs of a peer mediation program include the costs of hiring and paying a coordinator, training staff and students, and paying operating and evaluation costs. Depending on existing resources and institutional needs, a program may cost as much as \$40,000 per school. Decker, *supra* note 4, at 499–500.

<sup>121</sup> Johnson & Johnson, *supra* note 66, at 486–87 (citing various studies).

<sup>122</sup> *Id.*

<sup>123</sup> Telephone Interview with Catherine M. Boek, *supra* note 55 (stating that the fund was used for many peer mediation programs).

<sup>124</sup> See *supra* notes 9–17 and accompanying text (discussing Safe School Funds and safety concerns).

<sup>125</sup> *Item of Interest: Peer Mediation: An Alternative to Violence in Schools*, 73 J. OF KAN. BAR ASSOC. 9 (2004); see also Rozmus, *supra* note 19, at 84–85 (discussing as alternative funding sources how the former Washington Bullets sponsored anti-violence curriculum in area elementary schools and how a district attorney in New York applied forfeited drug money to establish peer mediation programs in junior high schools).

their towns and states that could benefit from peer mediation programs.

Besides providing funding, local and state bar associations and mediation groups may also help resolve the last criticism of peer mediation—that mediators in peer mediation programs lack experience and the ability to keep abreast of changes in the field of mediation.<sup>126</sup> However, this concern could be resolved if local bar associations adopt schools, aiding them in the development of their peer mediation programs. In Florida, the Florida Dispute Resolution Center may lead this charge, and start creating future mediators today. In some states, attorneys already are reaching out to peer mediation programs.<sup>127</sup> For example, a structure already exists to implement this program by working through the American Bar Association's (ABA) Project Out-Reach. Project Out-Reach unites the ABA's Tort Trial and Insurance Practice Section, Section of Dispute Resolution, and Young Lawyers' Division in an effort to teach students, through a three-attorney team, how to implement and develop a peer mediation program.<sup>128</sup> Thus, not only can students stay abreast of changes in mediation techniques, but the bar can help promote the communal power of a legal education.

## VI. CONCLUSION

With each passing year, acts of school violence seem to intensify. Underlying many of these heinous acts is the culture of bullying infesting American schools. Peer mediation cannot end bullying in the nation's schools. In fact, as a reactive measure, peer mediation may only increase the victimization of the bullied due to the power imbalance created by the bully's domination and control. However, peer mediation, as proactive measure, can instill in children the conflict resolution skills that inhibit the culture of bullying from forming. By stemming these risk factors, schools create a better school climate. Therefore, Florida, along with other states, should mandate at an early age the implementation of peer media-

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<sup>126</sup> Hattal & Hattal, *supra* note 75, at 376.

<sup>127</sup> Jack C. Hanna, *Lawyers March for School Peace: The Attorney's Role in Peer Mediation*, DISP. RESOL. MAG., Winter 1998, at 27–29 (detailing attorneys' volunteer efforts to implement peer mediation programs in schools throughout the country through the American Bar Association's Project Out-Reach).

<sup>128</sup> Am. Bar Ass'n, ABA Pub. Serv.: ABA Project Out-Reach: Supporting School Mediation <http://apps.americanbar.org/tips/publicservice/outreach.html> (last visited Feb. 19, 2012).

tion as a part of their anti-bullying statutes. Through the joint efforts of state and local bar associations, these peer mediation programs can be adequately funded and trained. Peer mediation is not a panacea to end bullying, yet it may give hope to another Jeff Johnston.