THE MAYHEW-HITE REPORT

ON DISPUTE RESOLUTION AND THE COURTS

Created by the Ohio State Journal on Dispute Resolution at the Moritz College of Law at The Ohio State University for the Alternative Dispute Resolution Community and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew.

VOLUME 4, ISSUE 1

WELCOME

The *Ohio State Journal on Dispute Resolution* is pleased to bring you Volume 4, Issue 1 of *The Mayhew-Hite Report on Dispute Resolution and the Courts*.

LEAD ARTICLE

In *Res Judicata and Class Action Arbitration Awards,* Kristen M. Blankley, J.D., discusses the unsettled application of *res judicata* and collateral estoppel by courts and arbitrators against class action arbitration awards in subsequent proceedings. Ms. Blankley explains the benefits of giving preclusive effect to a prior class action arbitration award in a subsequent procedure by an unnamed class member. Ms. Blankley is currently a law clerk in the Eighth Circuit Court of Appeals. She has won several awards for her scholarship in dispute resolution, including the Dispute Resolution Section of the ABA's James B. Boskey Memorial Essay Contest and Nancy H. Rogers Prize in Dispute Resolution Scholarship. The full-text of this article can be accessed here.

ARTICLE SUMMARY

Sarah Rudolph Cole, J.D., Squire, Sanders & Dempsey Designated Professor of Law at The Moritz College of Law at The Ohio State University, responds to the argument that all forms of arbitration are subject to the Constitution's procedural due process requirements in her article, *Arbitration and State Action* , 2005 B.Y.U. L. Rev. 1 (2005). She summarizes the Supreme Court's state action doctrine and applies it to several forms of arbitration to determine which types constitute state action and are therefore subject to Constitutional due process requirements. A detailed summary of this law review article can be accessed here.

CASE SUMMARY

In *Alford v. Bryant* , 137 S.W.3d 916 (Tex. Ct. App. 2004), the court held that under certain circumstances, a party may not "offensively" use the statutory mediation confidentiality provision to prevent a mediator from testifying as to the substance of a discussion held during a mediation. A detailed summary of this case can be accessed here.

STUDENT SPOTLIGHT

In her award winning paper, "Peer Mediation Programs: A Forum to Increase Appreciation for Diversity within our Schools' Walls," Laura Weidner assesses the current state of peer mediation programs in our nation's schools and stresses the need and benefits of including diversity in the implementation of such programs. Ms. Weidner is currently a J.D. Candidate and Dispute Resolution Certificate Student at The Ohio State University Moritz College of Law where this paper received second place in the Nancy H. Rogers Prize in Dispute Resolution Scholarship. Her first orientation to peer mediation was serving as

a peer mediator while in high school in the metropolitan Washington, D.C. area. Most recently, she spent the past summer as a Research Fellow for Conflict Resolution Education at The Western Justice Center Foundation. The full-text of this paper can be accessed here.

SAVE THE DATE

The *Ohio State Journal on Dispute Resolution* presents:

Listening to the World: New Ideas for Resolving Identity-Based Conflict
January 26, 2006
Saxbe Auditorium, The Ohio State University Moritz College of Law

The Ohio State Journal on Dispute Resolution's annual symposium aims to bring comparative dispute system design to bear on addressing domestic conflict that implicates questions of race, ethnicity and other identity-group divides, especially in the area of police-community relations. The morning's panels will explore some of the underlying causes and manifestations of selected problems in our own communities. In the afternoon, conflict resolution experts from around the world will share experiences and offer ideas for improving dispute resolution institutions in the United States. For more information about this year's symposium click here, or you may contact Symposium Editors Laura Weidner or Michael Spencer.

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VOLUME 4, ISSUE 1

Lead Article: Res Judicata and Class Action Arbitration Awards

by Kristen M. Blankley

Parties to a lawsuit know that when the case is over, they can live with the outcome or appeal. Starting over and trying again is not an option. The doctrines of *res judicata* and collateral estoppel prohibit such repetitive litigation. Whether these well-established judicial doctrines apply in arbitration, however, is far from clear. Although arbitration is becoming increasingly similar to litigation, the two procedures have key distinctions that may affect whether the courts or other arbitrators would apply preclusion principles to subsequent dispute resolution proceedings. The legal landscape becomes even murkier when determining what preclusion principles, if any, would prevent unnamed class members in a class-action arbitration from instituting either a legal action or arbitration procedure against a party who has already defended one class-wide arbitration.

Preclusion in the Courts

When parties litigate their claim in court, they can rest assured that they will not be forced to pursue or defend the exact same action in court another time after a binding resolution in the first action has been rendered. This is because the courts employ a system that precludes re-litigation of entire actions or issues that have been previously determined by a court. The term *res judicata* , which literally means "the thing decided," refers to the inability of parties to re-litigate an entire claim. Typically, *res judicata* , sometimes referred to as "claim preclusion," will be applied by a subsequent court when a prior court 1) makes a determination on the merits 2) of factual and legal issues actually litigated 3) between the same parties.

Collateral estoppel, a related doctrine, prohibits parties from re-litigating certain issues–rather than entire claims–that have already been decided by another court. Collateral estoppel applies when 1) the same parties have 2) actually litigated the same issue or issues 3) which were essential to a 4) final judgment on the merits by a previous court. Under collateral estoppel, issues which are not essential to a first action can be re-litigated in a subsequent action. However, if *res judicata* applies, the parties cannot re-litigate at all.

Public policy supports both of these doctrines. The preclusion doctrines promote judicial economy. Parties who have already litigated either an entire claim or an issue or two will be forced to accept the court's decision. In other words, the parties are not permitted to have two bites of the proverbial apple. Parties who are unsatisfied with the outcome of the first proceeding will have to appeal the first decision rather than start anew in the trial courts. Forcing parties to accept a final decision of the trial court will reduce the number of filings and relieve the courts of deciding the same issues multiple times, and the courts can more quickly turn their attention to other parties and their claims.

The doctrines of *res judicata* and collateral estoppel also benefit the individual parties. Parties bring suit, in part, so a neutral third party can render a *binding* decision, disposing of their claims. If the losing party could simply re-litigate the same action or issues a second, third, or fourth time, a judgment is no longer binding, and the prevailing party will constantly worry that the losing party will try again with a different judge or a different jury. Preclusion principles force the litigants to appeal their decisions rather than starting anew.

The third principle underlying preclusion is to give due respect to court decisions and to preserve faith in the court systems. Finality not only benefits the parties but also the public as a whole. The public can rest assured that decisions are final and

binding, creating a greater confidence in the legal system. Furthermore, the integrity of the judges and their decisions will be preserved. If parties could re-litigate their claims over and over again, different judges or juries could render conflicting opinions and undermine the principles of stare decisis. Thus, preclusion is rooted in sound public policy preserving the integrity of the courts and the parties' expectations.

Preclusion and Arbitration

Whether preclusion applies in arbitration may depend on two factors: 1) whether the parties entered their arbitral award as a court order under the Federal Arbitration Act ("FAA") and 2) whether the parties instituted the second action in arbitration or litigation. Under Section Nine of the FAA, the parties to an arbitration can agree to enter their award into the public record of the courts. A confirmed award is treated as if it were a judgment of the court. As such, a non-complying party could use the legal system to enforce the award through mechanisms such as attachment and garnishment. However, unlike state court decisions, arbitration awards are not entitled to Full Faith and Credit protections. [1] This Supreme Court decision, though, might only apply to arbitration awards involving Section 1983 claims. The *McDonald* court left open the question of the general preclusive effect of arbitration awards, and it allowed courts to establish their own preclusion rules. [2] Indeed, federal courts have applied the principles of *res judicata* to arbitration awards in cases not involving Section 1983. [3]

Most states have fashioned rules allowing confirmed awards to have preclusive effect. In *Corey v. Avco-Lycoming Division* , 307 A.2d. 155, 161 (Conn. 1972), the Supreme Court of Connecticut stated, "An arbitration award is accorded the benefits of the doctrine of *res judicata* in much the same manner as the judgment of the court." The *Corey* decision has been extended to awards in voluntary arbitration including claims under federal law. [4] California courts also give preclusive effect to arbitration awards, and in some instances the courts will apply an arbitration award in a subsequent proceeding involving a party not involved in the arbitration. [5] While most states give confirmed awards preclusive effect, some states, such as Michigan and Ohio, favor looking to the underlying contract to determine if an award should be given preclusive effect.

An unconfirmed award, in contrast, is not an official court judgment, so a subsequent court may be less likely to give it preclusive effect. At least one court has denied giving preclusive effect to an unconfirmed award and found the award not final because the parties still had time under the FAA to seek to vacate or confirm it. [6] One Connecticut court determined that unconfirmed arbitration awards are not entitled to preclusive effect because, without the backing of the court, the awards are not entitled to Full Faith and Credit under federal law. [7]

However, many courts are willing to give unconfirmed awards preclusive effect. California , for instance, has repeatedly applied *res judicata* to unconfirmed awards. Often, courts will ensure that the traditional elements of *res judicata* and collateral estoppel have been met before giving preclusive effect to unconfirmed awards. [8] In the federal courts, the Second Circuit has recognized the preclusive effects of unconfirmed awards since 1997. [9]

Whether an arbitrator must apply the principles of *res judicata* and collateral estoppel is much less documented. Arbitration has no settled rule of law, and the arbitrators are often only obligated to rule on the basis of equity. Because of this, arbitration does not have established preclusion rules and is unlikely to develop any set of binding legal rules. However, equitable principles and the previously mentioned policies may sway an arbitrator to give preclusive effect to a previously arbitrated case. Because arbitrators create awards, not legal judgments, the difference between a confirmed award and an unconfirmed award probably bears little, if any, on the analysis.

Although arbitration does not have overflowing dockets as do state and federal courts, there is still a need for decision-making economy. If one arbitrator does not give preclusive effect to previously-rendered awards, the parties who re-try the claims would essentially be wasting the time and talent of the second arbitrator as well as their own money. The arbitrator could be dedicating time to new cases, rather than re-hashing old issues with bitterly entrenched parties. Additionally, allowing the parties to try and try again until they win is fundamentally unfair for the defendant who is repeatedly forced into the proceedings.

Refusing to apply preclusion principles would also defeat the finality arbitration is supposed to impose. Finality is often championed as a hallmark of arbitration, and the extremely limited appellate review can be viewed as a way to ensure a quicker, binding resolution to a dispute. Against this backdrop, policy would support the use of *res judicata* and collateral estoppel to ensure that proceedings are over when the award is rendered. Repeated attempts to change the award would undermine the finality arbitration treasures. Furthermore, arbitrators may be inclined to apply preclusion principles out of respect and fairness for their fellow arbitrators. Although the number of arbitrators grows daily, the arbitral community is still relatively close-knit, and they may refuse to entertain repetitive claims out of deference to their colleagues. Thus, the principles supporting judicial *res judicata* and collateral estoppel are present in the arbitral forum.

Arbitrators, however, may have a marked advantage over their judicial counterparts: they are free to deviate from the norm

when equity so dictates. There may be cases in which a court would be bound by the law to apply preclusion principles, but an arbitrator could balance the equities and determine that preclusion is inappropriate under the circumstances. While an arbitrator should consider the preclusion principles, the arbitrator should also recognize his or her ability to apply the principles of equity and fairness in making a determination on preclusion.

How this Affects Class Action Arbitration

Even if courts and arbitrators are willing to give preclusive effect to arbitration awards involving the parties—or at least one of the parties—present in the first arbitration, it is not clear if either the courts or an arbitrator would give preclusive effect to a class action arbitration award against an unnamed class member. The unnamed class members, by definition, have not participated in the first action and have had no control over the proceedings that may bind them later. For this reason, courts or arbitrators may be wary of giving preclusive effect to a prior class action arbitration award.

On the other hand, a class action arbitration award would be rendered largely worthless if no subsequent court or arbitrator is willing to apply it to unnamed class members. Class procedures are necessary, especially for consumers whose claims may be worth less than the cost of pursuing the matter in either litigation or arbitration. They also spread the costs of pursuing a claim among all class members. If a plaintiff class wins their case in arbitration, the defendant should also be assured of its obligations to the class. If additional claimants could bring other actions, perhaps even other class actions, a defendant could be subject to financial exposure on multiple fronts. Defendants who fear such liability may choose to vigorously defend each action rather than settling the cases.

The doctrines of *res judicata* and collateral estoppel, if available at all, should be available for use by both the plaintiffs and the defendant. If the plaintiff class wins in the first proceeding, an unnamed class member should be able to enforce his or her rights under the award without having to re-prove the merits of the case. However, an unnamed class member who is disappointed with the first award should not be able to get a proverbial “second bite at the apple.” Just as the plaintiff class is bound by a favorable award, the defendant should be likewise bound and able to prevent additional proceedings on settled matters.

In order to limit liability and create predictability in class action arbitrations, the parties may want to consider setting forth the preclusive effects of an arbitration in their agreement to arbitrate. Such was the case in *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* , 328 F. Supp. 2d 865 (N.D. Ill. 2004), involving a class action claim by female employees against Merrill Lynch for gender discrimination. The arbitration consisted of a two-step process in which general fact-finding and statistical evidence was evaluated in part one, and the individual claims would be evaluated under this backdrop in part two. The court determined that under this agreement, the facts determined in part one must be accepted by the decision maker in the individual claims. *Id.* at 868-69. Thus, by ignoring the findings of the first procedure, the decision maker exceeded his authority.

While it may be advantageous for class participants to fashion an arbitration similar to the procedure used in *Merrill Lynch* , this is often not feasible. The *Merrill Lynch* litigation involved a post-dispute arbitration agreement and the plaintiff class consisted of a discrete, known group of female employees. Supplanting this procedure into the consumer realm would be difficult. Consumer class actions often include an indefinite plaintiff class. Even if all of the class members have signed pre-dispute arbitration agreements (which have been stored and maintained), the defendant company still may not be able to contact these consumers to institute a *Merrill Lynch*-style post-dispute arbitration agreement. Perhaps this information could be included in any pre-dispute arbitration agreement, but a pre-dispute agreement could only give a general statement as to what preclusive effect, if any, an arbitration award should have.

Because unnamed class members in any class action procedure have the most to lose, courts and arbitrators should ensure the first class action arbitration properly safeguarded the rights of the absent class members. For example, a court or arbitrator could use the Federal Rules of Civil Procedure as a guide to determine if the class members were adequately represented by both the named class members and the lawyers for the named members. The second decision-maker should also determine if the absent members received adequate notice of the proceedings or had the ability to “opt out.” These types of inquiries ensure the first proceeding was fair and that extending the decision of the first proceeding to the subsequent proceedings results in a just outcome.

What is clear is that class action arbitration is here to stay, even if the rules concerning *res judicata* and collateral estoppel have lagged behind. Without valid preclusion doctrines, any benefit received by the defendant would be lost, and the defendant would have little incentive to either agree to allow class action arbitration in the first place or to settle class action claims filed against it. However, class action arbitration is a necessary procedure, and both courts and arbitrators should recognize the preclusive effect of a prior arbitration in a subsequent procedure by an unnamed class member. However, the courts and arbitrators could be greatly assisted by developing guidelines under which they review the first decision for fairness before applying it to parties who did not participate in the first action.

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[1] *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 287-88 (1984).

[2] *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985).

[3] *See Benjamin v. Traffic Exe. Ass'n Eastern RR*, 869 F.2d 107, 110 (2d Cir. 1989).

[4] *Serafin v. Connecticut*, 2005 WL 578321, at *9 (D. Conn. Mar. 9, 2005).

[5] *Richard B. LeVine, Inc. v. Higashi*, 32 Cal. Rptr. 3d 244 (Cal. App. Ct. 2005).

[6] *Green Tree Fin. Corp. v. Honeywood Development Corp.*, 2001 WL 62603, at *4 (N.D. Ill. Jan. 24, 2001).

[7] *Jacobs v. Yale University*, 2000 WL 1530030, at *8 (Conn. Super. Ct. Sept. 21, 2000).

[8] *See In re Klein, Maus & Shire, Inc.*, 301 B.R. 408, 417 (Bnkr. S.D.N.Y. 2003).

[9] *See Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997).

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VOLUME 4, ISSUE 1

Article Summary: Arbitration and State Action

In *Arbitration and State Action*, Professor Sarah Rudolph Cole, Squire, Sanders & Dempsey Designated Professor of Law at The Moritz College of Law at The Ohio State University, responds to the argument that arbitration is a state action subject to the Constitution's procedural due process requirements. If courts were to accept this argument, many of the advantages of arbitration would be eliminated and there would be a significant, adverse effect on the use of arbitration. In response to this contention, Cole outlines the Court's state action doctrine and critically assesses the arbitration as state action theory as it applies it to three different types of arbitration: (1) court-ordered arbitration, (2) agency-initiated arbitration, and (3) contractual arbitration. She concludes that while constitutional violations in agency-initiated arbitration and court-ordered arbitration are actionable, those which arise in private, contractual dispute resolution procedures are not.

First, Cole explains that under the Supreme Court's state action doctrine, the constitutional protections of due process and equal protection only apply to the actions of governmental entities. Thus, a constitutional action against an individual or entity can only be maintained where it has been determined that this person or organization is acting on behalf of the state. In order to make such a determination, the Supreme Court has elaborated several state action tests.

In this article, Cole explains two of those tests: entanglement and public function. Under the entanglement test, the court determines whether the government is “entangled” in the conduct of the private person or entity. This inquiry considers “whether there is such a close nexus between the state and challenged action that the action may be ‘fairly treated as that of the state.’” Under the public function test, a state action is present when a service that is traditionally an exclusive governmental function is entrusted to a private individual or entity.

In Part II of her article, Cole provides independent analysis on the state action theory in relation to three forms of arbitration and critiques the commentators' and courts' conclusions on this issue. She quickly explains that court-ordered arbitration is clearly a state action because the court, a government actor, mandates the party to participate in the process. Thus, constitutional due process requirements must be met in court-ordered arbitration.

Next, she explains the complicated question of whether agency-initiated arbitration involves state action. Cole argues that courts have not answered this question correctly. She analyzes the relationship between agencies and the private parties the agencies regulate to conclude that agency registration requirements often create state action when the private entity requires the registrant to resolve disputes using arbitration.

Finally, Cole applies the Supreme Court's state action doctrine to private contractual arbitration agreements. Critics argue that a state action exists when courts enforce private arbitration clauses in contracts between private individuals, as well as when courts uphold arbitration awards. However, after applying the entanglement and public doctrine tests, Cole explains that the courts have correctly held that neither the enforcement of arbitration agreements, nor the use of the court system to enforce arbitration awards, constitutes a state action.

In her conclusion, she also briefly suggests actions that agencies should take to ensure due process protections are being met in agency-initiated arbitration proceedings. In sum, Cole's article provides an in-depth discussion of the state action doctrine and accurately describes the implications of finding a state action doctrine in arbitration.

Sarah Rudolph Cole, *Arbitration and State Action*, can be found in 2005 B.Y.U.L. Rev. 1 (2005).

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VOLUME 4, ISSUE 1

Case Summary: *Alford v. Long*, 137 S.W.3d 916 (Tex. Ct. App. 2004)

Issues

This case considers whether, in a subsequent legal malpractice action against her attorney for failure to disclose risks of settlement in a mediation, a party can “offensively” use the statutory mediation confidentiality provision to prevent a mediator from testifying as to the substance of a discussion held during a mediation.

Rule

A party seeking to assert the mediation confidentiality privilege [Tex. Civ. Prac. & Rem. Code Ann. §154.054 (Vernon Supp. 2004)] will be deemed to have waived that privilege when: (1) that party is seeking affirmative relief; (2) the privileged information sought, if believed by the factfinder, would most likely be outcome determinative; and, (3) the disclosure of the privileged information is the only manner in which the aggrieved party could obtain the evidence.

Facts

A roofing contractor sued Bryant for payment of the installation of a new roof on Bryant's residence. Bryant then hired attorney Long to represent her in this action. During mediation, the parties signed a written settlement agreement settling all claims between Bryant and the contractor, except for litigation and attorney's fees. A trial court determined this remaining issue by requiring each party to bear its own costs and attorney's fees. Bryant then sued Long for legal malpractice for failing to disclose the risks and benefits of settlement, including the possibility that the trial court could deny Bryant her attorney's fees. In response, Long claimed that she had fully disclosed the risks of settlement, including the risk that the trial court would not award attorney's fees to Bryant. According to Long, the only people present during the risk-benefit discussion were Bryan, Long, and the mediator. At trial, citing one of the confidentiality provisions of Texas ' alternative dispute resolution procedures, the court denied Long's request to call the mediator to testify regarding the substance of the disclosure.

Discussion

The court ultimately reversed the decision of the trial court finding that the trial court had abused its discretion when it precluded the mediator from testifying. The applicable Texas statute stated that “unless expressly authorized by the disclosing party,” the mediator “shall at all times maintain confidentiality with respect to the communications relating to the subject matter of the dispute.” The next provision provides that “unless the parties agree otherwise, all matters…are confidential and may never be disclosed to anyone.” Here, the court found that this provision did not preclude the mediator from disclosing the confidential communications because: (1) Bryant, who was invoking the privilege, was seeking relief; (2) the evidence was outcome determinative; and (3) Long could not obtain this evidence in any other way. Therefore, a party cannot “offensively” use the statutory mediation confidentiality provision to prevent a mediator from testifying as to the substance of a discussion held during a mediation when the testimony would be outcome determinative and the aggrieved party has no other means to secure such evidence. An interesting side-note to this case is the fact that the mediator did not oppose to being a witness in the trial. Thus, the court did not need to determine whether the mediator could assert the confidentiality privilege when both parties had waived it. Given the language of this statute, “unless the *parties* otherwise

agree," it does not appear that the mediator holds the privilege.

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Student Spotlight: Peer Mediation Programs: A Forum to Increase Appreciation for Diversity within our Schools' Walls

by Laura E. Weidner*

I. Introduction

Violence has been a problem in our city for a long time, and in recent years it has spread to our schools. Some schools have even installed metal detectors hoping to stop violence. But weapons aren't the only problem. No metal detector on earth can stop people from bringing fear, prejudice, and conflict to school. [1]

Despite indications that overall rates of school crime are decreasing, the violence that *is* occurring is more serious and lethal than that to which students were once exposed. [2] In the brief time span from July 1, 1999 to June 30, 2000, there were thirty-two school-associated violent deaths. [3] In 2001, students between the ages of twelve and eighteen were victims of approximately two million nonfatal crimes while on their school campuses. [4] School violence has plagued urban areas for quite some time and, in recent years, has permeated to suburbia and even rural America. [5] Dangerous confrontations have become such a common part of a student's day that after hearing about a drive-by shooting that took place around her school, a fourteen-year-old girl calmed her mother down by casually remarking, “Get used to it—that's the way it is.” [6] There is no excuse for this. Schools are supposed to be safe havens for our children, not dangerous institutions in which violence is the norm.

Even though conflict is a natural part of life, it is apparent from the statistics that children do not know how to properly deal with the inevitable tensions they face. A study of 815 students from nine high schools across the United States revealed that most teenagers instinctively respond to tense situations with violence. [7] Violence, however, rarely works and moreover, often does not address or solve the heart of the dispute. Schools have therefore implemented programs to educate students on the nature of conflict and how to appropriately deal with it. Part II of this paper discusses the foundations, process, and different structures of one form of conflict resolution education, peer mediation programs (PMPs). Part III assesses the success of PMPs, as shown through empirical studies. Part IV notes the resilience of youths' views on diversity, links the ability to increase an individual's perspective taking to PMPs, and finally explores ways in which to diversify PMPs and hopefully open children's and adolescents' minds.

II. Background of Peer Mediation Programs

A. History and Goals of Peer Mediation Programs

Due to the intricacies of human nature, conflict is bound to occur, and schools have tried several different disciplinary tactics over the years to manage disputing students. Traditionally corporal punishment dominated, but with the advent and growth of public education in the 1960s, exclusionary punishments including out-of-school suspension and expulsion became the preferred, albeit futile practice. [8] After the United States Supreme Court sanctified the right of students to public education in 1975, more humane, in-school suspensions became the norm. [9] But the violent nature of conflict began to rapidly escalate in the late 1980s, and legislators in a frenzied rush to remedy the situation adopted the Gun-Free Schools Act, which made federal funding for public schools contingent on each state taking a zero-tolerance stance towards firearms and

weapons in schools. [10] Many criticized the get-tough legislation as inflexible, disproportional, and like many of its predecessors, as inappropriately alienating at-risk students. [11]

After implementing a wide variety of supposed solutions with little or no success, administrators and legislators realized that there was no universal fix to school violence and that programs should instead be properly tailored to certain schools and their specific issues. Moving away from solely punitive reactions, schools took a more restorative, rehabilitative and educational path with the establishment of conflict resolution programs that aim to teach students how to approach conflict in a more productive manner, thereby producing a more cooperative environment in which they can learn.

PMPs are but one part of the broad conflict resolution spectrum that is currently infiltrating the education system. Schools choose to implement PMPs for several reasons, but the Ohio Commission on Dispute Resolution and Conflict Management has identified the following three standard overarching objectives:

1. To provide direct benefits to the children by enlarging their set of individual and interpersonal skills and conflict response options;
2. To improve the school climate so teachers could teach and children could learn by limiting disruptions; and
3. To reach and assist communities through the schools by encouraging children to use their skills in family or neighborhood conflicts. [12]

With such a wide range of goals, schools are optimistic about PMPs and view them as a potential “panacea for many of the ills facing today's schools.” [13]

B. The Basic Process of Peer Mediation

Unlike previous punitive reactions to misbehavior, PMPs are based on the premise that conflict is natural and can even be beneficial, as long as the disputant's aggression is derailed before it escalates into a serious altercation. [14] When two disputing students arrive at the peer mediation to ensure a safe atmosphere, a student mediator lays ground rules which can include no interruptions, no name-calling, and confidentiality. [15] Each student is given the chance to tell his side of the story, and it is the mediator's role to neutrally facilitate that communication by paraphrasing, reflecting feelings and clarifying the issues. The mediator identifies the interests of both participants and then guides them into the solution generation phase, in which the students discuss viable creative options for resolving their conflict. Just as in mediations of adults, it is the *disputants* who determine whether an agreement will be reached and if so, what that agreement will entail.

C. Structure of Peer Mediation Programs

There are currently over 8,500 PMPs in the United States [16] which generally follow either a cadre or total school approach. [17] Cadre approaches only select and train a few students who become responsible for mediating all possible disputes that may arise within the school. [18] The total school approach is a much bolder stance that incorporates conflict resolution education into a school's set curriculum and teaches all individuals even minimally associated with the school how to manage conflict constructively. [19]

III. Evaluation of Peer Mediation Programs

A. Success of PMPs

In response to inconsistent findings amongst studies on peer mediation, Nancy Burrell and colleagues combined forty-three previously recorded data sets on PMPs at all levels (ranging from kindergarten to high school). [20] In terms of descriptive outcomes, the study revealed that 93% of the mediations ended in the parties reaching some sort of agreement. [21] Students and administrators alike felt that mediation programs have a positive effect on their school and actual school records confirm those beliefs. [22] In-depth analysis of the large data set showed that 1) students can adequately follow the steps of the mediation process; 2) mediators' overall approach to interpersonal conflict does change as a result of training; and 3) that training successfully teaches mediators that conflict can be positive. [23] Burrell also found that after a year of serving as a peer mediator, student mediators' grades and self-esteem increased substantially. [24]

Sociologist Paul Lindsay compared fourteen schools (elementary, middle, and high schools) with PMPs to three schools *without* PMPs by interviewing school personnel at both groups of schools. [25] In regards to discipline, 53% of the adults responding to the questionnaire believed that since implementation of a PMP, their school was safer to a moderate or great degree. [26] Furthermore, teachers at schools with PMPs commented that the programs empower students to take responsibility for their actions and gain control of their lives, so they “feel like they are doing something worthwhile.” [27]

B. Concerns about PMPs

Despite the numerous advantages PMPs have bestowed upon educational settings, researchers have voiced two main concerns. First, while peer mediation effectively manages minor student conflicts (such as arguments between friends), some doubt its ability to deal with the highly violent ordeals that plague many American schools. [28] Second, although research solidly reveals that peer mediators benefit greatly from conflict resolution training because they personally go through the training and consistently witness the benefits of cooperation firsthand, it has yet to be seen whether student disputants enjoy the same positive results. [29]

IV. A Need for Diversity in Peer Mediation Programs

A. The Intersection of Diversity and Peer Mediation Programs

The population is becoming increasingly diverse and the nation's schools will continue to reflect that diversity. [30] Because schools are the very institutions which educate and house youths during their formative years, it is the school's role to prepare them to live and prosper in a society “which is in fact already very heterogeneous.” [31] Moreover, one of the most pressing problems in schools and among youth in general is cultural and racial bias. [32] Conflicts also frequently arise from social differences such as gender, sexual orientation, social class, or physical or mental abilities. Mediation is a logical place to confront these complex matters because “it is during mediations that these issues most often arise.” [33]

Children notice differences amongst humans very early in life; by age two, a child can distinguish between genders and skin colors [34] and shortly thereafter forms impressions of others (which of course can fall into either a good or bad category). Many youngsters learn prejudicial beliefs from their parents or their greater environment before they have the cognitive ability to personally evaluate them, but the good news is that negative attitudes towards people situated differently from oneself are not fixed. Prominent researcher Gordon Allport states that it takes the entire periods of childhood and adolescence for a human to “master prejudice.” [35]By promoting “tolerance, respect, and acceptance through new ways of communicating and understanding,” [36] conflict resolution education—especially PMPs since they are becoming a staple in our schools—can increase perspective taking and help open youngsters' minds.

B. The Development of Perspective Taking

Building on the concepts of Mead [37] and Piaget [38], social perspective taking is generally understood as the “ability to free oneself from one's own view and to recognize the thoughts, feelings, and motives of the self and others.” [39] Contemporary educational psychologist Robert Selman has identified four stages of the perspective taking process that develop between early childhood to late adolescence and has accordingly extended the well-established theory into the areas of moral development, friendship formation, and interpersonal negotiations. [40]

During the first level of egocentrism, youngsters from approximately age three to five believe that everyone else holds the same exact views as they do and are thus only concerned with their own needs, wants and feelings. [41]Because they are not yet able to take on the psychological perspective of others, when faced with conflict, cognitively infantile humans in this stage tend to either fight back or flee the situation. [42] Between the ages of six and eight, children enter the second level and although they can technically recognize that people have different perspectives and needs, [43] they still cannot realistically consider those factors when making decisions and thus, any problem solving they engage in will most likely result in a win-lose situation. [44]

Around age nine, the child approaching adolescence takes on a mutual or second-person perspective, [45] meaning that they can view their own thoughts, feelings, and behavior from another person's perspective and recognize that others can do the same. At this stage, the maturing child sees him or herself as part of a larger context, can empathize with others' situations, and in a conflict or negotiation context, desires all those involved to gain. [46] Then, as teenagers approach adulthood, they develop the capacity to engage in “shared perspective taking,” meaning that they can completely step back from their situation, see themselves from and incorporate a third-person point of view into an end result. [47] This highly sophisticated mind-frame permits people to truly collaborate and form win-win solutions to conflicts that are more inclusive and stable. [48]

C. The Influence of Perspective Taking on Prejudice

Gaining perspective not only helps form creative resolution of conflict, but also influences a person's greater cognitive scheme. One study questioned whether encouraging an individual to empathize with a stigmatized outgroup person (to take the perspective of someone different than him/herself) would increase their value of that person. [49] Before listening to a broadcast segment, the control group was instructed to “remain objective and detached,” while the experimental group was told to “imagine how the person being interviewed feels about the experiences he/she describes.” The segment contained one Jamal Johnson, an African-American undergraduate student, discussing his family life, the hardships of being a first generation college student, and the group-related struggles he constantly encountered.

Participants who adopted Jamal's perspective showed more empathy, attributed greater importance to situational causal factors (rather than placing blame on Jamal for his “problems”), and expressed more favorable attitudes towards African-Americans in general. [50] Through this, it can similarly be assumed that in a peer mediation setting, if students can take on other peoples' perspectives when working through a problem, they will better understand where their counterpart is coming from, attempt to overlook differences, and if they are able to internalize this openmindedness, potentially even break down stereotypes.

In a similar study, undergraduates were shown a photograph of an older man sitting on a chair, asked to write a narrative essay about him, and respond to a variety of questions about the elderly. [51] When composing their thoughts, half of the participants were told to “take the perspective of the photographed individual…[to] go through the typical day in their shoes” and the remaining half were given no instructions. The perspective-takers painted the older man in a better light and had a better overall attitude toward the elderly, probably because perspective taking results in greater overlap between representations of oneself and of the target. [52] By stepping into the shoes of the elderly man, common ground was established and the undergraduate perspective-takers noticed that the old man is not all that different from themselves. [53]

D. Ways to Diversify Peer Mediation Programs

In addition to the many benefits PMPs already offer, they provide a realistic opportunity for schools to promote intercultural sensitivity and better reflect modern day's heterogeneous student bodies. [54] Some believe that merely by placing different students in a cooperative context such as PMPs, bias will decrease. Psychologist Charles Green notes that “if they are working together for shared goals, it breaks down negative stereotypes they had of each other,” [55] but, one wonders how effective close proximity in a one-shot peer mediation session can be at ending longstanding fears or impressions.

Active, caring or concerned engagement through meaningful interaction and dialogue is probably a better way to ensure that the students truly respect members of different groups. [56] Because peer mediators develop these deep relationships, schools should do everything they can to erase socioeconomic and racial lines that divide today's students and diversify the peer mediator pool. When implementing PMPs, schools can establish greater diversity during the following three stages: recruitment, selection and training.

1. Recruitment

Often, high-achieving students that already have an extensive list of extracurricular activities on their resumes or students from professional and secure families are the ones volunteering to be peer mediators. While the programs benefit from these role models, they are not necessarily the ones who most need the interaction with their peers. [57] The first step in developing a diverse PMP, then, is to recruit prospective student mediators from traditionally underrepresented populations, including racial and ethnic minorities and at-risk, socially inhibited, and disabled students. [58]

One way to do this is to have program coordinators extend personal invitations to students who are often overlooked for school recognition. [59] Another possible recruiting tactic is for the coordinators to meet with a committee of teachers and together, compile a list of students who would likely benefit from participation in a PMP. [60]

2. Selection

Once a potential mediator pool is attained, PMP coordinators have to actually select those who will be trained and serve as peer mediators. Schools should try to select as many students from as many different cross-sections that they can, yet without reliance on quotas. [61] To break down neighborhood alliances for instance, students from various communities must be picked. In addition to the high academic achievers who seem to seek out participation, less-involved students should also be included because they seem to serve equally well as peer mediators. [62] Schools may be hesitant to have at-risk students [63] serve as peer mediators, but these troubled youths' negative energy may be re-channeled from working in close proximity with more “on-track” students. [64] Both socially inhibited and disabled students would also benefit from active involvement in a PMP. [65]

3. Training

Because it is neither realistic nor desirable that peer mediators only mediate students exactly like themselves, it is essential that once a school selects its diverse body of mediators, it trains the students in intercultural and intergroup sensitivity. [66] Coming to the mediation table from different cultural backgrounds and various levels of physical and mental capacities, young disputants will surely not approach the process in the same manner. [67]

The first portion of training should be dedicated to reaching students on an informational level; trainers should talk with their students and teach them that even though others may look or act different, heterogeneity is something to celebrate

rather than scorn. Mediators must be trained to be sensitive of disputants for whom English is their second language. [68] Training should also deal with sensitivity towards physically, mentally, and emotionally disabled students. [69] Trainers should instruct future mediators to “acknowledge the person's value as a human being before making reference to the condition they exhibit.” [70]

After gaining insight on people situated differently than themselves, trainers should have the mediator class actively participate in simulations that will expand their perspective and appreciation for diversity. More than just imprinting knowledge into their brains, students through these exercises will learn for themselves through doing, observing, and discussing. [71]

V. Conclusion

Peer mediation programs are fairly new phenomena whose exact successes and weaknesses will probably not be known for quite some time. Although doubts exist whether they are an appropriate means to resolve extremely violent conflict, PMPs seem to handle everyday minor disputes with grace and even more important, open students' eyes to the peaceful avenues of cooperation and collaboration. I urge schools to continue supporting and implementing PMPs and when doing so, to remember the additional benefits truly diverse PMPs serve. If a program recruits, selects, and trains students from *all* cross-sections of the student body, students will see it as a neutral forum and will thus, probably be more willing to try the alternative process. Moreover, by being in close proximity and working with traditionally peripheral students, mediators and participants will be better able to genuinely understand other's positions and desires, making common ground all the more visible and viable. If students can exit the peer mediation room with increased perspective on life, the possibility exists that they will maintain and approach their next quarrel with an open mind. The rate of interpersonal conflict would likely decrease and schools could, once again, be safe havens for our children.

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* B.A. Ohio University , 2002; J.D. Candidate, The Ohio State University Moritz College of Law, 2006. I would like to thank Professors Sarah Cole and Joseph B. Stulberg for encouraging me and other dispute resolution students to follow our hearts. I would also like to extend my sincerest gratitude to my amazing family and to my crazy, lovable friends for getting me through my days.

[1] Linda Lantieri & Janet Patti, Waging Peace in Our Schools 92 (1996) (quoting a student from Phoenix Academy in New York City.).

[2] *1999 Annual Report on School Safety* 2-3, U.S. Depts. of Education & Justice, http://www.ed.gov/PDFDocs/InterimAR.pdf.

[3] DeVoe, J.F. et al., *Indicators of School Crime and Safety: 2003* 2, U.S. Depts. of Education & Justice, http://nces.ed.gov/pubs2004/2004004.pdf (Oct. 2003).

[4] *Id.* at 6. Approximately twenty-eight percent of American male students enter the halls every day, toting guns, knives or other dangerous weapons. *See* Gary Richard Hattal & Cynthia Morrow Hattal, *Battling School Violence with Mediation Technology*, 2 Pepp. Disp. Resol. L.J. 357, 357 (2002).

[5] The spokesman for the National Education Association legitimately warns that “[t]here's no geographic exclusion anymore…It could happen anywhere at any time.” Vicky S chreiber Dill, A Peaceable School 6 (1998).

[6] David W. Johnson & Roger T. Johnson, Reducing School Violence Through Conflict Resolution 3 (1995).

[7] When given the hypothetical “if a girl sees someone flirting with her boyfriend, she should fight with her,” 81.4% agreed and an overwhelming 73.9% agreed without hesitation to the statement “it's okay to hit someone who hits you first.” William DeJong, *Preventing Interpersonal Violence Among Youth: An Introduction to School, Community, and Mass Media Strategies* 17, U.S. Dept. of Justice (1994).

[8] A. Troy Adams , *The Status of School Discipline and Violence*, 567 Annals 140, 142-44 (2000). Schools during this period merely pushed troubled youngsters away and as a result, the rift between the school and the student increased: the youngster felt more alienated, lost more respect for authority and therefore was more likely to engage in asocial behavior. *Id.* at 145.

[9] Goss v. Lopez, 419 U.S. 565 (1975). After Goss, schools were required to give students oral or written notice of the charges against them and a reasonable amount of time to explain or challenge the allegations at a hearing if they so desired. *See* Alixandra Blitz, *Peer Mediation Programs: An End to School Violence?*, 4 Cardozo Online J. Conflict Resol. 4, n.34 (2002), *at* http:cardozojcr.com/vol4no2/notes01.html.

[10] 20 U.S.C. 8921(b) (1994); *see also* Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 Am. U.L. Rev. 1039, 1046 (2001). Some states even went beyond what the Act mandated and expanded zero-tolerance attitudes to other disciplinary infractions. See Blitz, *supra* note 9 at n.35.

[11] *Id* at ¶ 10 . ; *see also id.* at n.42 (discussing Riane Eisler's views on the "dominator model"). Eisler warns of the dangers of excluding vulnerable students who already experience malicious thoughts. If a student believes that his school mistreated him, he may be provoked and seek revenge against the administration responsible for his suspension or expulsion. *Id.* Because the Act gave administrations significantly wide discretion to remove and send children to the very homes that may have been the very root of their problems, there was also concern that students were still being deprived of their democratic right to education.

[12] Sandra Kaufman, *Assessment of the Implementation of Conflict Management Programs in Seventeen Ohio Schools: First Year Report* 7, Ohio Commission on Dispute Resolution and Conflict Management (1990).

[13] William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations* , 3 H arv. Negot. L.R ev . 213, 215 (1998).

[14] Ronnie Casella, *The Benefits of Peer Mediation in the Context of Urban Conflict and Program Status* , 35 Urb. Educ . 324, 325 (2000).

[15] Lantieri & Patti, *supra* note 1, at 140. Everything discussed during the session is to remain confidential, with the exception of illegal or life-threatening statements. Blitz, *supra* note 9, at ¶ 17.

[16] Haft & Weiss, *supra* note 13, at 213.

[17] Helen Lupton-Smith, *Peer Mediation* , *in* Handbook of School Violence 137, 140 (Edwin R. Gerler, Jr. ed., 2004).

[18] David W. Johnson et al., *Effectiveness of Conflict Managers in an Inner-City Elementary School*, 89 J. E duc. Res . 280, 280 (1996). Advantages of the cadre approach include fairly easy implementation, low cost and minimal infringement on other school resources (such as time). Disadvantages of the method, however, are that the small number of mediators may not be able to realistically hear all the disputes that need to be heard, the mediators may not adequately represent the student body, and the depth of training may suffer. *See* Lupton-Smith, *supra* note 17, at 140-41.

[19] *See id.* at 141.

[20] *See* Nancy A. Burrell et al., *Evaluating Peer Mediation Outcomes in Educational Settings: A Meta-Analytic Review*, 21 Conflict Resol. Q. 7, 11 (2003).

[21] *Id.* at 16. This may be because the students appreciate the opportunity to actively engage in forming their settlements' boundaries, rather than having administrators determine their fate. Moreover, eighty-eight percent of those youngsters were satisfied with the terms of the agreement. *Id.* at 16-17.

[22] Schools with PMPs experienced a decline in administrative suspensions, expulsions, and disciplinary actions. *Id.* at 17-18.

[23] *Id.* at 18-19. These are difficult concepts to measure, but the results demonstrate that above all, peer mediation training and possibly even participation in the peer mediation process offer students a fresh outlook on the nature of conflict.

[24] *Id.* at 19-20. Burrell does not specifically discuss *why* conflict resolution training so positively influences other aspects of youths' lives, but it logically follows that since PMPs give mediators a dominant role in their school community and teach them how to cooperate with their peers, they enjoy a more peaceful life in which they can academically succeed.

[25] *See* Paul Lindsay, *Conflict Resolution and Peer Mediation in Public Schools: What Works?*, 16 Mediation Q. 85, 88 (1998). Lindsay notes that it is difficult to isolate the impact of peer mediation programs and that teacher and staff perceptions must be interpreted cautiously. *Id.* at 89.

[26] *Id.* at 89-91. The main difference between schools with and without programs is that peer mediation provides an alternative to the traditional disciplinary system, so that the child can be kept "out of the administrative loop." *Id.* at 91.

[27] *Id.* at 93. In schools without PMPs, students are fairly powerless because they must either go to a teacher for assistance or get stuck with whatever disciplinary action is handed to them. This seems to fill the missing gap which Burrell hinted. Since peer mediators and disputing youths learn skills that actively engage them in the conflict resolution process,

they become a valuable part of their school which seems to improve their self-esteem.

[28] *See* Casella, *supra* note 14, at 340. For example, should an elementary school peer mediator really bear the burden of "fixing" another student who brings a gun to school? Peer mediators who are not trained how to deal with difficult conflicts may not be able to locate the complex issues underlying the torment during a single mediation session. Also, the obstacle remains that many students who commit highly violent acts do so for the first time and therefore, even if peer mediators *could* be of assistance to extremely troubled youths, it is too late because the offense has already occurred. *See* Blitz, *supra* note 9, at ¶ 32.

[29] *Id.* at ¶ 26. Even if the participants reach an agreement, one wonders how much they really absorbed and whether they will recall the option of peer mediation or engage in problem-solving strategies when faced with their next conflict. Schools could remedy this potential concern by implementing a whole school approach; by teaching the *entire* student body conflict resolution skills as part of a set curriculum, all would benefit rather than select few who happen to be chosen as mediators.

[30] A 1999 United States Department of Commerce study on the changes of race and ethnic composition indicated that all racial and ethnic minority groups will increase at a faster pace than non-Hispanic whites so, that after 2050, non-Hispanic whites are likely to be the minority group. Wan He, *Dynamic Diversity: Projected Changes in U.S. Race and Ethnic Composition 1995 to 2050* 6, 11, U.S. Dept. of Commerce, http://www.mbda.gov/documents/unpubtext.pdf (1999).

[31] Lantieri & Patti, *supra* note 1 at 92.

[32] *Id.* at 89. For example, tension between groups of Laotian and white American students ran high at a Boston middle school; racial slurs and bigoted taunting became so bad that a Laotian student dropped out after others threatened her family members. *See* Michael J. Karcher & Michael J. Nakkula, *Multicultural Pair Counseling and the Development of Expanded Worldviews*, *in* Fostering Friendship: Pair Therapy for Treatment and Prevention 209 (Robert Selman, et al. eds., 1997).

[33] Ronnie Casella, *The Cultural Foundations of Peer Mediation: Beyond a Behaviorist Model of Urban Conflict*, *in* Preventing Violence in Schools: A Challenge to American Democracy 159, 176 (2001).

[34] Lantieri & Patti, *supra* note 1, at 16.

[35] *Id.*

[36] Richard J. Bodine & Donna K. Crawford, The Handbook of Conflict Resolution Education: A Guide to Building Quality Programs in Schools 11 (1998).

[37] George Herbert Mead believed that socialization of the self is dependant on the ability to take on another's role. *See* Rosanne Menna & Nancy J. Cohen, *Social Perspective Taking*, *in* Psychological Mindedness: A Contemporary Understanding 189, 189-190 (Mary McCallum & William E. Piper eds., 1997).

[38] Jean Piaget's extensive theory of cognitive development stated that an individual's social perspective taking arises from his ability to decenter; humans are initially egocentric and cannot differentiate between themselves and others, but eventually acquire the ability to consider multiple perspectives of a single situation. *Id.* at 190.

[39] *Id.* at 189 (citing Carolyn Uhlinger Shantz, *Social Cognition* , *in* 3 Handbook of Child Psychology: Cognitive Development 495 (Paul H. Mussen ed., 4th ed. 1983)).

[40] Selman's basic premise is that as children mature, they become increasingly aware that others maintain different perspectives and eventually begin to incorporate those perspectives into their decision-making process and produce higher negotiation strategies.

[41] Menna & Cohen, *supra* note 27, at 191.

[42] Steven Brion-Meisels & Robert L. Selman, *From Fight or Flight to Collaboration: A Framework for Understanding Individual and Institutional Development in the School* , *in* Schools, Violence, and society 164, 172 (Allan M. Hoffman ed., 1996). They are for the most part, ignorant to other possible solutions and thus, grab onto what seems to be the quickest and easiest fix (which again, is usually retaliation or avoidance).

[43] Menna & Cohen, *supra* note 37, at 191.

[44] Brion-Meisels & Selman, *supra* note 42, at 172.

[45] Menna & Cohen, *supra* note 37, at 191.

[46] Brion-Meisels & Selman, *supra* note 42, at 172. For instance, an adolescent in this stage may suggest the following mutually beneficial solution to her friend: “I'll help you with your homework if you'll teach me how to dance like you do.” *Id.* Since the achievement of this level opens the cognitive door for cooperation, it may be the most important point for conflict resolution education to intervene and reinforce the importance of actively listening to others in order to discover common ground and jointly work towards resolution.

[47] Michael J. Karcher, *Connectedness and School Violence: A Framework for Developmental Interventions*, *in* Handbook of School Violence 7, 21 (Edwin R. Gerler, Jr. ed., 2004).

[48] Brion-Meisels & Selman, *supra* note 42, at 172-73. Someone in this final cognitive stage looks at a problem's total picture when developing a solution and may say, “[y]ou can join our dance group even though we are already full, but you need to promise to not skip out on practices.” The individual has taken into account both her needs and her friend's needs, all the while ensuring that the agreement is objectively fair and realistic. *Id.* at 173.

[49] *See* Theresa K. Vescio et al., *Perspective Taking and Prejudice Reduction: The Mediational Role of Empathy Arousal and Situational Attributions* , 33 Eur. J. Soc. Psychol. 455, 456 (2003).

[50] *Id.* at 467.

[51] *See* Adam D. Galinsky & Gillian Ku, *The Effects of Perspective-Taking on Prejudice: The Moderating Role of Self-Evaluation* , 30 Personality & Soc. Psychol. Bull. 594, 596-97 (2000).

[52] *Id.* at 597, 600.

[53] An elderly man wakes up every morning, eats breakfast, and progresses through his day, just as they do.

[54] Norma L. Day-Vines et al., *Conflict Resolution: The Value of Diversity in the Recruitment, Selection and Training of Peer Mediators* , 43 Sch. Couns. 392, 392 (1996).

[55] Lantieri & Patti, *supra* note 1, at 17.

[56] Karcher & Nakkula, *supra* note 32, at 214, 223. Karcher and Nakkula discuss a “pair therapy” case study in which two culturally diverse seventh graders worked together on various tasks for an entire year. David, a white Irish-American who felt out of place in his school that was 98% children of color, was placed with Manuel, a Puertro Rican who was socially insecure due to a weight problem. During in-depth conversations, each conveyed his feelings of isolation from peers and with time, each gained perspective on the situation, became more comfortable with himself, and thus happier in his overall school environment. *Id.* at 215-18.

[57] Moreover, a PMP solely made up of mainstream students may discourage minorities from joining or even seeking out their assistance. One female African-American student said she has no interest in being part of the peer mediation team because it is “sissy” and just “[a]ll these White people sitting around…[t]here ain't no space for me in there.” Casella, *supra* note 14, at 349.

[58] Throughout the recruiting process though, it is cautioned to not unnecessarily elevate a student's hopes; if a student is not sensitive, mature, confident, and a good listener, he does not possess the qualities of a good mediation, will most likely not be selected as a peer mediator, and rejection at this early stage will only add to his feelings of disappointment.

[59] *See* Day-Vines et al., *supra* note 54, at 393-94. When genuinely approached, students seem to appreciate the attention, feel needed, and are thus more willing to consider becoming a peer mediator.

[60] *Id.* at 394. Teachers, after all, interact with the entire student body and are probably in the best position to evaluate who possess the characteristics of an effective mediator. At schools with PMPs already in place, current mediators can recommend candidates since they too, know their peers extremely well and understand what it takes to be a good member of the program. *Id.*

[61] *See id.* at 396.

[62] Just because someone does not get straight A's does not mean that they are a bad listener or facilitator.

[63] At-risk students are those who are “in jeopardy of leaving school before graduation.” Day-Vines et al., *supra* note 54, at 398.

[64] Also, with the comfort that the program contains people they can actually relate to, students with disciplinary or behavioral issues will be more likely to seek out the assistance of a PMP.

[65] For example, one young girl with a terminal illness who used to feel completely ostracized from her peers became a mediator and wrote in her journal that she now has the confidence to communicate more directly with her classmates because they look up to her. *See* Day-Vines et al., *supra* note 54, at 399.

[66] *Id.* at 400.

[67] For instance, as welcoming and neutral a setting as mediation is supposed to be, socially inhibited children and adolescents may still find the environment intimidating and at-risk students may be hesitant to trust student mediators.

[68] It is important for the mediators to carefully explain the process to such participants, to be patient, and to politely ask questions if they need clarification.

[69] These students deal with discrimination on a continuous basis; people tend to either tiptoe around them (treating them as fragile specimens) or avoid them altogether.

[70] Day-Vines et al., *supra* note 54, at 403.

[71] There is not a plethora of culturally-sensitive training material on the market, so it is suggested that PMP program developers have students come up with their own role plays and use the best ones in subsequent training sessions. *Id.* at 406. After all, students best understand the disputes that their peers go through, will be able to come up with creative mock mediations, and if the mediator class is diverse, will contribute great perspective.