

**EVALUATION OF THE LEGISLATIVE PROVISIONS WITH
REGARD TO SCHOOL DISCIPLINE IN SOUTH AFRICA AND
DETERMINATION OF WHETHER THESE PROVISIONS
PROVIDE SUFFICIENT GUIDELINES**

BY

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DECLARATION

I, Thabo Moses Mofokeng, student number 2005132523, affirm that the dissertation, "*Evaluation of the legislative provisions with regard to school discipline in South Africa and determination of whether these provisions provide sufficient guidelines*", for the degree *Magister Legum* in the Department of Mercantile Law, at the University of the Free State, hereby submitted, has not previously been submitted by me for a degree at this or any other university, and that it is my own work in design and execution, and that all the materials contained herein are recognized. I furthermore cede copyright of the dissertation in favour of the University of the Free State.

Date: _____

Mr T.M. Mofokeng

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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

In terms of section 29 of the Constitution of the Republic of South Africa, all citizens of the country have the right to a basic education.¹ For the constitutional right to education to be realised, learners need to be well disciplined and their attitude and behaviour should be shaped towards the improvement and maintenance of the quality of the learning process, which should take place without any disruption or disturbance.² The conduct of some learners in schools infringe upon other learners' constitutional right to learn in a peaceful school environment. It is not possible to teach or learn in an environment that is disorderly, disruptive and unsafe.³ If some learners are afraid of attending a school because they constantly feel threatened by the behaviour of other learners in a school, this disrupts the normal teaching and learning process, and it has a serious impact on all the learners' access to equal opportunities.⁴ Unacceptable behaviour by learners in a school constitutes an infringement of the constitutional rights of the educators and the learners.⁵

Good discipline is one of the key characteristics of an effective school environment and it is essential for effective teaching and learning.⁶ It must be maintained in schools and classrooms to ensure that the education of learners proceeds without disruptive behaviour and offences.⁷

¹ The Constitution of the Republic of South Africa 108/1996.

² South African Schools Act 84/1996:s 8(2).

³ Lekalakala 2007:1.

⁴ Joubert, De Waal and Rossouw 2004:78.

⁵ Reyneke 2011:129.

⁶ Squelch 2006:247.

⁷ Department of Education GN 776/1998:para 7.1.

The primary challenge in schools in South Africa is to administer the discipline of learners; educators, parents, school governing bodies and the Department of Education (the so-called education stakeholders) appear to be uncertain on exactly what is permitted or prohibited by the law.⁸ Also, the legislative provisions appear not to provide sufficient guidelines to the education stakeholders. For instance, the legislator does not guide education stakeholders sufficiently on how to consult in adopting a code of conduct for learners, as envisaged by section 8(1) of the South African Schools Act 84 of 1996 (hereinafter SASA). Again, section 8(5)(b) of SASA requires support measures or structures for counselling to be provided to a learner involved in disciplinary proceedings, but the legislator fails to guide stakeholders sufficiently on how to go about making these services available.

The tendency of governing bodies to not accommodate learners' religion or culture in the code of conduct, citing the maintenance of discipline as the reason, persists. Thus, the education stakeholders are left in the dark as the legislator has not provided them with guidance on procedures for learners to apply for an exemption from the code of conduct on religious and/or cultural grounds.

This study will investigate the enacted national regulations, guidelines, policies and regulatory legal framework addressing specific misconducts experienced in schools and determine if these provide clear guidelines to the education stakeholders.

In addition, Chapter 4 of the study will briefly investigate the legislative provisions with regard to the suspension and expulsion of learners from school. This subject is crucial in school discipline, because, most of the time, school governing bodies suspend and recommend the expulsion of learners as prescribed by section 9 of SASA. However, an evaluation indicates that there is legislative vagueness on suspensions and expulsions.

⁸ Roos 2003:482.

1.2 RESEARCH QUESTIONS

In this research, to address the above-mentioned problems, the following questions will be answered:

- What “consultation” entails, as envisaged in section 8(1) of SASA?
- What is the procedure for learners to apply for exemption from the code of conduct?
- What is the contents of the “support measures or structure for counselling”?
- Are there clear legislative provisions, regulations and/or policies on school discipline?
- Are there clear legislative provisions on the suspension and expulsion of learners?

1.3 RESEARCH METHOD

A qualitative research approach is to be followed in this study as it is the most appropriate method to determine the legislative provisions with regard to school discipline. Qualitative research focuses on the what, how, when and where of an issue – thus, attempting to determine the essence of the research object.⁹ The qualitative research process is focused on determining the qualities, characteristics or properties of specific phenomena to improve understanding thereof and the explanations therefor.¹⁰

According to McMillan and Schumacher:¹¹

Evaluation research focuses on a particular practice at a given site. Evaluation research assesses the merit and worth of a particular practice in terms of the values

⁹ Berg 2009:3.

¹⁰ Henning, Van Rensburg and Smit 2004:5.

¹¹ 2001:20.

operating at the site(s). Evaluation determines whether the practice works – that is, does it do what it is intended to at the site? Evaluation also determines whether the practice is worth the costs of development, implementation, or widespread adoption. Costs may be those of materials, space, staff development, teacher morale, and/or community support.

This study will evaluate the legislative provisions with regard to school discipline and determine whether these provide sufficient guidelines to education stakeholders.

Textual analysis of the education legislation in South Africa will be employed in this study. A literal meaning will be an acceptable interpretation of a provision only if it accords with a “generous” and “purposive” interpretation that “gives expression to the underlying values” of the Constitution.¹²

Section 39(1)(b) and (c) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law.¹³ This study will also consider international law and the foreign laws of other countries.

In the purposive approach to interpretation, the courts are not restricted to the text of the provision and the interpreter is at liberty to look beyond the text to external sources to determine the intended purpose of the legislator.¹⁴ The purposive approach includes not only scrutinising the language of the text, but also the character and aims of the Bill of Rights, the historical background of the concept, and, where applicable, the meaning and objectives of other specific rights.¹⁵

¹² Currie and De Waal 2013:148.

¹³ Constitution 1996.

¹⁴ Reyneke 2013a:23.

¹⁵ Currie and De Waal 2013:48-149.

In addition, policy analysis will be utilised in this study. A policy analysis is described as the process through which we identify and evaluate alternative policies or programmes that are intended to lessen or resolve social, economic, or physical problems.¹⁶

1.4 SIGNIFICANCE OF THE RESEARCH

The core theme of this research is to evaluate the legislative provisions with regard to school discipline and determine whether these provide sufficient guidelines. For instance, school governing bodies are given a crucial legislative mandate to maintain discipline in schools.¹⁷ Therefore, it is important to evaluate the efficiency of legislative provisions in guiding the relevant stakeholders regarding school discipline. Moreover, the need for an evaluation of legislative provisions with regard to school discipline is real and urgent, as most of the existing legislative provisions do not provide clear guidelines to education stakeholders and the regulations promulgated have not been updated.¹⁸

1.4.1 DEFINITIONS OF KEY CONCEPTS

“Code of conduct” means a document which sets a standard of behaviour regarding the conduct of learners at the school and describes the rules of conduct, transgressions, punishment, disciplinary system to be implemented by the school.¹⁹ It should also contain application for exemption from complying with

¹⁶ Patton 1999:1.

¹⁷ See SASA 84/1996: s 8, s 8A, s 9, s 10A and s 20(1)(d). These sections place a mandate on the school governing body with regard to discipline

¹⁸ The *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* was promulgated in 1998 and has not been updated; the *Regulations for Safety Measures* was promulgated in 2001 and has not been updated; the *National Policy on the Management of Drug Abuse By Learners In Public and Independent Schools and Further Education And Training Institutions* was promulgated in 2002 and has not been updated; the *Regulations to Prohibit Initiation Practices In Schools* was promulgated in 2002 and has not been updated, and *Devices to be Used for Drug Testing and the Procedure to be Followed* was promulgated in 2008 and has not been updated.

¹⁹ See Joubert 2009:507; and Department of Education 2008. *Examples of a Code of Conduct*.

it by the learners and educational support services to be implemented by the school.²⁰

“Department of Basic Education” refers to the national government represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools.²¹

“Department of Education” means the department established by section 7 (2) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), which is responsible for education in a province, unless the context points to the National Department of Basic Education. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals.²²

“Discipline” is about positive behaviour management aimed at promoting appropriate behaviour and development in learners’ self-discipline and self-control.²³

“Educator” means any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school.

“Expulsion” means the permanent prohibition of a learner to attend a particular school.

“Learner” means any person receiving education or obliged to receive education in terms of the South African Schools Act.²⁴

²⁰ See Chapter 2.

²¹ See *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC):para 56.

²² See *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC):para 56.

²³ Joubert 2009:502-503; and Reyneke 2013(a):29.

“Learner discipline” refers to individual learner’s self-control and self-driven to uphold moral standard required in the school.

“Minister” means the Minister of Department of Basic Education.

“Member of the Executive Council (MEC)” means the Member of the Executive Council of a province who is responsible for education in that province.

“Parent” refers to a parent as defined in the South African Schools Act 84/1996.

“Punishment” means a penalty or corrective measure inflicted on a learner who has transgressed a school rule and is guilty of misconduct.²⁵

“Principal” means an educator appointed or acting as the head of a school.²⁶

“School” means a public school which enrolls learners in one or more grades from grade R (Reception) to grade twelve.

“School Discipline” addresses schoolwide, classroom, and individual learner’s needs through broad prevention and intervention, and development of learners’ self-discipline.²⁷

“School governing body” means a governing body contemplated in South African Schools Act 84/1996.

“Suspension” means the temporary prohibition of a learner to attend a particular school.

²⁴ See South African Schools Act 84/1996:s 1.

²⁵ Jourbert:512.

²⁶ South African Schools Act 84/1996:s 1.

²⁷ Osher and Others 2010:48.

CHAPTER 2

CODE OF CONDUCT FOR LEARNERS

2.1 CONSULTATIONS IN ADOPTING A CODE OF CONDUCT

2.1.1 Introduction

Section 8(1) of SASA provides that:

Subject to any applicable law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

It is clear from the above quoted provisions that a governing body of a public school must *adopt* a code of conduct. However, the legislator did not define the word *adopt* as it appears in section 8(1) and section 20(1) (b) and (c) of SASA. Also, the Guidelines for Considerations by the Governing Bodies in Adopting a Code of Conduct,²⁸ does not define the word *adopt*.

For that reason, words that are not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary.²⁹ Although application of dictionary definitions is not always a clear course; many words have several alternative meanings, and context must guide choice among them.³⁰ Oxford dictionary defines the word *adopt* as to accept formally and put into effect.

The legislative duty to *adopt* a code of conduct means more than ordinary meaning, which is to formally accept and put into force a code of conduct. In the

²⁸ GN 776 of 1998.

²⁹ *Mantella Trading v Kusile Mining* (191/2014) [2015] ZASCA 10 (12 March 2015):para 23 and 26; and see Kim. 2008:6.

³⁰ *The Cleveland Graphite Bronze Company and Vandervell Products Ld v The Glacier Metal Coy. LD.* R.P.C. (1949) 66 (7):157-182.

context of section 8(1) and 20(1) (b) of SASA, more is required from the governing bodies which include drafting, drawing up, structuring, determining, formulating and promulgating the code of conduct.³¹

The word *adopt* in section 8(1) is inappropriate in that it restrains the governing body only to accept a code of conduct. This word would mean that a code of conduct will be promulgated by the Minister or MEC in general terms and would have to be accepted and particularized by school governing bodies in order to accommodate a particular school's circumstances.

The legislator when referring to the power to formulate the admission policy³² and language policy³³ by the governing body used the word "determine" which is broad and open-ended than "adopt".

In this study it is accepted that the word "adopt" would mean more than what is implied by its ordinary dictionary meaning. In actual fact, section 8(1) of SASA mandate the school governing body to formulate a code of conduct not merely to adopt it.

This study will now move to the main subject of this chapter which is consultation in adopting a code of conduct. Section 8(1) of SASA prescribes consultation by a governing body with other stakeholders before adopting a code of conduct.

However, nowhere in the legislation has the legislator indicated how this consultation should be conducted, or what it should entail. Thus, the governing body of a public school is obligated to consult, but is given no guidelines on how to fulfill such an obligation. Also, keeping in mind the composition of the governing body, one cannot simply assume that the governing body would

³¹ See *Head of Department, Department of Education, Free State Province v Welkom High School and Another: Head of Department, Department of Education, Free State Province v Harmony High School and Another*: para 69 and 70, the Constitutional Court used the words 'promulgate' and 'adopt' interchangeably, when referring to the governing body's power to determine a pregnancy policy.

³² SASA. 1996:sec 5(5).

³³ SASA. 1996:sec 6(2).

understand what consultation in the new constitutional dispensation entails.³⁴ The word “consultation” is integral in the provisions cited above.

SASA contains many other references to consultation. Section 5A refers to consultation between the minister of Basic Education, the minister of Finance and the Council of Education Ministers in prescribing minimum uniform norms and standards for infrastructure, school capacity in respect of the number of learners to be admitted, and the provision of learning and teaching support material. Section 6(1) of SASA equally makes reference to consultation in determining norms and standards for language policies in public schools. Section 9(8) of SASA requires consultation between the Head of Department (hereinafter HOD) and governing body if the HOD should decide not to expel a learner whom the governing body has recommended for expulsion.

The National Education Policy Act (NEPA)³⁵ also makes multiple references to consultation. Section 5, amongst others, deals with consultation on national education policy; section 6 mentions consultation on national legislation; while section 8(2) and 8(7) also contain the word “consultation”.

Clearly, the word “consultation” is commonly used in the realm of education governance and management, particularly in education laws; yet, the legislator fails to define it. This lack of a clear definition and guidelines places governing bodies in the precarious position of having to use their own discretion in deciding how to conduct a consultation, *inter alia* in respect of learner discipline.

The Oxford Dictionary defines the word “consult” as *having discussion with someone, typically before undertaking a course of action, or to seek information or advice from someone*. This means that the governing body of a public school should have discussion with the learners, parents and educators of the school before adopting the code of conduct. The governing body must process the

³⁴ See s 23 of SASA, which deals with the membership of the governing body of an ordinary public school.

³⁵ 27/1996.

action of discussing the code of conduct in order to reach a decision, or exchange ideas among stakeholders.

Yet again, when adopting a code of conduct for learners, governing bodies may be wondering: Does “consultation”, as it appears in section 8(1) of SASA, only include the learners, parents and educators who are part of the school at the time of the adoption of the code of conduct, or should the learners, parents and educators who later become part of the school also be consulted? Do the provisions of section 8(1) of SASA apply to a learner if (s)he leaves to enroll at another school? Does a newly transferred/promoted/deployed/appointed educator have the right to be consulted with regard to an already existing code of conduct?³⁶ This line of thinking is valid because in the education sector the movement of learners and educators happens all the time. Scrutiny of the legislation and guidelines also reveals insufficient guidance on matters such as the frequency of such consultation.³⁷ None of these concerns are addressed by the current education legislation.

As mentioned earlier, the governing body of a public school is obligated to consult, but is given no guidelines on how to fulfill such an obligation. Even though the Guidelines for Considerations by the Governing Bodies in Adopting a Code of Conduct³⁸ was promulgated to guide them in adopting a code of conduct, this document does not give a formula on how this should be done.

The disagreement whether consultation took place also appears in case law. In *Hospital Association of SA and Others v the Minister of Health and Another*,³⁹ the question whether consultation took place or not was decided by the court and it was held that:

³⁶See s 6 of the Employment of Educators Act 76/1998 with regard to the appointment, promotion and transfer of educators.

³⁷ Reyneke 2013a:11.

³⁸ GN 776 of 1998.

³⁹ *Hospital Association of SA Ltd and v Minister of Health and Another, ER24 EMS (Proprietary) Limited and Another v Minister of Health and Another, South African Private Practitioners Forum and Others v Director-General of Health and Others* (37377/09, 37505/09, 21352?09) [2010] ZAGPPHC 69; 2010 (10) BCLR 1047 (GNP); [2011] 1 All SA 47 (GNP) (28 July 2010).

*The presence or absence of consultation is a jurisdictional fact the presence or absence of which is objectively justiciable by a court. For that purpose, there must be some evidence placed before the court to demonstrate that consultation in fact occurred and that it occurred prior to the promulgation of the Regulations.*⁴⁰

To demonstrate that consultation has indeed materialised, the governing body must keep evidence to prove that it occurred. The minutes of the consultation, the agenda, time, date and venue could be useful tools to indicate that consultation occurred prior to the adoption of the code of conduct.

Existence of proper consultation has not been an easy factor to determine in adopting a code of conduct. Similarly, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Home and Others*,⁴¹ the residents complained of not being fully consulted in the eviction process.

Other stakeholders in education were, for many years, denied the right to consult with each other in matters of common concerns like in adopting a code of conduct.⁴² In *MEC v Pillay*,⁴³ the Constitutional Court held that consultation promotes and deepens democracy. In the context of the code of conduct for learners, it means that the school community is involved in the running of the school; thus, they acquire a sense of ownership over the code.⁴⁴ Democratic school governance is based on consultation, collaboration, cooperation, partnership, mutual trust and participation of all affected parties in the school community.⁴⁵

⁴⁰ *The Hospital Association of SA Ltd and Others v the Minister of Health*:para 17-18.

⁴¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Home and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (10 June 2009):para 109; also see *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008); see *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12?05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

⁴² See Lekalakala 2007:80.

⁴³ *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007):para 82.

⁴⁴ *MEC for Education v Pillay*:para 82.

⁴⁵ Sithole 1995:107.

In terms of section 39(1)(b) of the Constitution, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. There is nothing which prevents this study from considering international law. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

In *Doctors for Life International v Speaker of the National Assembly and Others*,⁴⁶ the Constitutional Court considered the decision making and consultation process envisaged in passing certain health bills. In addressing the issue, the Constitutional Court held that:⁴⁷

Merely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process.

The same principle is relevant in the context of school discipline. Merely to prescribe consultation in adopting a code of conduct is not enough. Measures need to be put in place to facilitate consultation in adopting a code of conduct for learners. To achieve this, it may be desirable to provide stakeholders with education and/or information that build capacity for meaningful consultation.⁴⁸ It would be futile to consult stakeholders, as required by section 8(1) of SASA, without prior education and/or information on a code of conduct and school discipline in general.

Consultation can be done orally, through the submission of written representation; it may be fulfilled in different ways and is open to innovation on the part of the governing bodies.⁴⁹ Consulting the stakeholders in adopting a

⁴⁶ See *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006):para 130.

⁴⁷ *Doctors for Life International*:para 130.

⁴⁸ *Doctors for Life International*:131.

⁴⁹ *Doctors for Life International*:145.

code of conduct ensures that their interests in school discipline are taken into consideration and given weight. Thus, the stakeholders will feel that they have participated in the adoption of the document and that they have ownership of it and will support its objectives.⁵⁰

All attempts must be made to hear the opinions of all the relevant stakeholders, to encourage participation of those who are uninterested or too shy to speak, and assist those who are intimidated by peer pressure or fear recrimination.⁵¹

Conversely, consultation envisaged by section 8(1) of SASA does not mean that the governing body has to accommodate everyone's whim in the code of conduct.⁵² What is required is good faith and reasonableness on all sides and the willingness to listen and understand the concerns of the other stakeholders.⁵³ South African Law Reform Commission,⁵⁴ concluded that the words "after consultation with" require the decision-maker to give serious consideration to the views of the stakeholders, but would leave her free to disagree with them. It does, however, compel the governing body to seriously, objectively and rationally consider everything that is tabled before it during the consultative process.⁵⁵ But, it does not require the parties to agree on every issue.⁵⁶

There should be inclusive consultation with all relevant role players.⁵⁷ If there was widespread consultation in adopting the code of conduct for learners, and there were genuine attempts to incorporate reasonable suggestions, there will be little room for disagreement once the document has been adopted.⁵⁸

⁵⁰ KwaZulu-Natal Provincial Department of Education and Culture:10.

⁵¹ KwaZulu-Natal Provincial Department of Education and Culture:10.

⁵² FEDSAS 2010. *Draft code of conduct for learners of public schools*:1.

⁵³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Home and Others* [2008]:para 224.

⁵⁴ South African Law Reform Commission 2007:387.

⁵⁵ FEDSAS 2010:1.

⁵⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Home and Others* [2008]:para 224.

⁵⁷ The governing body must reach out to the learners, parents and educators of the school and engage them meaningfully in an effort to establish and preserve a disciplined school environment.

⁵⁸ KwaZulu-Natal Provincial Department of Education and Culture:10.

The governing body should ensure that the contents of the code of conduct are effectively communicated to all the role players.⁵⁹ It can be discussed at parents' meetings, and amongst the parents, educators and learners of the school.⁶⁰ It is expected of the governing bodies, if it is financially viable, to ensure that every educator, parent and learner of the school receive a copy of the code of conduct or have a ready access to it.⁶¹

During consultation, the stakeholders should discuss the extent of the scope of the code of conduct.⁶² They should discuss the *support measures or structures for counselling* a learner who needs educational support services and *due process* to be followed in disciplinary proceedings of learners. Another point that would need discussion is the procedure to be followed when applying for exemption from the code of conduct in the case of religious and cultural practices.⁶³ In addition, the stakeholders should discuss the nature of sanctions to be imposed for infringing the code of conduct.⁶⁴ All sides must approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another.⁶⁵ In *Residents of Joe Slovo v Thubelisha Home and Others*, the court held that:⁶⁶

Mutual understanding and accommodation of each others' concerns, as opposed to reaching agreement, should be the primary focus of meaningful engagement.

Even though the legislator is silent on amending the code of conduct, it is critical to amend it because of changes in issues relating to school discipline and the school's standards for dealing with antisocial behaviour.⁶⁷ The power to adopt

⁵⁹ <http://www.ethics.org/resource/what-do-after-your-code-conduct-written>. 2/21/2014.

⁶⁰ Lekalakala 2007:124.

⁶¹ <http://www.ethics.org/resource/what-do-after-your-code-conduct-written>. 2/21/2014.

⁶² Western Cape Provincial Department of Education. 2007. *Learner Discipline and School Management. Practical guide to understanding and managing learner behaviour within the school context*:3.

⁶³ *MEC Education: KwaZulu-Natal v Pillay*:para 117 and 184.

⁶⁴ See GN 776/1998:10; and SASA:s 9 for possible sanctions.

⁶⁵ *Residents of Joe Slovo Community, Western Cape v Thubelisha Home and Others* [2008]:224.

⁶⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Home and Others* [2008]:224.

⁶⁷ <http://www.ethics.org/resource/what-do-after-your-code-conduct-written>. 2/21/2014.

must necessarily include the power to amend.⁶⁸ New school discipline issues, rules, regulations and procedures arise and these must be reflected in the code of conduct for learners.⁶⁹ For example, issues relating to the use of email, internet access and access to websites were not addressed in the typical code of conduct 10 to 12 years ago.⁷⁰ A code of conduct that is not current is not relevant.⁷¹

When intending to make amendments to the code of conduct, the governing body must consult all the stakeholders. The term of office of members of the governing body, other than a learner, is three years.⁷² Thereafter, the newly elected governing body may review the existing code of conduct for learners of the school. It is therefore important for the newly elected governing body to be knowledgeable about school discipline and endeavour to improve it from its existing state. This could include amending the code of conduct, if there is a need, and if a new concept is to be incorporated in the code of conduct.

In *MEC for Education: KwaZulu-Natal and Others v Pillay*, the Constitutional Court held that:⁷³

*The amendments to the code of conduct should only be adopted after a proper process of consultation in terms of section 8 of Schools Act has taken place.*⁷⁴

The purpose of this portion of the chapter is to provide an insight of what the legislator intended to imply by the word “consultation” in adopting a code of conduct, in the context of school discipline. The aim is to suggest formula for consulting, as the legislator did not prescribe a formula on how this should be done.

⁶⁸ *Pillay v KwaZulu Natal MEC for Education, High Court of SA (Natal Provincial Division)* 2006 (AR 791/05):para 117.

⁶⁹ Lekalakala:124.

⁷⁰ <http://www.ethics.org/resource/what-do-after-your-code-conduct-written>. 2/21/2014.

⁷¹ <http://www.ethics.org/resource/what-do-after-your-code-conduct-written>. 2/21/2014.

⁷² SASA:s 31(1).

⁷³ *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007):para 184.

⁷⁴ *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008(1) SA 474 (CC):184.

2.1.2 Consultation with learners in adopting a code of conduct

In terms of section 8(1) of SASA, learners are among the categories of persons who must be consulted when adopting a code of conduct. Section 10 of the Children's Act provides that:

... every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has a right to participate in an appropriate way and views expressed by the child must be given due consideration.

The code of conduct regulates school discipline and learners have an interest in it. They have the right to be consulted when the school governing body adopts the code of conduct. The learner who is capable of forming his/her own views has a legislative right to participate in the adoption of the code of conduct.⁷⁵ According to Mabovula,⁷⁶ although the democratisation of school governance has given all stakeholders a powerful voice in school affairs, learners' voices are seemingly being silenced. This would mean that learners' views are not considered in decision-making process, including in adopting a code of conduct. Non-participatory contributory factors include teachers' dominance in school governing bodies' meetings, manipulation of learners by teachers, learners being used as a form of "window dressing" for governing body approval by government.⁷⁷

The implications of section 8(1) of SASA extend to primary school learners. The non-existence of a representative council of learners (RCL) in a primary school should not be interpreted as excluding primary learners' participation in adopting a code of conduct.⁷⁸ Respect for the young child's views as a participant in the adoption of the code of conduct for learners is frequently overlooked or rejected

⁷⁵ Children's Act 38 of 2005:s 10.

⁷⁶ Mabovula 2009:219.

⁷⁷ Mabovula 2009:220.

⁷⁸ See SASA:s 11(1) for the establishment of RCL.

on the grounds of age and immaturity.⁷⁹ The different ages, levels of development and capacity of the learners should be kept in mind as this will have a direct impact on the level of support provided to them to be able to participate effectively in the drafting of the code of conduct.⁸⁰ Information, experience, the environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacity to form a point of view.⁸¹ Therefore, the views of the learners have to be assessed, often on a case-by-case examination, and not in accordance with age and maturity.⁸²

In terms of Article 12(1) of the United Nations Convention on the Rights of the Child:⁸³

The state parties shall assure to the child who is capable of forming his or her own views the right to express his or her views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 applies both to younger and older children in the primary and secondary school phase. As holders of rights, even the youngest children are entitled to express their views, which should be given due weight. Young children are acutely sensitive to their surroundings and rapidly acquire an understanding of the people, places and routines in their lives, along with an awareness of their own unique identity.⁸⁴ All learners at a school have the right to participate in the

⁷⁹ United Nations Committee on the Rights of the Child. *General comment No. 7. 2005. Implementing child right in early childhood*:para 14.

⁸⁰ UNCRC 2009:para 134 (e).

⁸¹ *General Comment No 12. 2009*:para 29.

⁸² *General Comment No 12. 2009*:para 29.

⁸³ United Nations Convention on the Rights of the Child. Adopted and opened for signature and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force on 2 September 1990, in accordance with article 49.

⁸⁴ United Nations Committee on the Rights of the Child. *General comment No. 7. 2005. Implementing child right in early childhood*:14.

school discipline, particularly in adopting a code of conduct, as this will affect them at the school.⁸⁵

Statutorily, learners are included as participants in the structure of school governance, but that does not mean that they are participating.⁸⁶ It is argued by Geldenhuys that discipline in the school context would be more successful if learners were given a voice in the process.⁸⁷ Therefore, it is not up to the governing body to adopt a code of conduct for learners without consultation with other stakeholders, including learners.

Adequate time and resources should be made available to ensure that learners are properly prepared and have the necessary knowledge and the opportunity to contribute their views.⁸⁸ Roos⁸⁹ suggested that schools need to revisit their codes of conduct each year and learners should be encouraged to reconsider the codes of conduct and submit proposals for amendments.

Learners will make a valuable contribution to school discipline if involved in adopting a code of conduct for learners. Participation of learners in adopting a code of conduct could be done on a one-on-one basis, or through class representatives or learner representatives, where learners can freely express their views on the contents and development of a code of conduct.⁹⁰

It is understood from Shier⁹¹ that the advantages of involving learners in the affairs of the school (that will include school discipline) are:

- Learners develop an increased sense of ownership and belonging (and thus commitment to honour the code of conduct and to abide by it);

⁸⁵ GN 776/1998:4.1.

⁸⁶ Mabovula 2009:221.

⁸⁷ Geldenhuys and Doubell:321.

⁸⁸ United Nations Committee on the Rights of the Child (UNCRC). *General Comment No 12. 2009. The Rights of the Child to be heard*:para 134(e).

⁸⁹ Roos 2003:486.

⁹⁰ *General Comment No 12. 2009*:para 110.

⁹¹ Shier 2001:114.

- Learners' self-esteem increases;
- It increases empathy and social responsibility; and
- Learners' participation lays the groundwork for citizenship and democratic participation, thus helping to safeguard and strengthen democracy.

If learners have a better understanding of how the discipline process works, and what the purpose of the code of conduct is, they will conform to it as it will now be their responsibility to adhere to what they chose.⁹²

If the school governing body involves the learners in school discipline matters, they will realise that in breaching the code of conduct they disappoint the entire school community, including themselves.⁹³ Active participation of learners will consciously create a sense of loyalty between the learners and the school that they respect and promote the objectives of the code of conduct for learners.⁹⁴

According to Shier,⁹⁵ giving learners more say in decision-making at school will lead, directly and indirectly, to improvements in both the atmosphere and the learning environment of the school, and that positive education outcomes will follow.

Mabovula⁹⁶ points out that age exclusion dominates school governance; although inclusion is of paramount importance in school governance it was lacking and there was no sign of learner participation. It is against the spirit and purport of SASA that the governing body adopts the code of conduct for learners, without the effective engagement of learners and other role players. Learners are able and competent to make a valuable contribution on matters pertaining to school

⁹² Geldenhuys and Doubell 2011:330-333.

⁹³ Western Cape Education Department. 2007:3.

⁹⁴ Western Cape Education Department. 2007:3.

⁹⁵ Shier 2006:16.

⁹⁶ Mabovula 2009:228.

discipline. They are knowledgeable about disciplinary methods; thus, it will add value to the code of conduct by consulting them.⁹⁷

In practice, when a school admits new learners, they are provided with the existing code of conduct of that school. Sometimes, however, they are merely requested to acknowledge receipt thereof by a signature.⁹⁸ Thereafter, the learners continue with their tuition without being familiar with the contents of the code of conduct. From there onward, they will only come in contact with it if they happen to contravene its contents.

Mabovula⁹⁹ found that there are a variety of non-participatory contributory factors, such as educators' dominance in governing body's meetings, manipulation of learners by educators, and learners being used as form of 'window dressing' for governing body approval by government, and as a tokenism to appease them.

The governing bodies are obliged to respect, protect and promote the learners' participation rights in school discipline.¹⁰⁰ School discipline concerns should be seen as a matter to be dealt with by a partnership of the governing body, learners, parents and educators of the school.

2.1.3 Consultation with the parents and educators in adopting a code of conduct for learners

The parents and educators of a school are one of the categories of participants that must be consulted when adopting a code of conduct. Consultation, referred to in section 8(1) of SASA, should precede the adoption of a code of conduct; only after consultation, the governing body must adopt a code of conduct for learners.

⁹⁷ Geldenhuys and Doubell 2011:329.

⁹⁸ GN 2432/1998. *Admission Policy for Ordinary Public Schools*: para 14.

⁹⁹ Mabovula:220.

¹⁰⁰ Reyneke 2013b:209.

The literacy levels and the socio-economic and/or marital status of parents should not determine their involvement in school discipline when consulting in adopting a code of conduct for learners.¹⁰¹ School governing bodies should devise effective ways of involving all the parents and educators of the school in school discipline, including in adopting a code of conduct for learners. In order to build a strong relationship with parents and educators, school governing bodies need to create sustained contact with them throughout the entire school year.¹⁰²

To comply with section 8(1) of SASA, schools are required to create options for parents who work fulltime, or for whom transportation, health or other valid reasons exist.¹⁰³ Taylor¹⁰⁴ suggested that scheduling a parent or staff meeting at a convenient time for parents, coordinating bus or carpool services to and from school parent involvement activities, providing childcare during school parent involvement activities, and holding meetings at locations that are easier for all parents to get to, such as a community centre, should be offered by the school to create flexibility in addressing parents' needs and concerns regarding involvement. Bearing in mind the financial viability of the school, it is open to the creativity of the governing bodies to find ways of attracting all the parents of the school to play a part in school discipline including the adoption of a code of conduct.

Schools benefit when they include parents in the decision-making process.¹⁰⁵ When parents and educators are treated as partners and are provided with a good platform by the governing body, they will provide useful information on ways to instill discipline in learners. Schools that work well with families, where

¹⁰¹ Callender and Hansen:26.

¹⁰² Callender and Hansen:26.

¹⁰³ Taylor and Dounay 2008:3.

¹⁰⁴ Taylor and Dounay 2008:4.

¹⁰⁵ Davis 2000:14.

parents and educators are involved, have more support from the parents and the educators of the school, and have a better reputation in the community.¹⁰⁶

The right to be consulted in the adoption of a code of conduct is open to all the parents of the school. It is not limited to the parent-members serving on the governing body of the school.¹⁰⁷ All parents of the school must be consulted in adopting a code of conduct for the learners.

However, in consulting with the parents the governing body must be mindful of language barriers. Consultations should be conducted in the language that is understood by all the parents in order to facilitate better participation on their part and to exchange ideas effectively.¹⁰⁸ Jargon and terminology should be translated into familiar and understandable language for the parents.¹⁰⁹ While all educators are college and/or university graduates, and most are middle class, in some schools many family members are not.¹¹⁰ Some parents may not have had any experience with formal education. However, they do have important knowledge about their child, so it is important to ask the right questions and really listen for the answers with regard to school discipline.¹¹¹ The governing body should be open-minded and well organised in their consultation with parents.¹¹²

Also, the educators of the school must be granted the opportunity to make inputs regarding school discipline in a code of conduct for the learners. Similarly, all the educators of the school should be consulted, irrespective of the period of their

¹⁰⁶ <http://outreach.msu.edu/bpbriefs/issues/brief30.pdf> (Accessed on 07/01/2015)

¹⁰⁷ See SASA:s 23(2).

¹⁰⁸ English is not only the official language in South Africa. Section 6 of the Constitution recognises the following languages as official languages of South Africa: The official languages of the Republic are Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Depending on the location of the school, the school governing can use one of the official languages.

¹⁰⁹ Joseph 2013:46.

¹¹⁰ Callender and Hansent:26.

¹¹¹ Callender and Hansent:26.

¹¹² Cotton and Wikelund:7.

experience in the education sector. Unlike the parents, the educators work in the school and this should make it easy for the governing body to consult them at any convenient time. The legislator also does not guide the governing body on whether the consultation should be conducted at the same time with the relevant stakeholders, or separately. Thus, the governing body may continue consulting the educators separately, when the time is convenient.

The educators should be engaged on the contents of the code of conduct. They must make inputs regarding the exemption from the code of conduct, due process rights to be afforded to the learners, and support measures and structures for counselling learners and sanctions for infringing upon the code of conduct. When an educator is employed or transferred to another school, he/she should be informed in the new school about the existing code of conduct and be given an opportunity to discuss it.

The contents of the code of conduct for the learners should not be strange to the educators and the other stakeholders in the school. They should be familiar with the contents from its conceptualisation.

The provincial Departments of Education must also play a part by providing training to the stakeholders on material issues related to school discipline and enable them to adopt a comprehensive code of conduct for learners, which will put in the centre the best interests of the learners.¹¹³ The provincial Departments of Education have to play a leading role in ensuring that stakeholders know what they are meant to be doing. They must provide education to stakeholders that will build capacity for participation.¹¹⁴ The provincial Departments of Education should consider providing workshops to facilitate familiarity among stakeholders

¹¹³ See SASA: s 19 for the training of school governing bodies to enable them to perform their functions.

¹¹⁴ *Doctors for Life International*:130.

on the different aspects of school discipline. In the *MEC for Education v Pillay*¹¹⁵ the Constitutional Court said that:

There is no doubt that consultation and public participation in local decision-making are good and deserves to be applauded. They promote and deepen democracy. In the context of the code of conduct for learners, it means that the School community is involved in the running of the school and acquires a sense of ownership over the code.

When stakeholders become aware of the complexities of running a school and the challenges encountered in administering school discipline, they become more cooperative and supportive.¹¹⁶ In the *MEC v Pillay* the court further held that:¹¹⁷

...the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success.

It is certainly a rewarding experience when education stakeholders pool their abilities and resources to bring about positive discipline in schools and even though it will require some time to plan appropriate ways to involve all the stakeholders, it will be worthwhile.¹¹⁸

2.1.4 Legislative resorts available if learners, parents and educators were not consulted in the adoption of a code of conduct

The legislator does not provide guidelines to address a situation where the relevant stakeholders were not consulted when adopting a code of conduct. The Children's Act and Convention on the Rights of the Child frame the right of the child to participate in matters concerning the child as indispensable, right and not

¹¹⁵ *MEC for Education v Pillay*:82.

¹¹⁶ Davis 2000:14.

¹¹⁷ *MEC v Pillay*:185.

¹¹⁸ Joseph 2013:46.

a favour afforded to children.¹¹⁹ Failure or neglect to afford children, or to refuse children, the opportunity to participate would be a violation of their constitutional right¹²⁰ and a breach of the United Nations Convention on the Rights of the Child.¹²¹

Stakeholders who are not consulted may approach the HOD to enforce the participation right in adopting a code of conduct. In terms of SASA, the HOD may, in turn, if he/she determines on reasonable grounds that a governing body has ceased to perform functions allocated to it or has failed to perform one or more of such functions, appoint sufficient persons to perform governing body functions, as the case may be, for a period not exceeding three months.¹²² This also implies that, should the governing body fail to consult other stakeholders in adopting a code of conduct, the HOD may appoint sufficient persons to conduct consultation in terms of section 8(1) of SASA.

If no help is derived from the provincial Department of Education, nothing may prevent the aggrieved stakeholders from approaching the High Court for an appropriate order including setting aside the code of conduct in question. However, in the case of *Borbet South (Pty) Ltd and Others v Nelson Mandela Bay Municipality*,¹²³ the High Court had to consider an application, where the applicant sought an order nullifying the municipal budget that was adopted without public participation in its decision making; the court held that to undo the budget process some years after the event will inevitably give rise to significant disruption and uncertainty. The court concluded that it would not be in the interests of justice to do so.

¹¹⁹ Reyneke 2013b:213.

¹²⁰ Reyneke 2013b:213.

¹²¹ United Nations Convention on the Rights of the Child article 12.1 places an obligation on state parties to assure that the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

¹²² 84/1996:s 25(1).

¹²³ *Borbet South (Pty) Ltd and Others v Nelson Mandela Bay Municipality* (3751/2011)[2014] ZAECPEHC 35; 2014 (5) SA 256 (ECP) 3 June 2014:para 108.

2.1.5 Lack of the role of the Department of Education with regard to section 8(1) of SASA

The legislator did not stipulate the role of the Department of Education with regard to the adoption of the code of conduct for learners. In *Queens College Boys High School v MEC, Department of Education*, a case that centred on school discipline, the High Court held that:¹²⁴

The governing bodies, parents, educators, learners and Department of Education have reciprocal obligation under SASA to accept responsibility for the governance of Public Schools in partnership with each other.

The Department of Education must also play part in an effort to establish a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.¹²⁵ It does not follow why the legislator did not include the role of the Department of Education in adopting a code of conduct. Even Government Gazette number 776 of 1998,¹²⁶ which offered guidance in adopting a code of conduct for learners, did not incorporate the roles or functions of the Department of Education.

On a close reading of SASA it transpires that the power to determine policies in the school vests with the governing bodies and it seems as if the Department of Education does not have to do anything.¹²⁷

Since the legislator gave governing bodies conclusive power to adopt a code of conduct, in 2008 and 2009, the governing bodies of Welkom High School and Harmony High School formulated pregnancy policies for their respective schools

¹²⁴ *Queens College Boys High School v MEC, Department of Education, Eastern Cape Government* (454/08) [2008] ZAECHC 165 (21 October 2008):para 32.

¹²⁵ SASA:s 8(2).

¹²⁶ GN 776/1998.

¹²⁷ See SASA:s 5(5), 6(2) and 8(1).

that provided automatic exclusion of any learner from school in the event of her falling pregnant.¹²⁸ In this case the Free State Department of Education challenged the constitutionality of that pregnancy policy. Consequently, the matter proceeded all the way to the Constitutional Court. The Constitutional Court held that even if a school governing body has the power to adopt a learner pregnancy policy, it has no power to make a policy that includes provisions that are inconsistent with the Constitution or legislation.¹²⁹ It is therefore important for all the crucial partners in education to consult with regard to the provisions of the code of conduct or any policy directed at school discipline to avoid similar situation.

The wording of section 5(5) and 6(2) of SASA, whilst are unrelated to school discipline, but they have similar effect. Section 5(5) of SASA gives the governing body the power to determine the admission policy of a public school and does not stipulate the role of the Department. Omission by the legislator of the role of the Department of Education when determining the admission policy of schools has led to litigation between governing body and the HOD.¹³⁰

Section 6(2) of SASA also provides that the governing body of a public school may determine the language policy of the school subject to the Constitution, SASA and any applicable provincial law. This section also does not call for the involvement of the Department of Education. In *Ermelo High School and Another*

¹²⁸ See *Head of Department, Department of Education, Free State Province v Welkom High School and Another: Head of Department, Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12)[2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013).

¹²⁹ *Head of Department, Department of Education, Free State Province v Welkom High School and Another: Head of Department, Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12)[2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) (10 July 2013):para 236.

¹³⁰ See also *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (CCT 135/12)[2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).

v Head of Department of Education: Mpumalanga and Others,¹³¹ the Supreme Court of Appeal held that the power to determine language policy vests exclusively with the governing body. However, in the *Head of Department: Mpumalanga Department of Education v Ermelo*,¹³² the Constitutional Court followed a different interpretation from the Supreme Court of Appeal and held that section 6(2) does not mean that the function to decide on a medium of instruction of a public school is absolute or is the exclusive preserve of the governing body.

In the context of school discipline, it would be prudent for the legislator to take proactive steps by including the role of the Department of Education in adopting a code of conduct for learners. It follows that there is no reason why involvement of the Department of Education is not stipulated in adopting a code of conduct for learners. An overarching design of SASA is that public schools are run by different crucial partners and one of them is the Department of Education.¹³³ The same argument extends to the power to determine admission and language policies of the school even though they are unrelated to school discipline.

It would be good if section 8 of SASA requires the HOD to be consulted like other crucial partners in education; or he or she should endorse a code of conduct before it could become enforceable. The HOD is put in the precarious situation where she only comes into contact with a code of conduct when the learner has been recommended for expulsion from the school.¹³⁴ One of the roles of the Department of Education could include, ensuring that all stakeholders have the necessary information on school discipline to enable them to participate

¹³¹ *Ermelo High School and Another v Head of Department of Education: Mpumalanga and Others* (219/2008) [2009] ZASCA 22; 2009 (3) SA 422 (SCA); [2009 3 All SA 386 (SCA) (27 March 2009):22-30.

¹³² *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* (CCT40/09) [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (14 October 2009):58.

¹³³ See *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo*:56.

¹³⁴ See chapter 4.

effectively in the adoption of the code of conduct and establishment of overall school discipline.

2.2 REASONABLE ACCOMMODATION IN A CODE OF CONDUCT

2.2.1 Introduction

Section 8(4) of SASA provides that:

Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.

The implication of section 8(4) is that once the code of conduct is adopted by the governing body, all the learners of the school must adhere to it, regardless of their religious or cultural practices. The above cited subsection explicitly states that “nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct...”. Analysing how school governing bodies treat learners who practice religious and cultural beliefs,¹³⁵ there should be provisions in SASA to exempt a learner from the obligation to comply with the code of conduct in the case of religious and cultural practices.¹³⁶

In terms of SASA, a code of conduct must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.¹³⁷ Governing bodies have the tendency not to accommodate learners’ religion or customs in the code of conduct, citing the maintenance of discipline as the reason. This study will

¹³⁵ See *Lerato Radebe v Principal of Leseding*, Free State High Court, Bloemfontein, case number 1821/2013, unreported; *Pillay v KwaZulu-Natal MEC for Education*, High Court of SA (Natal Provincial Division) 2006 (AR 791/05); and *D. Antonie v Governing Body of Settlers High School and Others* (2000).

¹³⁶ See *MEC v Pillay*:184.

¹³⁷ SASA:s 8(2).

assess the existing legislative provisions to determine whether they guide education stakeholders on the possible inclusion of such exemption in the code of conduct, and will determine if there is a need to develop or amend education legislation to eliminate instances of religious intolerance committed in the name of discipline.

The objective of SASA, amongst others, is to advance the democratic transformation of society, combat all forms of unfair discrimination and intolerance, protect and advance South Africa's diverse cultures and languages, and uphold the rights of all learners, parents and educators in partnership with the state.¹³⁸ The Constitution also guarantees the right to freedom of conscience, religion, thought, belief and opinion.¹³⁹ However, in the unreported case *Lerato Radebe v Principal of Leseding*,¹⁴⁰ for example, the school excluded a female learner from attending school from mid-January until May 2013 because she wore dreadlocks, which was in contravention of the school's code of conduct.¹⁴¹ Schools must make exemptions for sincerely held religious and cultural beliefs and practices of the learners.¹⁴²

Subsequent to the judgement of the Constitutional Court in *Pillay's* case, most schools still did not amend their codes of conduct to provide for the granting of exemptions from them in the case of religious and cultural practices. In addition, the legislator had not issued regulations or rules to the stakeholders to provide exemptions from the code of conduct based on religious and cultural grounds and a procedure for the application and granting of those exemptions.¹⁴³

The constitutional right to religion is always likely to be infringed by the code of conduct in pursuit of school governing bodies' attempts to maintain discipline in

¹³⁸ Preamble of SASA.

¹³⁹ Constitution 1996:s 15(1)

¹⁴⁰ *Lerato Radebe v Principal of Leseding*, Free State High Court, Bloemfontein, case number 1821/2013, unreported.

¹⁴¹ *Lerato Radebe v Principal of Leseding*:para 12.

¹⁴² *MEC v Pillay*:114.

¹⁴³ See *MEC v Pillay*:117.

schools.¹⁴⁴ The code of conduct must reflect the constitutional democracy, human rights and transparent communication which underpin South African society.¹⁴⁵ A human right is something that one has automatically from birth, not something that one gains because of one's age, wealth or intelligence.¹⁴⁶ The principles underpinning a code of conduct for learners must be respect for one another and a concern to ensure that the fundamental rights contained in Chapter 2 of the Constitution are adhered to, in particular the principles of human dignity, equality, freedom and diversity.¹⁴⁷ The code of conduct is directed at the advancement and protection of the fundamental rights of every person guaranteed in the Bill of Rights in the Constitution.¹⁴⁸

The code of conduct must respect, protect, promote and fulfill the rights contained in the Bill of Rights.¹⁴⁹ It must not unfairly discriminate against any one or more of the constitutional rights of a learner.¹⁵⁰ All learners must enjoy equal treatment before the law and receive equal protection and benefits of the law.¹⁵¹

Every learner has inherent dignity and has the right to have his/her human dignity respected. This implies mutual respect, including respect for one another's convictions and cultural and religious traditions.¹⁵²

The International Covenant on Civil and Political Rights provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the

¹⁴⁴ Constitution 1996:s 15(1). It provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.

¹⁴⁵ GN 776/1998:1.3.

¹⁴⁶ Van Vollenhoven, Beckmann and Bignaut:120.

¹⁴⁷ Deacon and Merabe 2015:s 8 note.

¹⁴⁸ GN 776/1998:3.2.

¹⁴⁹ GN 776/1998:4.1.

¹⁵⁰ Constitution 1996:s 9(3).

¹⁵¹ The Constitution 1996:s 9(1).

¹⁵² GN 776/1998:4.2- 4.3.

*other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*¹⁵³

South Africa is known worldwide for its cultural, ethnic and religious diversity; it is therefore expected that South African education authorities would aim, among others, to ensure that school practices, especially at public schools, do not impede access to education and do not infringe on the constitutional rights of any of the learners either.¹⁵⁴ If the code of conduct adopted by the governing body violates learners' constitutional right to religion, such a code will be void and unconstitutional.¹⁵⁵ According to De Waal,¹⁵⁶ principals, educators and school governing bodies, bearing in mind the diversity of South African communities, are in dire need of clear guidelines on how to respect and honour the constitutionally entrenched right to all of the different religions and cultures in schools.

In 2006 the Minister of Education promulgated National Guidelines on School Uniforms¹⁵⁷ to ensure that practices related to school uniforms do not impede access to education in any way and do not infringe the constitutional rights of learners. In terms of the National Guidelines on School Uniforms, a school uniform policy or dress code should take into account the religious and cultural diversity within the community served by the school; measures should be included to accommodate learners whose religious beliefs are compromised by a uniform requirement.¹⁵⁸

However, policy or guidelines made by the Minister in terms of the National Policy Act or SASA do not create obligations of law that bind provinces.¹⁵⁹ In order to compel the schools, the legislator has to promulgate legislative

¹⁵³ The International Covenant on Civil and Political Rights: Article 27.

¹⁵⁴ De Waal, Mestry and Russo 2011:63.

¹⁵⁵ *MEC v Pillay; D Antonie v Settlers High School and Lerato Radebe v Principal of Leseding Secondary Schools* are all good examples.

¹⁵⁶ De Waal, Mestry and Russo 2011:63.

¹⁵⁷ GN 173/2006:para 2.

¹⁵⁸ GN 173/2006:29(1).

¹⁵⁹ *Minister of Education v Harris* (CCT 13/01)[2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (5 October 2001):para 11; Also see *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* (252/99) [2001] ZASCA:para 7.

instruments such as measures or rules to accommodate learners whose religious or cultural beliefs are compromised by the attempts of the schools to elevate a code of conduct above the Bill of Rights, pleading attempt to maintain school discipline.

In the codes of conduct, schools cannot simply ban the wearing of any and all religious and cultural symbols as this would amount to a violation of the constitutional rights of other learners.¹⁶⁰ If wearing particular attire, such as yarmulkes and headscarves, is part of the religious practice of learners or an obligation, schools should not, in terms of the Constitution, prohibit the wearing of such items.¹⁶¹ Male learners requesting to have a beard as part of a religious practice may be required by the school to produce a letter from their religious teacher or organisation substantiating the validity of the request.¹⁶²

In the code of conduct the school governing bodies have to accommodate the diversity of religious and cultural traditions that permeate South African society.¹⁶³ In the *MEC KwaZulu-Natal v Pillay*,¹⁶⁴ the Constitutional Court ordered the governing body to amend the code of conduct to provide for reasonable accommodation for exemption from the code of conduct on religious and cultural grounds, and a procedure for the application and granting of those exemptions.

Taking into account the fact that reasonable accommodation is not currently regulated by the legislator, to minimize further violation of learners' rights, the legislator should make an enabling provision in SASA which gives the Minister of Education or MEC the power to promulgate an enforceable document setting out exemptions from the code of conduct and the procedure to apply.¹⁶⁵

¹⁶⁰ Nicholson:23.

¹⁶¹ GN 173/2006:29(3).

¹⁶² GN 173/2006:29(3).

¹⁶³ Nicholson 2009:2.

¹⁶⁴ *MEC Education v Pillay*:117.

¹⁶⁵ Roos 2003:492.

2.2.2 Reasonable accommodation of religion and culture in the code of conduct

The International Covenant on Civil and Political Rights Article 18(1)(2) provides that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

The essence of the freedom of religion is the right to entertain such religious beliefs as a person chooses; the right to declare religious beliefs openly and without fear of hindrance or reprisal; and the right to manifest beliefs by worship and practice or by teaching and dissemination.¹⁶⁶ Freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs.¹⁶⁷ Therefore, a code of conduct that coerces learners into refraining from practicing their religion will impair freedom of religion. The denial of a role for religion in the public sphere leads to the privatisation and increasing marginalisation of religion in society.¹⁶⁸ A school cannot suspend or expel a Rastafarian learner for wearing dreadlocks, a practice required by his/her religion.¹⁶⁹

In the *MEC v Pillay*,¹⁷⁰ the court held that:

Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. While it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.

¹⁶⁶ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

¹⁶⁷ <http://constitutionallyspeaking.co.za> (07/01/2015).

¹⁶⁸ Currie and De Waal:337.

¹⁶⁹ <http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed/> (2015/06/04).

¹⁷⁰ *MEC v Pillay*:47.

Some schools in South Africa find it difficult to accept religions and cultures that differ from the norm, and as a result they fail to act in accordance with South African legislation, and may even be guilty of unfair discrimination as defined in section 9 of the Constitution.¹⁷¹ They do not wish to respect diversity and would rather impose the values of the majority religious or cultural group on everyone rather than to accommodate the practices with which they do not agree or which they fear or despise.¹⁷² The case of *Pillay* is a classic example of this phenomenon.¹⁷³

The Bill of Rights affirms “the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others”, and highlights the importance of individuals and communities to be able to enjoy what has been called the “right to be different”.¹⁷⁴

The Promotion of Equality and Prevention of Unfair Discrimination Act describes¹⁷⁵ “discrimination” as:

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly -

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.¹⁷⁶

According to the above provision, a policy can be discriminatory if it meets the envisaged requirements. The school code of conduct can be discriminatory, directly or indirectly, if it imposes burdens or withholds benefits and opportunities from a learner to practice his/her religion or culture on one or more of the

¹⁷¹ Van Vollenhoven, Beckmann and Blignaut 2006:127-128.

¹⁷² <http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed/>. 2015/06/04.

¹⁷³ See *Lerato Radebe v Leseding*; and *Pillay V MEC for Education, KwaZulu-Natal*.

¹⁷⁴ Currie and De Waal:339.

¹⁷⁵ No 4. 2000.

¹⁷⁶ *The Promotion of Equality 4/2000:s 1(viii)*.

prohibited grounds. In the *MEC for Education KZN v Pillay*,¹⁷⁷ the abridged facts were the wearing of a gold nose stud by the learner (Sunali). The wearing of the gold stud was against the school's code of conduct. The learner pierced her nose and inserted a small gold stud. The mother of the learner made it clear to the school that the wearing of the nose stud was not for fashion purposes, but as part of a long-standing family tradition and for cultural reasons. The governing body denied the learner permission to wear the nose stud and the Department of Education in KwaZulu-Natal supported the school in its decision not to grant an exemption to the learner.

The mother of the learner took the matter to the Equality Court. The issue before the Equality Court was whether the school's refusal to permit Sunali to wear the nose stud at school was an act of unfair discrimination in terms of the Equality Act. The Equality Court held that although a *prima facie* case of discrimination had been made out, the discrimination was not unfair. In this case, because of the lack of legislative guidance, the Department of Education in KwaZulu-Natal supported the school's action and the Equality Court affirmed the decision. Most probably, the situation would have been different if the legislator provided clear legislative instrument on the exemption of learners' religious and cultural rights in the code of conduct.

The mother of the learner took the matter to the High Court.¹⁷⁸ The High Court held that:

The failure by the school to recognize the full place of Appellant's group in its society and to allow Appellant, her daughter and their group the right to enjoy their culture and to practice their religion, as embodied in the nose stud and the reference to their religion and culture, by First and Second Respondents, as "idiosyncratic practices", amount to a repudiation of their equal worth and respect as human beings,

¹⁷⁷ *MEC v Pillay*:5-10.

¹⁷⁸ *Pillay v KwaZulu-Natal MEC of Education* (AR791/05) [2006] ZAKZHC 8 (5 July 2006).

*regardless of individual differences. The discrimination in this case impairs human dignity and is unfair.*¹⁷⁹

According to the Constitutional Court, the school code of conduct which does not provide a reasonable accommodation will be discriminatory if it imposes a burden on the learner or withholds a benefit from the learner.¹⁸⁰ It is apparent that reasonable accommodation is an important factor in the determination of the fairness of discrimination.¹⁸¹ The Constitutional Court held that:

*It is most appropriate to make a reasonable accommodation where, discrimination arises from a rule (code of conduct) or practice that is neutral on its face but which nevertheless has a marginalizing effect on certain portions of society.*¹⁸²

In *MEC v Pillay*, the Constitutional Court affirmed that the problem for dispute was the inadequacies of the code of conduct to provide for reasonable accommodation and procedure to apply for it.¹⁸³ The school had to, within a reasonable time, effect amendments to the school's code of conduct to provide for the reasonable accommodation for deviations from the code on religious or cultural grounds, and a procedure according to which such exemptions from the code can be sought and granted.¹⁸⁴

It would be perfectly correct for a school, through its code of conduct, to set strict procedural requirements for exemption.¹⁸⁵ It would also be appropriate for the parents and, depending on their age, the learners, to be required to explain in writing beforehand why they require an exemption.¹⁸⁶

¹⁷⁹ *Pillay v KwaZulu-Natal MEC of Education* (AR791/05) [2006] ZAKZHC 8 (5 July 2006):para 51.

¹⁸⁰ *Pillay v MEC*:45.

¹⁸¹ *Pillay v MEC*:78.

¹⁸² *Pillay v MEC*:78.

¹⁸³ *MEC v Pillay*:38.

¹⁸⁴ *MEC v Pillay*:119.

¹⁸⁵ *MEC v Pillay*:110.

¹⁸⁶ *MEC v Pillay*:110.

A properly drafted code of conduct provides reasonable accommodation for learners and sets out procedure to apply for an exemption.¹⁸⁷ Learners may submit a written application to the governing body for total or partial exemption from one or more of the items contained in the code of conduct on cultural, religious or medical grounds.¹⁸⁸ This application must identify the specific rule that is offensive to the learner's religious or cultural right as contained in the Constitution.¹⁸⁹ Such an application must include full reasons, as well as confirmative evidence that the learner belongs to that specific religion or culture and that the religious or cultural practices, rules and obligations are in conflict with the school's code of conduct.¹⁹⁰ Application for exemption from the code of conduct must be based on the core religious and cultural beliefs inherent to such religion or culture.¹⁹¹ The governing body must consider the application and, if it is satisfied that the application is justified in terms of constitutional principles, the approval should be granted in writing.¹⁹²

Schools should avoid subjecting learners to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the code of conduct.¹⁹³ A code of conduct that does not provide a reasonable accommodation for religion and culture is defective and unconstitutional. The reasonable accommodation must be considered when drafting a code of conduct for learners, more especially to accommodate religion and culture.

In terms of section 2(c) of the Schedule under the Equality Act,¹⁹⁴ the failure to reasonably and practically accommodate diversity in education is categorised as

¹⁸⁷ *MEC v Pillay*:37.

¹⁸⁸ FEDSAS. 2010:8.

¹⁸⁹ Department of Education. 2008. *Example of a Code of Conduct for a School*:8.

¹⁹⁰ FEDSAS. 2010:9.

¹⁹¹ Department of Education. 2008. *Example of a Code of Conduct for a School*:9.

¹⁹² Department of Education. 2008. *Example of a Code of Conduct for a School*:9.

¹⁹³ *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000):para 35.

¹⁹⁴ Promotion of Equality and Prevention of Discrimination Act 4/2000 Schedule: *Illustrative list of unfair practices in certain sectors*:para 2(c).

“illustrative unfair practice in school”. The legislator should mandate the provincial Departments of Education to assist schools in setting exemptions from the code of conduct and procedure to apply for such. In *MEC Education v Pillay*,¹⁹⁵ the court held that religious and cultural practices are protected because they are central to human identity, and hence to human dignity, which in turn is central to equality.

In *Lerato Radebe v Principal of Leseding High School*,¹⁹⁶ the High Court emphasised that South African courts should be alert and proactive, and root out the evil of religious intolerance in any form. The same principles should be cherished by South African schools when adopting and amending a code of conduct for learners.

Wearing dreadlocks and nose studs, based on religious or cultural practices, have not been proved to cause poor discipline in South African schools.¹⁹⁷ Therefore, there is no justification for the schools to cite maintenance of school discipline as the basis to prohibit the wearing of dreadlocks and nose studs, if they are the results of sincerely held religious and cultural beliefs and practices.¹⁹⁸

2.2.3 Justification for refusal to grant a reasonable accommodation

According to the *International Covenant on Civil and Political Rights*:¹⁹⁹

freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, orders, health, morals or the fundamental rights and freedom of others.

¹⁹⁵ *MEC Education v Pillay*: para 62.

¹⁹⁶ *Lerato Radebe v Principal of Leseding Technical School*: para 21.

¹⁹⁷ <http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed/>. 2015/06/04.

¹⁹⁸ See *MEC v Pillay*: para 114.

¹⁹⁹ International Covenant on Civil and Political Rights: Article 18(3).

The right to religion, culture and expression are not absolute in the school environment.²⁰⁰ If the practice could place undue burden on the school; thus, a reasonable accommodation will be justifiably denied.²⁰¹

If the school adduces evidence showing that a learner, who is applying for exemption from the provisions of the code of conduct for learners, will become ill-disciplined or that the learner will negatively affect the discipline of others, then such will be rational reasons for withholding the exemption.²⁰² In *Pillay's* case, the Constitutional Court pointed out that the learner wore the nose stud for more than two years without a demonstrable effect on school discipline or the standard of education.²⁰³

There might be specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform.²⁰⁴

A mere desire to preserve uniformity, without real evidence that permitting the practice will threaten academic standards or discipline, will not justify a refusal.²⁰⁵ De Waal²⁰⁶ provided an example of justifiable grounds to deny a reasonable accommodation, namely, if learners want to hold a religious-cultural school event in an attempt to convince other learners to join their religious-cultural endeavours.

If the religious or cultural practice of a learner requires him/her to sing during school hours while learning and teaching is underway, that might hamper the learning process and can be grounds for refusing an exemption. Unlike the

²⁰⁰ See Constitution:s 36 for the limitation of rights.

²⁰¹ <http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed>. 2015/06/04.

²⁰² *MEC v Pillay*:102.

²⁰³ *MEC v Pillay*:102.

²⁰⁴ *MEC v Pillay*:114.

²⁰⁵ *MEC v Pillay*:114.

²⁰⁶ De Waal and McCabe 2013:99.

wearing of dreadlocks, the smoking of dagga is illegal and will not be exempted.²⁰⁷

2.3 SUPPORT MEASURES OR STRUCTURES FOR COUNSELLING A LEARNER INVOLVED IN DISCIPLINARY PROCEEDINGS

2.3.1 Introduction

Section 8(5)(b) of SASA states that:²⁰⁸

The code of conduct must also provide for support measures or structures for counselling a learner involved in disciplinary proceedings.

However, the legislator is silent on what these support measures or structures for counselling may be, who is expected to offer them, how and when this should occur, and who needs to bear the costs. The legislator seems to have left this as a grey area, failing to guide stakeholders sufficiently on how to go about making available these services. Issues such as infrastructure, planning, human resources, and funding are all left unaddressed.²⁰⁹ The legislation also does not expand on the concept “disciplinary proceedings” as it appears in section 8(5)(b).²¹⁰ This may lead to the assumption that a learner must be the subject of a disciplinary hearing to be eligible for support measures or structures for counselling. Thus, by failing to provide adequate guidance, the legislator in effect excludes learners who are not involved in disciplinary proceedings from receiving

²⁰⁷ <http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed/>. 2015/06/04; also see *Prince v President of the Law Society of the Cape Good Hope* (CCT36/00) [2002] ZACC 1; 2002(2) SA 794; 2002 (3) BCLR 231 (25 January 2002).

²⁰⁸ 84/1996.

²⁰⁹ National Planning Commission. 2011. National Development Plan Vision for 2030: 279; and see the Department of Education 2014. *Draft Policy on Screening, Identification, Assessment and Support*: 9 and 19.

²¹⁰ SASA 84/1996.

these services. In this regard, Reyneke²¹¹ argues that the law is not in line with the best-interests-of-the-child standard, and cites the following grounds:

- it is not aligned with the holistic development of the child or with assisting the child to learn to act in a socially responsible manner;
- it does not contribute to the creation of a physically and emotionally safe environment;
- it infringes upon the dignity of individuals and the collective;
- it does not contribute adequately to relationship-building or to repairing relationships;
- it can affect learners' access to education as well as the availability of education; and
- it hampers learners' right to life, survival and development.

Also, the phrase “support measures or structures for counselling” is ambiguous. Upon reading the phrase, the reader may assume that measures or structures must be channeled only to counselling. Challenges faced in school discipline are complex and will not be resolved by counselling alone. In this context, the support services need to be flexible, so that they can be responsive to the needs of children. Some services will need to be targeted directly at children; others will need to target their primary caregivers as well.²¹² Learners who experience learning difficulties and/or behavioural challenge because of poverty should also qualify for support services even if they are not involved in the disciplinary proceedings.²¹³

²¹¹ Reyneke 2013a:541.

²¹² National Planning Commission 2011:264.

²¹³ Department of Education. *Education White Paper 6* 2001:9.

2.3.2 Legislative provisions with regard to support measures or structures for counselling

Section 8(5)(b) of SASA was first introduced by section 6 of the Education Laws Amendment Act 31 of 2007. Before 31 December 2007, there was no section 8(5)(b) in SASA. This subsection was inserted; it made provision for support measures and structures for counselling learners involved in disciplinary proceedings to be contained in the code of conduct for learners. Yet, the legislator failed to define this concept. Evaluation of the legislative provisions indicates that based on the inadequacy mentioned above, the legislator made it difficult for the school to offer support measures or structures for counselling learners.

Another factor that should be taken into account is that the sequence of the provisions of SASA section 8(5)(a), which makes provisions for due process safe-guarding the interests of the learner and any other party involved in disciplinary proceedings,²¹⁴ comes before the subsection which provides for support measures or structures for counselling a learner involved in disciplinary proceedings. This legislative sequence reiterates the fact that disciplinary proceedings precede support structures or measures for counselling. This may also mean that support measures or structures should not be provided prior to disciplinary proceedings. Thus, a learner has to misbehave before legislation affords him/her with support measures or structures for counselling. Clearly, in this regard, SASA does not give the child's best interests the importance it deserves.²¹⁵

Section 8(5)(b) is technically applicable only to instances of serious misconduct, because a disciplinary proceeding is held only in instances of serious misconduct.²¹⁶ Linking the provision of these services to disciplinary proceedings make them inaccessible to learners who are not involved in disciplinary proceedings, but need these services.

²¹⁴ SASA:s 8(a).

²¹⁵ Constitution:s 28(2).

²¹⁶ Reyneke 2013:193.

In UK, the Department of Education published a document policy which provides that.²¹⁷

Disruptive behaviour can be an indication of unmet needs. Where a school has concerns about a pupil's behaviour it should try to identify whether there are any causal factors and intervene early in order to reduce the need for a subsequent exclusion.

The UK Department of Education identified the need for early intervention in order to reduce the need to expel a learner from the school. Likewise, the South African legislator should tackle learners' disruptive behaviour with educational support not disciplinary proceedings. The legislator should enforce early intervention programmes, which will eradicate antisocial behaviour and address the specific behaviour of learners.²¹⁸

The responsibility to adopt a code of conduct rests with the governing bodies of schools; it is expected that they should include support measures or structures for counselling learners involved in disciplinary proceedings in the code of conduct. Upon scrutinising SASA, one would expect that as a governing body is responsible for including support measures or structures in the code of conduct, it should also be solely responsible for determining how these services should be provided to the learners of a school. It has already been elucidated in this study that the legislator has absolved the Department of Education from taking responsibility in school discipline.²¹⁹

An evaluation of legislative provisions with regard to school discipline indicates that the duty to adopt a code of conduct and the determination of its contents are left in the hands of the school governing body. The legislator should involve the Department of Education so that it plays a leading role in the contents of the

²¹⁷ UK Department of Education. 2012. Exclusion from maintained schools, Academies and pupil referral units in England:4.

²¹⁸ National Planning Commission 2011:274.

²¹⁹ See the discussion under heading 2.2.

code of conduct and in how to maximise the provision of support measures and structures for assisting learner who need support.

The support measures and structures, encapsulated in the code of conduct, should be utilised when a learner is involved in disciplinary proceedings, and even before the disciplinary proceedings begin, if there is a need. The support measures or structures should not merely be contained in the code of conduct to be compliant with SASA,²²⁰ the schools must actually implement those measures and structures.

In the case of *Tania Megan Jacobs v The Chairperson of the Governing Body of Rhodes High School and Others*,²²¹ the facts of the case centred around the negligence of the school's staff to refer a learner, who had obvious social problems, for professional assistance. In this case, the Western Cape High Court held that there was a legal duty on the part of the defendants (the Department and the principal of the school) and their servants (other educators) to act positively by referring the learner for professional assistance.²²² However, the Western Cape High Court did not provide guidance as to when, how to refer the learner, and who must bear the financial costs.

There should be dedicated resources channeled towards ensuring that all learners are well cared for from an early age and receive appropriate emotional, cognitive and physical development stimulation.²²³

Article 29(1) of the Convention on the Rights of the Child, provides that:²²⁴

(1) State parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

²²⁰ Section 8(5)(b).

²²¹ *Tania Megan Jacobs v The Chairman of the Governing Body of Rhode High School and Others* 2004 SA 7953 W.

²²² *Tania Megan Jacob's* case:para 24.

²²³ National Development Plan:66.

²²⁴ Conventions on the Rights of the Child (CRC). Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

- (b) *The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*
- (c) *The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;*
- (d) *The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;*
- (e) *The development of respect for the natural environment.*

The support measures and structures afforded to learners must integrate the aims of education as laid down by article 29(1) of CRC. The aims set out in article 29(1) of CRC are directed at the holistic development of the child, including development of respect for human rights, an enhanced sense of identity and affiliation, and child's socialization and interaction with others and with the environment.²²⁵ These aims are all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities.²²⁶

Support measures or structures for counselling a learner currently envisaged by the legislator in section 8(5)(b) are ambiguous and do not provide guidance to the stakeholders.

2.3.3 Use of the phrase "Education Support Services", instead of "support measures of structures for counselling"

On 15 March 1995, the Parliament published the White Paper on Education and Training,²²⁷ which introduced the concept "Education Support Services". In terms of the said White Paper, Education Support Services encompass all education-related health, social work, vocational and general guidance and counselling, and

²²⁵ United Nations on CRC. General Comments no 1 of 2001:para 1.

²²⁶ United Nations on CRC. General Comments no 1 of 2001:1.

²²⁷ Department of Education. White Paper on Education and Training 196/1995.

other psychological programmes and services to learners who need these services in mainstream schools.²²⁸ The support measures or structures, envisaged by SASA, are only channeled towards counselling a learner already involved in disciplinary proceedings.²²⁹ The use of the words "...for counselling" in section 8(5)(b) of SASA limits support to counselling only. Often learners face challenges in the learning process, which are a result of a broad range of experiences in the classroom, at school, at home and in the community, and counselling alone cannot offer a solution for this.²³⁰ Other education-related health, social work, vocational and general guidance, and other psychological programmes, could be the best methods to assist learners in need of these services.²³¹

The respective provincial legal frameworks approach education support to learners in a similar fashion as the White Paper on Education and Training. For instance, the Gauteng School Education Act²³² defines "educational auxiliary service" as any service necessary to provide for the health and welfare of learners. The Eastern Cape School Education Act²³³ provides that the MEC may, out of funds appropriated for this purpose by the Legislature, make provision for such educational auxiliary services as he/she may deem necessary. The Free State Schools Education Act²³⁴ defines "educational support services" as all education-related health and social work, general and counselling guidance, psychological programmes and services provided to all learners.

In 2007, the Education Laws Amendment²³⁵ introduced "support measures and structures for counseling"; however, the legislator did not define the concept to

²²⁸ Department of Education. White Paper on Education and Training Part 2 Chapter 5:para 27.

²²⁹ See SASA:s 8(5)(b).

²³⁰ Department of Education 2014:para 12.

²³¹ Department of Education. White Paper on Education and Training Part 2 Chapter 5:para 27.

²³² Gauteng School Education Act 6/1995: s 1; also see Northern Cape School Education Act 6/1996: s 1; and Eastern Cape School Education Act 1/1999:s 1

²³³ Eastern Cape School Education Act 1/1999:s 1.

²³⁴ Free State School Education Act 2/2000:s 1; also see KwaZulu-Natal School Act 3/1996: s 1; and Western Cape School Education Act 12/1997:s 1.

²³⁵ Education Laws Amendment Act 31/2007:s 6.

guide the stakeholders on its contents. It is probable that the legislator did not consider the provincial legal framework when coming up with section 8(5)(b).

Provincial Departments of Education have identified and established District-Based Support Services.²³⁶ The District-Based Support Services collaborate closely with Social Services Department to ensure a seamless system of support to learners who experience behavioural challenges and where the support required goes beyond school level.²³⁷

This study finds that support measures or structures, envisaged by the current legislation, are not clear to the stakeholders. Education Support Services is an appropriate concept and the legislator should make use of it. Education Support Services concept, accompanied by provincial legislative instrument, can provide programmes for learners who require additional support to enhance their participation, inclusion in school, socialization and interaction with others.²³⁸

SASA does, however, not make these services accessible and enforceable. It is inconceivable that in the current constitutional supremacy,²³⁹ where a child's best interests are of paramount importance in every matter concerning the child, SASA could be more comprehensive on suspension and expulsion than on support services. Also, the provinces promulgated meticulous regulations on how to conduct disciplinary proceedings against learners, but none drafted regulations on the provision of support services to learners.

2.3.4 Cooperative governance and intergovernmental relations with regard to education support services

The poor discipline in schools may be caused by factors beyond the control of the school and the provincial Department of Education - for instance, socio-

²³⁶ Department of Education 2005. Directorate: Inclusive Education Conceptual and Operational Guidelines For the Implementation of Inclusive Education: District-Based Support Teams: 19-20.

²³⁷ Department of Education 2014:27.

²³⁸ Department of Education 2014:9.

²³⁹ Constitution 1996:s 2.

economic aspects such as a lack of access to basic services, poverty and under-development.²⁴⁰ There is a need for other government departments, community services, private professionals, non-government organisations (NGOs),²⁴¹ early intervention providers and community-based rehabilitation services to cooperate with the Department of Education in addressing school discipline challenges.²⁴² Health professionals could play a significant role in making education support services accessible. Where necessary, schools and Provincial Departments of Education should acquire the support of health professionals such as psychologists, speech therapists, occupational therapists and other therapists to conduct more formal assessments of learners.²⁴³ The educators' and parents' role in an inclusive assessment is also crucial.²⁴⁴

In terms of the Constitution every child has the right to basic nutrition, shelter, basic health, care services and social services.²⁴⁵ The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.²⁴⁶ The Ministry of Education intends to explore a holistic and integrated approach to education support services, in collaboration with other government departments.²⁴⁷ Therefore, the Department of Education has to provide the necessary infrastructural and human resource support for support services to succeed.²⁴⁸

The goal of the Department of Education is to use schools as vehicles to promote access to public services amongst learners, in areas such as health, poverty

²⁴⁰ Department of Education 2014:12.

²⁴¹ Non-governmental/non-profit organisations refer to national or local organisations which provide services or support to children and/or families. They can operate either on a voluntary basis or run services on a contract basis for certain government departments.

²⁴² Department of Education 2014:25; and 2005:19-20.

²⁴³ Department of Education 2014:34.

²⁴⁴ Department of Education 2014:37.

²⁴⁵ Constitution 1996:s 28(1)(c); The Children's Act 38/2005:s 12(1).

²⁴⁶ Constitution 1996: s 27(2).

²⁴⁷ White Paper 196/1995: Part 2 Chapter 5:para 30; and see Department of Education 2014:25.

²⁴⁸ Department of Education 2005:8.

alleviation, psychosocial support, sport and culture.²⁴⁹ The need is particularly strong in the poorest communities.²⁵⁰ To achieve this goal, the involvement of other organs of state is required.²⁵¹ The inclusive, integrated approach recognises that issues of health, social, psychological, academic and vocational development, and support services for learners with behavioural challenges in mainstream schools are interrelated.²⁵² For this to work, the budgetary and other material resource implications of working together should be identified and the necessary infrastructural support should be in place.²⁵³

In this regard, section 41(1)(h) of the Constitution provides that:²⁵⁴

- (1) *All spheres of government and all organs of state within each sphere must-*
- (h) *cooperate with one another in mutual trust and good faith by-*
- (i) fostering friendly relations;*
 - (ii) assisting and supporting one another;*
 - (iii) informing one another of, and consulting one another on, matters of common interest;*
 - (iv) co-ordinating their actions and legislation with one another;*
 - (v) adhering to agreed procedures; and*
 - (vi) avoiding legal proceedings against one another.*

“Cooperative governance” refers to the relationships in government, and to the relationships between government and civil society.²⁵⁵ One important element of cooperative governance is coordination. Coordination involves harmonisation of actions and efforts flowing from a shared purpose or vision.²⁵⁶ This could be achieved through, amongst others, legislation and legislative mandates of

²⁴⁹ National Planning Commission 2011:157.

²⁵⁰ National Planning Commission 2011:158.

²⁵¹ In terms of s 239 of the Constitution, “organ of state” means: any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include court or a judicial officer.

²⁵² White Paper 196/1995: Part 2 Chapter 5:para 30.

²⁵³ Department of Education 2005:40.

²⁵⁴ 108/1996.

²⁵⁵ Draft Green Paper: Cooperative Governance 2010:5.

²⁵⁶ Draft Green Paper: Cooperative Governance 2010:5.

different sphere of government and departments, coordination of functions or roles within a clear spatial development framework and alignment of budgets, human resources and performance management indicators to efficiently identify and meet priority development goals, such as the present.²⁵⁷ For example, there is a need to involve, amongst others, learners, educators, parents, counsellors and other health professionals, social workers, relevant community organisations, business, and community leaders in addressing school discipline challenges.²⁵⁸

“Intergovernmental relations” means relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs.²⁵⁹ To achieve the holistic development of the learners, intergovernmental relations must be cherished.

In the context of school discipline, to effectively establish a disciplined and purposeful school environment, the legislator should provide legislative instruments which enforce cooperative and intergovernmental relations between the organs of state on the provision of educational support services to learners. Cooperation is needed to ensure satisfactory service delivery, including educational support to learners.²⁶⁰ There is a close relationship between education, health, well-being and social affairs.²⁶¹

The Intergovernmental Relations Framework Act was enacted to give effect to the cooperative governance principles outlined in the Constitution.²⁶² In practice, the implementation of the Intergovernmental Relations Framework Act²⁶³ has not

²⁵⁷ Draft Green Paper 2010:5.

²⁵⁸ Department of Education 2005:38.

²⁵⁹ Intergovernmental Relations Framework Act 13/2005: s 1.

²⁶⁰ Coetzee 2010:85.

²⁶¹ That is why it is important for the Department of Social Development to work together with the Department of Education to assist learners who are experiencing social challenges.

²⁶² Draft Green Paper 2010:5.

²⁶³ 13/2005.

improved integrated services.²⁶⁴ Coetzee²⁶⁵ indicates that poor service delivery makes one believe that the value, functioning and contribution of cooperative governance and intergovernmental relations is a myth. There could be a smooth and efficient provision of education support services if the government departments and other relevant bodies work together to address school discipline as early as possible.

The Department of Basic Education's Action Plan 2014²⁶⁶ alluded to the fact that schools have an important role to play in promoting the overall well-being of learners, partly because this contributes to better learning and partly because many aspects of well-being (such as physical and psychological health) are important in themselves.

District-Based Support is provided through different kinds of departmental structures in the nine provinces, for example, through some form of district centre that integrates the various kinds of educational support services.²⁶⁷ All spheres of government and all organs of state must cooperate with one another in mutual trust and good faith by fostering friendly relations and assisting and supporting one another.²⁶⁸ The main task of the government as an institution of society includes meeting the needs of the citizens, including children.²⁶⁹

In order to achieve the objectives of education support services, there should be close cooperation amongst government departments and other relevant bodies. In the case of *Tania Megan*²⁷⁰ the Western Cape High Court held that if the school had acted without delay when the learner's social problems first manifested themselves by referring him for professional assistance, it is probable that psychological intervention could have been secured timeously to evaluate

²⁶⁴ Draft Green Paper 2010:5.

²⁶⁵ Coetzee 2010:84.

²⁶⁶ Department of Basic Education 2011:157-158.

²⁶⁷ Department of Education. 2005: 10.

²⁶⁸ Constitution:s 41(1)(h) and see Lle 2010.

²⁶⁹ Coetzee 2010:84.

²⁷⁰ *Tania Megan's case*:44.

and assess him psychologically and, if necessary, the Department of Social Services could have been involved, as a matter of urgency, to evaluate and assess the learner's socio-economic circumstances.

The Department of Sports and Recreation White Paper on Sports and Recreation provides that:²⁷¹

If South Africa wants to create a better future for its children, physical education and sports must be a matter of priority. It can also play an important role in creating motivation for, and commitment to life-long participation. Evidence exists that sport and physical activity can benefit education.

To achieve this, the Department of Sports and Recreation should cooperate with the Department of Education to maximise access to sport, recreation and physical education in every school. In terms of the Draft School Sport Policy,²⁷² the objectives of the Department of Education with regard to school sport are to use these programmes to entrench the democratic values enshrined in the Constitution, to develop functional and vibrant institutions of learning and centres of community life, and as an integral component of holistic education. School discipline can be improved by intergovernmental relations and cooperation between the Department of Sport and Recreation and the Department of Education in making sport, recreation and physical education accessible to schools.

According to Coetzee,²⁷³ there is a direct relationship between poor service delivery and cooperative governance. Therefore, in the context of school discipline, the concept and implementation of the principle of cooperative governance and intergovernmental relations with regard to the provisions of education support services will bring a revolution in the education system.

²⁷¹ The Department of Sports and Recreation White Paper on Sports and Recreation for the Republic of South Africa 2012:29.

²⁷² GN 1025/2011. *Call for Public Comments on the Draft School Sport Policy*:para 5.

²⁷³ Coetzee 2010:85.

CHAPTER 3

EVALUATION OF THE NATIONAL REGULATIONS AND GUIDELINES APPLICABLE TO SCHOOL DISCIPLINE

3.1 INTRODUCTION

This chapter will investigate the enacted national regulations, guidelines, policies and regulatory legal framework addressing specific misconducts in schools and determine if these provide clear guidelines to education stakeholders. There are national regulations and policies which have been promulgated to address specific discipline problems encountered by school authorities.²⁷⁴ This chapter will evaluate in depth such national documents.

The legal framework on drug related misconduct will be explored, which will include section 8A of SASA, the National Policy on the Management of Drug Abuse by Learners, Devices to be Used for Drug Testing and Procedure to be followed, and Regulations for Safety Measures at Public Schools.

The legal framework on unlawful initiation practices in schools will be touched on, and thus section 10A of SASA and the Regulations to Prohibit Initiation Practices in Schools. For example, the Regulations to Prohibit Initiation Practices in Schools do not stipulate the Department of Education's role in preventing

²⁷⁴ Here is a list of some of the provincial regulations: Free State Department of Education. 2001. Regulations Regarding the Discipline of Learners at Public Schools; Western Cape Provincial Notice 365/2011. Regulations Relating to Disciplining on Suspension and Expulsion of Learners at Public Schools in the Western Cape; Eastern Cape PN 32/1999, Regulations Relating to Behaviour of Learner in Public Schools, which may Constitute Serious Misconduct. The following is a list of some of the national regulations and policies: Department of Education Regulations and Measures for Safety at Public Schools GN 1040/2001 as amended in 2006; Department of Education Devices to be Used for Drug Testing and Procedure to be followed GN 1140/2008; Department of Education Promulgation of National Policy on The Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions GN 3427/2002; Department of Education Regulations to Prohibit Initiation Practices in Schools GN 24165/2002.

initiation practices in schools; the responsibility is placed solely on governing bodies.

The enacted Regulations for Safety Measures place an enormous responsibility solely on schools “to develop action plans to counter threats of violence”. The regulations, guidelines and policies on school discipline require a certain unavoidable educational level to grasp them.

In terms of section 20(1)(c),²⁷⁵ the governing body of a public school must promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners of the school. To promote the best interests of the school, the governing body has the task of familiarising itself with education legislation and regulations promulgated thereunder, especially those on school discipline. The governing body’s ability to perform its functions is fundamental in the assessment of the effectiveness of school governance in South Africa.²⁷⁶

The legislator promulgated regulations which furnish the governing body with unique powers and rights. It is therefore crucial for governing bodies to acquaint themselves with the regulations relevant to school discipline. They provide the procedures to be followed in particular instances, and the steps to adhere to.²⁷⁷

Governing body members, as well as all educators, need to become legally and policy “literate” in order to be able to execute their duties and exercise their rights in accordance with the applicable legal and policy frameworks.²⁷⁸ An effective disciplined school environment, conducive for teaching and learning, begins with knowledge and understanding.²⁷⁹ Regulations, guidelines and policies on school discipline need a certain educational level to be grasped by the stakeholders. In this regard, section 19 of SASA becomes critical. Section 19(1) provides that:

²⁷⁵ SASA:s 20(1)(c).

²⁷⁶ Heystek 2011:459.

²⁷⁷ For instance, Education Regulations Measures for Safety at Public Schools GN 1040/2001.

²⁷⁸ Beckmann 2007:212.

²⁷⁹ Skiba *ea*:1.

Out of funds appropriated for this purpose by the *provincial legislature*, the *Head of Department* must establish a programme to-

(a) *provide introductory training for newly elected governing bodies to enable them to perform their functions.*

Training of governing body members on regulations and policies is integral to enable them to grasp the regulations that are applicable to school discipline and the implementation thereof. The HOD must establish a programme to provide introductory training for newly elected governing body members.²⁸⁰

The training of school governing body members remains a priority for the successful functioning of a governing body.²⁸¹ Training of governing body members should be tailor-made to the needs of the local community and such training sessions should be relevant, easy to assimilate, and should motivate the targeted group.²⁸² Also, section 16(2)(d) of SASA provides that the principal must assist the governing body in handling disciplinary matters pertaining to learners.

The principal is an educator appointed or acting as the head of a school.²⁸³ This means that principals are qualified to teach, educate or train learners.²⁸⁴ The training on handling disciplinary matters is a complex matter and needs to be facilitated by professionals who have recognised expertise in disciplinary matters.²⁸⁵ Principals may not be appropriate personnel to assist the governing body in matters relating to discipline as issues surrounding discipline may go beyond their professional skill.²⁸⁶

The regulations applicable to school discipline are equally complex and require training from suitable professionals in the area of legislative interpretation. If

²⁸⁰ SASA:s 19(1), the legislator used the preemptory word “must”.

²⁸¹ Tsotetsi *ea* 2008:387.

²⁸² Tsotetsi *ea* 2008:386.

²⁸³ SASA:s 1.

²⁸⁴ Employment of Educators Act 1998:s 1.

²⁸⁵ Some parents take school governing bodies and the Department of Education to court due to procedural flaws.

²⁸⁶ See Chapter 2:para 2.3.

governing bodies receive appropriate training, they will be able to execute their legislative mandate in the prescribed way and effectively establish discipline in schools. Xaba²⁸⁷ finds that despite various attempts at training and capacity building of school governing bodies, including financial resources having been expended for this purpose, studies abound on the numerous challenges in the governance of schools in South Africa.

The lack of the HOD training of school governing bodies on regulations, especially relating to school discipline, reduce the ability of governing bodies to maintain a disciplined school environment.²⁸⁸ Although there are 11 official languages in South Africa, all the applicable regulations and policies on school discipline have not been translated into all the official languages used by governing bodies in the community setting.²⁸⁹

The single most important factor in education in South Africa, which appears to experience insurmountable challenges, is the governing body.²⁹⁰ Thus, it is imperative that the HOD establishes a programme to provide continuing training to governing bodies to promote the effective performance of their functions, or to enable them to assume additional functions.²⁹¹ Such a programme must be financed out of funds appropriated for this purpose by the provincial legislature.²⁹² The HOD may request a recognised governing body association or other appropriate training authority to train the members of the governing body of a particular school or group of schools and to build the necessary capacity.²⁹³ This will require the HOD to enter into an agreement with the governing body association, and to a certain extent bear the financial implications of the training.²⁹⁴

²⁸⁷ Xaba 2011:201.

²⁸⁸ School environment envisaged by s 8(2) of SASA.

²⁸⁹ See Constitution:s 6(1) for a list of official languages.

²⁹⁰ Xaba 2011:201.

²⁹¹ SASA:s 19(1)(b).

²⁹² SASA:s 19(1)(b).

²⁹³ SASA:s 19(4)(a).

²⁹⁴ SASA:s 19(4)(b).

The re-organisation of the school system and the establishment of democratic school governing bodies throughout the country require a comprehensive programme to build capacity for management and governance, especially on school discipline.²⁹⁵

The members of school governing bodies require the training to enhance their level of understanding of numerous regulations and policies promulgated by the Minister of Education, applicable to school discipline, in order to effectively implement them.²⁹⁶ Properly trained and knowledgeable school governing bodies are a key link in the education chain.²⁹⁷ The shift to decentralised school governance and management requires the members of school governing bodies to develop a wide range of skills and the capability to deal with the complex issues and tasks they are expected to fulfill, such as maintaining school discipline.²⁹⁸ While there is a willingness amongst parents to play a role in governing the education received by their children, including in school discipline, there is a great need to develop the skills and capacity amongst elected governing body members so that they can effectively undertake their task.²⁹⁹

As mentioned at the beginning of the introduction, this chapter will investigate the enacted national regulations, guidelines, policies and regulatory legal framework addressing specific misconducts encountered in schools, and determine if these provide clear guidelines to education stakeholders.

²⁹⁵ GN 130/1996 Education White Paper 2, the Organisation, Governance and Funding of Schools:25.

²⁹⁶ For instance, Regulations on Prohibition of Initiation Practices talks about *crimen iniuria* and initiation practices. These words are not easy to understand. Regulations on Random Search and Seizure and Drug Testing might infringe on the constitutional rights of learners, hence understanding the correct procedure is critical for the school governing body and other relevant stakeholders.

²⁹⁷ www.fedsas.org.za/english/media.aspx?mid+169. 2015/06/07.

²⁹⁸ Van Wyk 2007:137.

²⁹⁹ www.gmsouthafricafoundation.com/content/school-governing-bodies-building-programmes. 2015/06/07.

3.2 INITIATION PRACTICES IN SCHOOLS

3.2.1 Background

According to a report of the South African Human Rights Commission (hereinafter SAHRC),³⁰⁰ the Minister of Education approached it to investigate initiation practices at schools and higher education institutions with a view of making recommendations directed at the institutions, as well as government, with the objective that any such recommendations should assist in the regulation of initiation practices which could cause harm to learners and students.

Therefore, the SAHRC in terms of its powers undertook to investigate initiation practices at education institutions. The SAHRC, in doing this, adopted an investigative process that sought to address initiation practices on a systematic basis.³⁰¹

The SAHRC reported that student groupings and staff members favoured the abolishment of initiation practices.³⁰² The opinion was expressed that initiation practices cannot be viewed as a tradition worth retaining. Students described these processes as human rights abuses and in conflict with a democratic culture, and as having more negative aspects to them than positive.³⁰³ The students were of the view that tragic and violent incidents occurred as a result of the tradition of initiation, and that they were not isolated and extraordinary incidents.³⁰⁴ Senior students continued to believe they had the tacit approval of the school to put new arrivals through a physical and emotional test and swear them to silence.³⁰⁵

³⁰⁰ South African Human Rights Commission (SAHRC) 2001:para 2.

³⁰¹ SAHRC 2001:para 4.

³⁰² SAHRC 2001:para 4.

³⁰³ SAHRC 2001:para 4.

³⁰⁴ SAHRC 2001:para 44.

³⁰⁵ <http://southafricahazing.blogspot.com/2009/03/brutal-initiations-contiue-in.html>1. 30/01/2015.

Learners should be protected from abuse by adults or other learners and learners' behaviour should be free of any violence, and in line with the democratic values of human dignity, equality and freedom.³⁰⁶

The SAHRC further found that incidents of initiation practices all occur within an institutional culture of authoritarianism and bullying.³⁰⁷ Such a culture is premised on a belief that older learners and students are superior to their younger counterparts and that they therefore are justified in treating these younger counterparts as inferior until the younger counterparts have "paid their dues".³⁰⁸

Huysamer³⁰⁹ in an investigation on hazing in boys-only secondary schools found that hazing, associated with initiation, is a centuries-old practice aimed at initiating newcomers.

After an extensive investigation, the SAHRC recommended to the Minister of Education that initiation practices have to be abolished in all its forms and guises, even the most innocent practices.³¹⁰ The SAHRC³¹¹ further recommended to the Minister that a commitment be made, through section 61 of SASA, by developing regulations that seek to eradicate initiation and other practices in public and private schools. Therefore, the legislator promulgated section 61(1)(h) of SASA, giving the Minister the enabling provisions to make regulations on initiation practices at public and independent schools.

Ultimately, section 10A of SASA was enacted and provided the definition of "initiation practices" as:³¹²

³⁰⁶ GN 1589/2002 Regulations to Prohibit Initiation Practices in Schools:para 4.4.

³⁰⁷ SAHRC 2001:46.

³⁰⁸ SAHRC 2001:46.

³⁰⁹ Huysamer and Lemmer 2013:1.

³¹⁰ SAHRC 2001:70.

³¹¹ SAHRC 2001:71.

³¹² SASA: s 10A(3).

any act which in the process of initiation, admission into, or affiliation with, or as condition for continued membership of, a school, a group, intramural or extramural activities, interschool's sports team, or organization-

(a) endangers the mental or physical health or safety of a person;

(b) undermines the intrinsic worth of human beings by treating some as inferior to others;

(c) subjects individuals to humiliating or violent acts which undermine the constitutional guarantee to dignity in the Bill of Rights;

(d) undermines the fundamental rights and values that underpin the Constitution;

(e) impedes the development of a true democratic culture that entitles an individual to be treated as worthy of respect and concern; or

(f) destroys public or private property.

3.2.2 Prohibition of initiation practices

Section 10A (1) of SASA provides that-

A person may not conduct or participate in any initiation practices against a learner at a school or in a hostel accommodating learners of a school.

Learners have the right to a safe environment that is conducive to education, including security of property, security of person, well cared for school facilities, school furniture and equipment, toilet facilities, absence of harassment in attending classes, writing tests and examinations, and partaking in extramural activities or sport.³¹³

Regulations³¹⁴ explicitly prohibit initiation practices in schools. Initiation practices undermine the intrinsic worth of human beings by treating some as inferior to

³¹³ GN 1589/2002:para3.5.1.

³¹⁴ GN 1589/2002: 4.1-4.4.

others.³¹⁵ Initiation practices undermine the fundamental rights and value that underpin the Constitution.³¹⁶ These practices infringe upon the right to equality. Section 9(1) and (2) of the Constitution provide that:³¹⁷

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Initiation practices further transgress the constitutional rights of learners to human dignity, freedom and security of the person.³¹⁸ Section 10 of the Constitution provides that:³¹⁹

Everyone has inherent dignity and the right to have their dignity respected and protected.

In terms of the Constitution everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) to be free from all forms of violence from either public or private sources;

(c) not to be tortured in any way; and

(d) not to be treated or punished in a cruel, inhuman or degrading way.³²⁰

Prohibition of initiation practices is also linked to several dimensions of the right to dignity.³²¹ Learners have the right to bodily and psychological integrity.³²² The

³¹⁵ GN 1589/2002:4.1-4.4.

³¹⁶ GN 1589/2002:3.5.1

³¹⁷ 108/1996.

³¹⁸ Constitution 1996:s 12.

³¹⁹ Constitution 1996.

³²⁰ Constitution 1996: s 12(1).

school environment itself must reflect the freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all learners, ethnic, national and religious groups, and persons of indigenous origin.³²³ A school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of article 29(1) of the Convention on the Rights of the Child.³²⁴

In terms of section 10A(2)(a) of SASA, any person who conducts or participates in any initiation practices against a learner at a school is guilty of misconduct and disciplinary action must be instituted against such a person in accordance with the applicable code of conduct, prescribed in section 8. The governing body must take disciplinary action against any learner who has inflicted initiation practice(s) on another person.³²⁵ The governing body, as the body assigned to maintain discipline at a school, must take all the necessary steps to eliminate initiation practices at a school.

The principal must ensure that no initiation practices take place in his/her school, including hostels, or during any school activities away from the school premises.³²⁶ The principal must put systems in place to encourage learners to bring initiation practices to his/her attention and to ensure that such learners are free of victimisation.³²⁷ The regulation empowers the school governing body and the principal to deal with initiation practices in schools.

Furthermore, the principal, in terms of the Regulations to Prohibit Initiation Practices in School, has a responsibility to ensure that learners are not subject to *crimen injuria*, assault, harassment, maltreatment, degradation, humiliation or

³²¹ Reyneke 2013a:394.

³²² Constitution 1996:s 12(2).

³²³ CRC General Comment 2001:para 19.

³²⁴ CRC General Comment 2001:para 19.

³²⁵ SASA:s 10A (2)(a).

³²⁶ GN 2002:5.1.

³²⁷ GN 2002:5.1.

intimidation from educators or learners, and must protect learners from such practices.³²⁸ The principal must take reasonable steps to ensure that such practices are not the result of peer pressure.³²⁹

An institutional culture which actively endorses, or at the very least does nothing to eradicate initiation practices which undermine the self-esteem of individuals, and/or which subjects individuals to humiliating and violent acts, undermines the constitutional guarantee to dignity in the Bill of Rights.³³⁰ Initiation practices are not in line with learners' constitutional rights and can endanger the physical and emotional safety and development of learners.³³¹ Conduct that violates the rights of learners ought to be prohibited and disciplined.³³² Although the responsibility is placed on the principal to ensure that no initiation practices take place in his/her school, the responsibility to take disciplinary action against perpetrators rests with the school governing body.

If any initiation practices or acts take place through the actions of learner, the governing body must take appropriate action in terms of section 8 of SASA or the code of conduct to prevent such practices and to protect learners from such practices.³³³

Surprisingly, the regulations on initiation practices do not say anything on the role of the Department of Education in preventing initiation practices in schools. The school governing bodies cannot effectively prevent initiation practices on their own; they need the diligent cooperation of all relevant stakeholders.³³⁴ Every educator is responsible for assisting the governing body to prohibit initiation practices in schools and during school-related activities. Educators have a duty

³²⁸ GN 2002:5.2.

³²⁹ GN 2002:2.

³³⁰ SAHRC 2001:21.

³³¹ Reyneke 2013a:394.

³³² SAHRC 2001:36.

³³³ GN 2002:5.4.

³³⁴ See paragraph 2.3 for a discussion on cooperation.

to control the actions of learners when such actions may inflict harm on others, or violate the rights of other learners or educators.³³⁵

The regulations on prohibition of initiation practices do not guide the school governing body on the appropriate sanction to be imposed or action to be taken if a learner has been found guilty of an unlawful initiation practice. Therefore, school governing bodies have to use their discretion whether to punish the perpetrator or offer educational support services. Nevertheless, it is vital that the disciplinary proceedings resulting from unlawful initiation practices should be in line with the aims of education and discipline. Thus, they should result in the holistic development of the transgressors and the victims, and should contribute to all the learners' understanding of what responsible life in society entails.³³⁶

The evaluation of legislative provisions with regard to school discipline and determination on whether these provide sufficient guidelines to stakeholders shows that the legislation provides no guidance to school governing bodies on how to prevent initiation practices, even the Regulations to Prohibit Initiation Practices³³⁷ similarly do not provide guidance. School governing bodies and principals are entrusted with an important legislative mandate to see to it that initiation practices do not occur in schools.³³⁸ However, under the prevailing circumstances where the HOD fail to provide introductory training for newly elected governing bodies and ongoing training to enable them to perform their functions, to promote the effective performance of their functions, or to enable them to assume additional functions, it is impossible for governing bodies and principals to prevent initiation practices on their own, without the HOD playing his/her part as contemplated by section 19.³³⁹

³³⁵ GN 2002:6.

³³⁶ Reyneke 2013a:394.

³³⁷ GN 2002.

³³⁸ See SASA:s 10A(2) and GN 2002:5.1.

³³⁹ SASA.

3.3 EVALUTION OF REGULATIONS ON DRUG-RELATED MISCONDUCT IN SCHOOLS

3.3.1 Introduction

There is concern in South Africa about alcohol abuse among young people.³⁴⁰ Most of those who use illegal drugs, such as cannabis, will usually have first used alcohol and/or tobacco.³⁴¹ In a high school survey conducted among learners in 2002, about half (49.1%) reported to have drunk alcohol, one third (30.5%) to have smoked cigarettes, and 12.8% to have used cannabis in their lifetime.³⁴²

Young people who display poor discipline seem to be disproportionately involved in using illegal substances.³⁴³ A longitudinal study among high school learners in Cape Town found a strong association between binge drinking, dropout and low academic aspirations over a period of two years.³⁴⁴ Also, tobacco, alcohol and other substance abuse amongst learners, in particular secondary learners, is a problem that undermines learning and learner well-being through absenteeism, high risk sexual behaviour and violence.³⁴⁵

Morojele³⁴⁶ indicated that if schools do not discourage alcohol and other drug use among their learners, then these behaviours are likely to occur. The availability of drugs in and around schools facilitates their acquisition and use.³⁴⁷ Having low academic aspirations and performing poorly at school have been found to be related to adolescents' use of alcohol.³⁴⁸

³⁴⁰ <http://www.sahealthinf.co.za/admodule/students.htm>. 31/01/2015; and Morojele *ea* 2009:1.

³⁴¹ Flisher *ea* 2002:162-167.

³⁴² Morojele *ea* 2009:1.

³⁴³ Morojele *ea* 2009:1.

³⁴⁴ Morojele *ea* 2001:110-127.

³⁴⁵ National Planning Commission 2011:159.

³⁴⁶ Morojele *ea* 2009:1.

³⁴⁷ Morojele *ea* 2009:1.

³⁴⁸ Morojele *ea* 2001:110-127.

The Minister of Education promulgated the National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institution³⁴⁹ to assist and support, not only those learners who abuse drugs, but also the majority of learners and staff who do not use drugs but who may be affected by the usage of drugs by others. The Policy also assists and supports learners with a drug problem, as long as they are prepared to cooperate with educators and other professionals involved in the treatment and rehabilitation process.

Studies on drug usage in South Africa point to an increase in drug abuse across all communities, irrespective of wealth, although usage rates and drugs of choice vary between communities, based on access and cost.³⁵⁰ Evidence indicates that school communities are particularly vulnerable and drug use by learners is on the increase in both rural and urban schools, including primary schools.³⁵¹ The presence of illegal substances and drugs on school premises is not conducive to creating an acceptable environment in which learning can take place.³⁵²

In terms of section 61(a) of SASA,³⁵³ the Minister may make regulations to provide for safety measures at public and independent schools. The aim of the Regulations for Safety Measures at Public Schools is to establish safe public schools, which are free from violence and drugs. In terms of paragraph 4 of the Regulation for Safety Measures at Public Schools, all public schools are declared drug free and dangerous object free zones.³⁵⁴ No educator, parent or learner, and no other person, may possess or use alcohol, illegal drugs, any illegal substance or dangerous objects during any school activity.³⁵⁵

³⁴⁹ GN 3427/2002. Promulgation of National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools:para 6.

³⁵⁰ GN 3427/2002:4.

³⁵¹ GN 3427/2002:4.

³⁵² SAHRC. Comment on Education Laws Amendment Bill 2007:3.

³⁵³ SASA.

³⁵⁴ GN 3427/2002:4(1).

³⁵⁵ GN 3427/2002:4(4).

3.3.2 Search and seizure and drug testing at schools

3.3.2.1 Constitutional rights of a learner when conducting search and seizure and drug testing at school

The Constitution³⁵⁶ entrenches the right to human dignity,³⁵⁷ privacy³⁵⁸ and property,³⁵⁹ amongst others. Random search and seizure and drug testing would obviously infringe on these rights.³⁶⁰ However, the Constitution itself provides that no right is absolute, given that any right in the Bill of Rights may be limited in terms of section 36. Section 36(1) of the Constitution provides that:³⁶¹

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 8A of SASA is a law of general application in that it applies to all schools and is aimed at safeguarding the interest of learners with regard to their right to education, which must take place in an environment free of drugs and dangerous objects.³⁶² Given that section 8A limits certain rights conferred in the Bill of Rights, it must be implemented with due regard to human dignity, privacy and the right to property of the learners concerned.³⁶³

Educators and principals in South Africa frequently find it necessary to search learners and remove from their possession items which may be harmful to them or others.³⁶⁴ When conducting search and seizure and drug testing, all information relating to drug use, misuse or dependence by a learner should be

³⁵⁶ Constitution 1996.

³⁵⁷ Constitution:s 10.

³⁵⁸ Constitution:s 14.

³⁵⁹ Constitution:s 25.

³⁶⁰ GN 1140/2008.Devices to be Used for Drug Testing and the Procedure to be Followed. Annexure A:144:para 1.

³⁶¹ Constitution 1996.

³⁶² Joubert, Sughurue and Alexander 2013:118.

³⁶³ GN 1140/2008 Annexure A:144:para 1.

³⁶⁴ Joubert *ea* 2013:122.

treated as confidential.³⁶⁵ The results of the testing cannot be made public, but can be shared with the child's parent or guardian.³⁶⁶ The process must be sensitive to the rights of the learner. The principal or his/her delegate must not attempt to humiliate the learner or expose his/her drug habit, which will infringe on his/her human rights.³⁶⁷

By its very nature, searches and drug testing are an invasion of privacy and may infringe the constitutional and personal rights of learners.³⁶⁸ Search and seizure and drug testing in schools are relatively new procedures in South Africa and have not yet been tested in the courts.³⁶⁹ Thus, principals and education officials are interpreting and implementing section 8A as they see fit.³⁷⁰

3.3.2.2 Responsibilities of the principal or delegate

In terms of section 8A(2) of SASA, the principal or his/her delegate may, at random, search any group of learners, or the property of a group of learners, for any dangerous object or illegal drug, if a fair and reasonable suspicion has been established-

(a) that a dangerous object or an illegal drug may be found on school premises or during a school activity; or

(b) that one or more learners on school premises or during a school activity are in possession of dangerous objects or illegal drugs.³⁷¹

These provisions require the principal or other educators, acting as delegates, to search learners for the possession of illegal substances and drugs. It is not preferable that educators are expected to take on the role of policing the drug

³⁶⁵ GN 3427/2002:16.

³⁶⁶ GN 3427/2002:16.

³⁶⁷ GN 1140/2002 Annexure B 2008:para 62-63.

³⁶⁸ Joubert *ea* 2013:117.

³⁶⁹ Joubert *ea* 2013:122.

³⁷⁰ Joubert *ea* 2013:122.

³⁷¹ SASA 84/1996:s 8A(2).

usage of learners.³⁷² This may impact negatively on relationships and the culture of leaning within the school environment.³⁷³

The principal or his/her delegate may at random administer urine or other non-invasive test to any group of learners, who on fair and reasonable grounds are suspected of using illegal drugs, after taking into account all relevant factors contemplated in subsection 3.³⁷⁴ The principal or his/her delegate must-

(a) within one working day, if practicable, inform the parent that a random test or search and seizure was done in respect of his or her child; and

(b) inform the learner and his or her parent of the result of the test immediately after it becomes available.³⁷⁵

If the police cannot collect the dangerous object or illegal drug from the school immediately, the principal or his/her delegate must-

(a) take the dangerous object or illegal drug to the nearest police station; and

(b) hand the dangerous object or illegal drug over to the police to dispose of it in terms of section 31 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).³⁷⁶

Clearly, in terms of the cited legislative provisions, the principal or educators, acting as delegates, are required to usurp the South African Police Services' task on the learners of the school. SASA places an unbearable obligation on school governing bodies and principals in the context of school discipline. Some tasks, such as searching learners, fall beyond the duty of principals and school governing bodies. Therefore, there is a need for the legislative instruments to demand cooperative governance and intergovernmental relations among the

³⁷² SAHRC 2007:8.

³⁷³ SAHRC 2007:8.

³⁷⁴ SASA 84/1996:s 8A(8).

³⁷⁵ SASA 84/1996:s 8A(10).

³⁷⁶ SASA 84/1996:s 8A(6).

government departments and entities - particularly in the context of school discipline.³⁷⁷

3.3.2.3 Prerequisites for random search and seizure and drug testing at schools

With regard to a urine or other non-invasive test, a learner contemplated in subsection 8 may be subjected to a urine or other non-invasive test for illegal drugs only if-

- (a) the test is conducted by a person of the same gender;*
- (b) it is done in a private area and not in view of another learner;*
- (c) one adult witness, of the same gender as the learner, is present;*
- (d) the sample is clearly and correctly labelled with full particulars as contemplated in subsection (5), with the necessary changes; and*
- (e) a device contemplated in subsection (11) is used.³⁷⁸*

With regard to a body search, where a search contemplated in subsection 2 entails a body search of the learners in question, such search may only-

- (a) be conducted by-*
 - (i) the principal, if he or she is of the same gender as the learner; or*
 - (ii) by the principal's delegate, who must be of the same gender as the learner;*
- (b) be done in a private area, and not in view of another learner;*
- (c) be done if one adult witness, of the same gender as the learner, is present; and*

³⁷⁷ See para 2.3 for a discussion on this point.

³⁷⁸ In terms of s 8A(9) of SASA 84/1996, the Minister identified the following list of devices which must be used for drug testing of learners: Drug detective wipe detection system for surfaces; One step home cocaine test strip; Multi-drug test; Quicktox ;rug screen dipcard test; Monitect drug screen cassette test; Toxcup drug screen cup test; Multi panel drug testing device; Smart check drug screen test; Drug smart cup; Avitar oral screen 4; or drugometer.

*(d) be done if it does not extend to a search of a body cavity of the learner.*³⁷⁹

In regard to a search of any group of learners or the property of a group of learners, a random search may be conducted of any group of learners, for any dangerous object or illegal drug, if a fair and reasonable suspicion has been established-

(a) That a dangerous object or an illegal drug may be found on school premises or during a school activity; or

*(b) That one or more learners on school premises or during a school activity are in possession of a dangerous objects or illegal drugs.*³⁸⁰

In terms of section 8A(3)(a),³⁸¹ random search and seizure may only be conducted after taking into account all relevant factors, including-

(i) the best interest of the learners in question or of any other learner at the school;

(ii) the safety and health of the learners in question or of any other learner at the school;

(iii) reasonable evidence of illegal activity; and

(iv) all relevant evidence received.

A search must be reasonable and proportional to the suspected illegal activity.³⁸²

If a search should be conducted of any group of learners or the property of a group of learners, the principal or his/her delegate cannot target the particular learner(s). Regulations prohibit random searches of an individual learner.³⁸³

³⁷⁹ SASA:s 8A(4).

³⁸⁰ SASA:s 8A(2).

³⁸¹ SASA.

³⁸² SASA:s 8A(3)(b).

³⁸³ GN 3427/2002:21.

3.3.2.4 Handling of seized dangerous object or illegal drug

In terms of section 8A(5) of SASA, any dangerous object or illegal drug that has been seized must-

- (a) be clearly and correctly labelled with full particulars, including-*
 - (i) the name of learner in whose possession it was found;*
 - (ii) the time and date of search and seizure;*
 - (iii) an incident reference number;*
 - (iv) the name of person who searched the learner;*
 - (v) the name of the witness; and*
 - (vi) any other details that may be necessary to identify the item and incident;*
- (b) recorded in the school record book; and*
- (c) handed over to the police immediately to dispose of it in terms of section 31 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).³⁸⁴*

If the police cannot collect the dangerous object or illegal drug from the school immediately, the principal or his/her delegate must-

- (a) take the dangerous object or illegal drug to the nearest police station; and*
- (b) hand the dangerous object or illegal drug over to the police to dispose of it in terms of section 31 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).³⁸⁵*

In this process the Police Services must be involved from the start of the search process. The task of searching suspects fall within their ordinary functions. Educators should be allowed to occupy themselves with teaching and learning.

³⁸⁴ SASA:s 8A(5).

³⁸⁵ SASA:s 8A(6).

3.3.2.5 Consequences to learner(s) who tested positive or who are found in possession of a dangerous object, or an illegal drug is found in his/her possession.

A learner may be subjected to disciplinary proceedings if-

- (a) *a dangerous object or illegal drug is found in his or her possession; or*
- (b) *his or her sample tested positive for an illegal drug.*³⁸⁶

3.3.2.6 Support to learners who abuse/use drugs

The purpose for promulgating the policies on the management of drug abuse by learners is to assist and support those learners who abuse drugs, but also the majority of learners and staff who do not use drugs, but who may be affected by the usage of drugs by others, while assisting and supporting learners with a drug problem, as long as they are prepared to cooperate with educators and other professionals involved in the treatment and rehabilitation process.³⁸⁷

Learners who use or abuse drugs should not be condemned in the school society, but should be assisted.³⁸⁸ They should be referred to professionals (paid for by their parents) or utilise the Provincial Departments of Education's Support Units.

Learners who have experienced or are experiencing problems as a result of alcohol and drug use, misuse or dependency, and accept treatment, should be afforded the appropriate assistance, and should not be denied the opportunity to receive an education or the right to reintegration into the same school.³⁸⁹

³⁸⁶ SASA:s 8A(12).

³⁸⁷ GN 3427/2002:6.

³⁸⁸ GN 3427/ 2002:9.

³⁸⁹ GN 3427/2002:30.

The focus of conducting random search and drug testing in schools is on identifying a drug abuse problem, and learners who are victims of dependency must be assisted before they are subject to disciplinary proceedings.³⁹⁰

3.3.2.7 Dealing with a learner who is unwilling to be searched

If reasonably practicable, the parent should be telephoned or a message should be sent to the parent to inform them that the learner is unwilling to cooperate in a lawful search and seizure procedure, as provided for by SASA, and that the learner will be handed over to the police.³⁹¹ In the specific circumstances of an unwilling learner, the chances are higher that the learner will ultimately be subjected to disciplinary proceedings. This will also constitute misconduct of objectionable behaviour³⁹² and therefore punishable.

If the parent indicates that he/she is willing to participate by instructing the learner to cooperate in a search and seizure, which is being conducted in terms of section 8A, where the outcome is linked to an internal disciplinary process, the parent may be given a reasonable opportunity to come to the school and to instruct the learner to cooperate.³⁹³

If either the learner or the parent refuses to cooperate, the matter, and the learner, must be handed over to the Police, so that they may conduct a search in terms of the Criminal Procedure Act.³⁹⁴ The outcome of such a search is linked to a Criminal Court Process with possible criminal prosecution.³⁹⁵

³⁹⁰ GN 1140/2008 Annexure B:para 1.

³⁹¹ GN 1140/2008 Annexure B:4.6.

³⁹² PN 156/2001:s 3(1)(j).

³⁹³ GN 1140/2008 Annexure B:4.6.

³⁹⁴ GN 1140/2008 Annexure B:4.6.

³⁹⁵ GN 1140/2008 Annexure B:4.6.

3.3.3 Learners dealing in drugs

In terms of the Drugs and Drug Trafficking Act,³⁹⁶ “*deal in*” in relation to a drug includes performing any act in connection with the trans-shipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug.

In the case of *Nomgquibelo Cynthia Mose and Minister of Education, Western Cape and Others*,³⁹⁷ the learner in this case was selling dagga to other learners at school, whilst in a school uniform. The governing body, after a fact-finding hearing, recommended his expulsion to the HOD. The HOD, after considering the recommendation of the school, expelled the learner. The learner lodged a juridical review. The court dismissed the application and the learner was expelled for selling dagga to other learners.³⁹⁸

Therefore, learners who are “*dealing in*” drugs; learners who are not making use of the assistance offered to them; or learners who do not change their drug-related ways after being offered assistance will face harsh disciplinary action.³⁹⁹

3.3.4 Evaluation of section 8A of SASA and its regulations

At first glance, section 8A of SASA seems to be clear, but is not. It creates an unnecessary misunderstanding of search and seizure and drug testing.

Section 8A(2) makes use of the words “*search any group of learners or the property of a group of learners*”. The implication of this phrase is that a search can only be done on a group of learners. This phrase delays the eradication of drug use in schools, or the possession of dangerous objects.

³⁹⁶ Drug and Drug Trafficking Act 140/1992:s 1.

³⁹⁷ *Nomgquibelo Cynthia Mose v Minister of Education in the Western Cape-Department of Education and Others*, Cape of Good Hope Provincial High Court. Case No 13018/08.

³⁹⁸ *Nomgquibelo Cynthia Mose v Minister of Education in the Western Cape-Department of Education and Others*:22.

³⁹⁹ This became evident in the above case of *Nomgquibelo Cynthia Mose v Minister of Education in the Western Cape* where the Western Cape High Court dismissed the application of the learner who was expelled.

The section further implies that a principal cannot search an individual learner, despite the strong and fair suspicion that an illegal drug may be found in the possession of the learner, or that the learner will test positive for drug use. The reference to the word “*group*” places unnecessary limitation on the part of school authorities.

If there is a fair and reasonable suspicion against an individual learner, why should a search be conducted on a “*group of learners*”? In inserting the word “*group*”, the legislator failed to bear in mind the objective of section 8A, which is to assist the learner who is a victim of dependency.

The phrase “*group of learners*”, as used in section 8A(2), may hamper the learning and teaching process, if compared to a search of the suspected individual learner or learners. What is the rationale for limiting the search and urine test to “*a group of learners*” and not an individual who is reasonably and fairly suspected of being in possession of, or will test positive for the use of illegal drugs?

Section 8A of SASA and the regulations promulgated under it do not incorporate the role of the Department of Education in eliminating drug-related misconduct in schools and the possession of illegal substances.

In addition, the SAHRC⁴⁰⁰ suggested that the use of the provision, section 8A(2), could damage the trust relationship between educators and learners.

In South Africa, there is already a shortage of teachers, and consequently classrooms are often overcrowded.⁴⁰¹ Therefore, to expect principals and educators (delegates) to conduct search and seizure will shift their focus from performing their core responsibilities; thus, they will be expected to perform

⁴⁰⁰ SAHRC 2007:5.

⁴⁰¹ <http://www.news24.com/SouthAfrica/Politics/Overcrowding-at-6-000-schools-20080113>.
31/01/2015.

duties that are outside their employment contract and the Employment of Educators Act 76 of 1998.⁴⁰²

3.4 SAFETY IN PUBLIC SCHOOLS

3.4.1 Introduction

A safe school is a school that is free of danger and where there is an absence of possible harm, a place where non-educators, educators and learners may work, teach and learn without fear of ridicule, intimidation, harassment, humiliation, or violence.⁴⁰³ In general, schools should be orderly places in which children and young people, as well as teachers and other education workers, feel safe.⁴⁰⁴ Carrying knives, guns and other weapons underline the extent of violence and crime experienced in South African communities which generally impacts negatively on education and what happens in schools, in particular.⁴⁰⁵ Bester⁴⁰⁶ found that the main cause of violence is academic tension, not the repercussions for behaviour and violence modelled by society.

What we do in our schools on a day-to-day basis in regard to discipline may be related to serious crime and violence. By implementing comprehensive programmes that improve the school climate and reduce minor disruptions, schools may be able to reduce the risk of more serious incidents.⁴⁰⁷ Thus, day-to-day disruptions and serious violence are in some way related.⁴⁰⁸

⁴⁰² SAHRC 2007:5.

⁴⁰³ Prinsloo 2005:5.

⁴⁰⁴ ETUCE 2010:3.

⁴⁰⁵ Mncube and Harber 2013:1.

⁴⁰⁶ Bester and Du Plessis 2010:209.

⁴⁰⁷ Skiba, Boone Fontanini, Wu, Strussell, Indiana Education Policy Centre and Peterson:5-10

⁴⁰⁸ Skiba *ea*:7.

There is no single strategy which can keep South African schools safe, rather, the most effective programmes are comprehensive, applying an array of strategies to promote a safe school climate and respond to disruption.⁴⁰⁹

Surveillance cameras, metal detectors and the most widely used electronic approaches to security could help to some extent to bring safety in schools.⁴¹⁰ However, Skiba⁴¹¹ holds the view that preventive programmes, such as bullying prevention, peer mediation or anger management have far more effective results than technology-based fixes such as metal detectors or video surveillance cameras. Mayer⁴¹² explained that the psychological impact of security strategies is also important to consider and argued that preliminary data suggests that metal detectors may create more disorder and fear than not.

A number of conflict resolution or violence curricula have documented promising changes in learners' attitude and behaviour.⁴¹³ Peer mediation appears to be a promising tool that can help teach learners methods to settle their conflict without resorting to violence.⁴¹⁴

The most frequently adopted circumscribed violence reduction programme, counselling, testing, coaching, and/or training are provided to promote individual behaviour change with respect to cooperative, pro-social, and peaceful strategies to resolve conflicts.⁴¹⁵

When violent incidents occur in schools, they obstruct teaching and have a malign influence on the working environment of teachers and the quality of learning of pupils.⁴¹⁶ This further implies that educators spend most of their time focusing on solving problems associated with school violence, instead of

⁴⁰⁹ Skiba *ea*:9.

⁴¹⁰ Greene 2005:239.

⁴¹¹ Skiba *ea*:10.

⁴¹² Mayer and Leone 1999:333.

⁴¹³ Skiba *ea*:12.

⁴¹⁴ Skiba *ea*:12.

⁴¹⁵ Gottfredson and Gottfredson 2002:3-35.

⁴¹⁶ Gottfredson and Gottfredson 2002:3.

focusing on effective teaching and learning.⁴¹⁷ Whilst occurrences of most serious violence remain low, any violent incident can be distressing both for those directly involved and for those who witness it.⁴¹⁸

Violence in schools has received widespread media coverage and clearly impacts negatively on the physical and mental health of learners.⁴¹⁹ A video surfaced in 2014 that shows a pupil (in a school uniform) at Sizimele High School in Dannhauser, KwaZulu-Natal being murdered in full view of other pupils at the school.⁴²⁰ The attack happened after pupils attended their morning assembly. It transpired that learners were carrying dangerous weapons at school, including knobkieries and sticks, and they fought and consequently the victim was murdered.⁴²¹ For instance, 16% of Grade 8 to 11 learners reported having been threatened by a weapon such as a gun, knife, panga or knobkierie on school property.⁴²²

In the United States, from 1 July 2010 to 10 June 2011, there were 31 school-associated violent deaths in elementary and secondary school.⁴²³ In South Africa, the Western Cape Education Department had to temporarily close 14 schools in Manenberg because of an increase in gang violence.⁴²⁴ Schools exist within and are connected to local communities, where effects of gang activity, access to guns, and neighbourhood violence can be introduced into schools.⁴²⁵ This is how violence has invaded South African schools. According to media reports, bullets were fired into a classroom at one school and two gang members

⁴¹⁷ Ncontsha and Shumba 2013:1.

⁴¹⁸ Gottfredson and Gottfredson 2002:3.

⁴¹⁹ Department of Education Action Plan 2014:159.

⁴²⁰ <http://www.2oceanvibe.com/2013/10/30/pupil-murdered-in-front-of-school-mates-in-kzn.video>. 14/06/2014.

⁴²¹ <http://www.2oceanvibe.com/2013/10/30/pupil-murdered-in-front-of-school-mates-in-kzn.video>. 14/06/2014.

⁴²² National Planning Commission 2011:159.

⁴²³ [http://nces.ed.gov/fasfacts/display.asp?id=49.national centre for education](http://nces.ed.gov/fasfacts/display.asp?id=49.national%20centre%20for%20education) statistics. 03/06/2014.

⁴²⁴ <http://mg.co.za/article/2013-08-14-fourteen-cape-town-schools>. 03/06/2014.

⁴²⁵ Mayer and Furlong 2010:22.

entered the premises of another school.⁴²⁶ The safety of educators and learners is under threat.⁴²⁷

Clearly, managing gun access by youths is a nation, state and community level challenge far beyond the authority of schools.⁴²⁸ The availability of guns is spreading among young people, despite the prohibition of possession of a firearm unless a person holds a license, permit or authorisation.⁴²⁹

In this regard, section 61(a) of SASA provides that:

The Minister may make regulations to provide for safety measures at public and independent schools.

3.4.2 Violence free public schools

To prevent similar occurrences to the incidents mentioned above, the Minister of Education promulgated Regulations for Safety Measures at public schools.⁴³⁰ All learners have the right to learn in a safe and protective school environment. Preventing violence in schools can improve the learning environment and the academic performance of learners and educators.⁴³¹ School violence prevention programmes are most likely to be effective when they are rigorously evaluated and reinforced by community-wide prevention activities that schools, the community, learners, organisations, and families have strategically planned, implemented, and evaluated.⁴³²

⁴²⁶ <http://mg.co.za/article/2013-08-14-fourteen-cape-town-schools>. 03/06/2014.

⁴²⁷ <http://mg.co.za/article/2013-08-14-fourteen-cape-town-schools>. 03/06/2014.

⁴²⁸ Mayer and Furlong 2010:22.

⁴²⁹ Firearms Control Act 60/200:s 3.

⁴³⁰ GN 1040/2001.

⁴³¹ <http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/tools.html>. 14/10/2014.

⁴³² <http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/tools.html>. 14/10/2014.

Paragraph 4(1) of the Regulations for Safety Measures at Public Schools provides that all public schools are declared drug free and dangerous free zones.⁴³³

The Regulations define dangerous objects as:

(a) any explosive material or device;

(b) any firearm or gas weapon;

(c) any article, object or instrument that may be employed to cause bodily harm to a person or damage to property, or to render a person temporarily paralysed or unconscious; or

(d) any object that the Minister may, by notice in the Gazette, declare to be a dangerous object for the purposes of these regulations.

No person may carry any dangerous object on school premises.⁴³⁴ No person may cause any form of violence or disturbance that can negatively impact on any school activities.⁴³⁵ No person may wittingly condone, connive in, hide, abet someone in, or encourage the possession of dangerous objects, or refuse, fail or neglect to report the sighting or presence of any dangerous object to the principal or the Police Services as soon as possible.⁴³⁶ No person may directly or indirectly cause harm to anyone who exposes a person who is trying to hamper the prevention of dangerous activities or the prevention of the presence of dangerous objects.⁴³⁷

Public schools must cooperate with police stations to ensure that visible policing is present during all sports and cultural events at the schools.⁴³⁸ This implies that

⁴³³ GN 1040/2001.

⁴³⁴ GN 1040/2001:para 4(2)(b).

⁴³⁵ GN 1040/2001:4(2)(f).

⁴³⁶ GN 1040/2001:4(2)(g).

⁴³⁷ GN 1040/2001:4(2)(h).

⁴³⁸ GN1040/2001:9(3).

public schools must take reasonable measures to ensure the safety of learners during a school activity.⁴³⁹

The Regulations for Safety Measures at Public Schools⁴⁴⁰ do not provide possible sanctions to be imposed or steps to be taken if a learner contravenes the Regulations. The school governing bodies have to use their discretion in this regard.

3.4.3 Action plans to counter threats of violence in schools

Paragraph 9(5) of the Regulations for Safety Measures at Public Schools⁴⁴¹ provides that:

Schools must develop action plans to counter threats of violence that could have a negative impact on school activities, and to implement regulation 4(1).

In terms of the provisions cited above, a school is solely responsible for developing action plans to counter threats of violence. This responsibility is practically impossible for some schools. It cannot simply be assumed that all schools have the necessary capacity to develop action plans to counter threats of violence. These provisions place an unrealistic responsibility on schools that do not have the capacity.

Furthermore, the Regulations do not guide schools on how to develop such an action plan to counter threats of violence, what it contents should be, and who should be involved in the process. Therefore, there is a need for the legislator to demand that cooperative governance and intergovernmental relations become a reality among the government departments and entities, particularly in the

⁴³⁹ GN1040/2001:8A(2).

⁴⁴⁰ GN 1040/2001.

⁴⁴¹ 1040/2001.

context of school discipline, to draft action plans to counter threats of violence and to ensure that these plans are implemented.⁴⁴²

⁴⁴² In this instance, the Police Services need to play a role in developing the Action Plan to Counter Threats of Violence. Also see para 2.3 for a discussion on Cooperative Governance Intergovernmental Relations.

CHAPTER 4

EVALUATION OF LEGISLATIVE PROVISIONS ON THE SUSPENSION AND EXPULSION OF LEARNERS FROM A PUBLIC SCHOOL

4.1 INTRODUCTION

In this chapter, the study will evaluate the legislative provisions with regard to school discipline, particularly suspension and expulsion as sanctions to enforce discipline in schools.

In many instances, school governing bodies, after finding a learner guilty of committing a serious misconduct, suspend and forward recommendations in terms of SASA for the expulsion of such a learner.⁴⁴³ This chapter will evaluate the existing legislative provisions with regard to suspension and expulsion, and determine whether these provide sufficient guidance to the stakeholders.

For instance, it is a topical issue whether the school governing body can suspend a learner and simultaneously recommend his/her expulsion to the HOD. Section (1E)⁴⁴⁴ of SASA allows suspension, together with a recommendation for expulsion of a learner, whereas section 9(1C) of SASA implies a different view. In practice, some school governing bodies are not certain what the correct procedure is because the legislation is not clear on this point.

Another challenge, experienced by school governing bodies in their efforts to establish and maintain school discipline, is HODs' failure to finalise recommendations for expulsion within the legislative time frames.⁴⁴⁵ SASA is explicit that an HOD must consider the recommendation by the governing body

⁴⁴³ See SASA:s 9(1C)(b).

⁴⁴⁴ SASA.

⁴⁴⁵ *George Randell Primary School v MEC for Department of Education, Eastern Cape Province and Others* (663/09) [2010] ZAECBHC 17 (2 November 2010):5 and 9.

and decide whether or not to expel a learner within 14 days of receiving such recommendation.⁴⁴⁶ However, the legislator does not stipulate what should happen if the HOD does not finalise the recommendation for expulsion within the prescribed time frame.⁴⁴⁷

Also, the current legislation does not afford the aggrieved school governing body the right to lodge an appeal against an HOD's decision pertaining to the recommendation for expulsion. Therefore, the unsatisfied governing body has to take the matter to court for resolution. This could be exigent for many schools which do not have financial muscle to approach judiciary system and will be forced to adopt the decision of the HOD.

There are no guidelines stipulating what the HOD should take into account in deciding whether to expel a learner or not, which opens the door for unreasonable and subjective decision-making.⁴⁴⁸ In the case of *Queens College Boys High School v MEC, Department of Education, Eastern Cape*, the school governing body stated that:⁴⁴⁹

An analysis of reasons for the decisions of the Head of Department viewed cumulatively confirmed institutional bias against approving recommendations for expulsion which indicated that Head of Department had abdicated her responsibility to apply her mind to the facts.

Some schools have therefore approached the courts to review the decisions of HODs not to expel learners, and, in all instances, have been successful.⁴⁵⁰

⁴⁴⁶ SASA:s 9(1D).

⁴⁴⁷ Reyneke 2013a:173.

⁴⁴⁸ Reyneke 2013a:544.

⁴⁴⁹ *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others*. Eastern Cape Provincial Division, unreported case 454/08: para 5.

⁴⁵⁰ Reyneke 2013: 174: *Governing Body of Tafelberg School v Head of Western Cape Education Department* [1999] 4 All SA 573 (c); *Maritzburg College v Dlamini and Others* [2005] JOL 15075 N; *Pearson High School v Head of Department, Eastern Cape Province, and Others* [1999] JOL 5517 (Ck); *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* – Eastern Cape Provincial Division: unreported case 454/08;

The Constitution⁴⁵¹ entrenched the right to a basic education; this right, like any other right in the Bill of Rights, may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors contemplated in section 36(11) of the Constitution.⁴⁵²

In the case of *George Randell Primary School v MEC Education Department Eastern Cape*,⁴⁵³ the High Court held that:

it may well be so that the HOD had good intentions of giving protection to the third respondent, a 13-year-old child, but the circumstances of this case clearly called for the limitation of the rights of the learner in terms of sections 28 and 29 of the Constitution to the extent of the infractions of which he was found guilty.

Section 9 of SASA⁴⁵⁴ is the law of general application and it permits the school governing body and the HOD to exclude a learner from a public school if his/her conduct disrupts learning and teaching operations. A learner, by his/her own misconduct, may forfeit his/her legitimate entitlement to attend the public school in terms of section 9 of SASA. The continued right to attend school is dependent on the learner's behaviour during the time of schooling.⁴⁵⁵ The governing body may suspend, and the HOD can legitimately deprive a learner of the opportunity to attend the school on a disciplinary basis, provided that the due process principle is observed.

St Michaels School for Girls and Others v The Head of the Free State Education Department and Others – Free State Provincial Division: unreported case 5597/2008.

⁴⁵¹ Constitution 1996:s 29(1).

⁴⁵² Constitution 1996.

⁴⁵³ *George Randell Primary School v MEC for Department of Education, Eastern Cape Province and Others* (663/09) [2010] ZAECBHC 17 (2 November 2010):10.

⁴⁵⁴ SASA:s 9(1) and (2).

⁴⁵⁵ SASA authorises expulsion in the case of serious misconduct.

In *Mose v Minister of Education, the Western Cape Department of Education and Others*, the Western Cape High Court held that:⁴⁵⁶

Learners and in particular learners at high school institutions cannot place in jeopardy his or her fellow learner's equally important right to proper basic education in a safe environment by indulging in serious misconduct, like selling and abusing illegal drugs at school premises. With rights come responsibilities. Learners and more importantly, must appreciate and understand that misconduct, like in open society, attracts sanctions and in appropriate circumstances, may include expulsion.

The expulsion of a learner does not imply that the learner cannot attend any other school, but only implies that the learner cannot return to a particular school.⁴⁵⁷ If a learner, who is not subject to compulsory attendance, is expelled from a school the parents of the learner may make alternative arrangements for his/her placement at another school and may request the assistance of the provincial Education Department.⁴⁵⁸

Suspensions and expulsions are legitimate sanctions and learners should not think that they cannot be suspended or expelled simply because it is their first offence or infraction of a code of conduct, rule or policy.⁴⁵⁹ Upon checking section 8 and 9,⁴⁶⁰ it transpires that the governing body is expected to resort to suspension and recommendation for expulsion judiciously and sparingly, primarily in response to serious misconduct.

In UK, Department of Education provided guidance to schools that whilst expulsion may still be an appropriate sanction, schools should take account of any contributing factors that are identified after an incident of poor behaviour has

⁴⁵⁶ *Mose v Minister of Education, the Western Cape Department of Education, Gabru and Others* [2008], ZAWCHHC 56:21.

⁴⁵⁷ Reyneke 2013a:178.

⁴⁵⁸ Western Cape PN 365/2011:para 10(2).

⁴⁵⁹ GN 776/1998:7.6.

⁴⁶⁰ SASA.

occurred.⁴⁶¹ For example, where it comes to light that a learner has suffered bereavement, has mental health issues or has been subject to bullying.⁴⁶²

In light of the above, it is critical for this study to evaluate the legislative provisions with regard to school discipline, particularly regarding suspension and expulsion as sanctions to enforce school discipline.

4.2 SUSPENSION OF A LEARNER PRIOR TO A DISCIPLINARY PROCEEDING AS A PRECAUTIONARY MEASURE

Ndofirepi⁴⁶³ aptly stated that suspension is a punishment measure employed in South African schools. It appears as if suspension and expulsion are used to rid schools of learners who are perceived to be troublemakers.⁴⁶⁴ As a general rule, a notice and a disciplinary hearing should precede the suspension of a learner from a school.⁴⁶⁵ However, a learner whose presence poses a continuing danger to persons or property, or an ongoing threat of disrupting the academic process may immediately be suspended from a school, provided that the learner has been granted a reasonable opportunity to make representation to it in relation to such a suspension.⁴⁶⁶

Section 9(1) of SASA provides that:

The governing body may, on reasonable grounds and as a precautionary measure, suspend a learner who is suspected of serious misconduct⁴⁶⁷ from attending school,

⁴⁶¹ UK Department of Education 2012:6.

⁴⁶² UK Department of Education 2012:6.

⁴⁶³ Ndofirepi, Makaye and Ndofirepi 2012:86.

⁴⁶⁴ Skiba, Eckes and Brown 2009:1077.

⁴⁶⁵ Goss *et al.* V. Lopes Supreme Court of United States 419 U.S. 565. 1975.

⁴⁶⁶ SASA:s 9(1).

⁴⁶⁷ This is a lists of serious misconducts, according to the Provincial Notices of the respective Provincial Departments of Education: A learner at school who-

(a) used or had in his or her possession or sells or distributes a dangerous object, alcoholic liquor or illegal drugs; (b) commits an act of bullying, assault, theft, arson or malicious damage to property; (c) commits an act of gross insubordination or engages in immoral conduct; (d) is in possession of or uses any unauthorised copy of a test or examination question paper, or cheats, distributes, trades,

but may only enforce such suspension after the learner has been granted a reasonable opportunity to make representations to it in relation to such suspension.

In terms of the above cited provisions, school governing bodies have the legislative power to suspend a learner prior to the disciplinary proceedings, as a precautionary measure for allegedly committing a serious misconduct.⁴⁶⁸ The governing body of a public school must always promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school, and secure their safety.⁴⁶⁹

The grounds that the school governing body may rely on when imposing preliminary suspension as a precautionary measure are as follows: If there is a possibility that the learner's presence at the school will lead to disruption, injury to other learners or damage to property; or, if there is a reasonable prospect that the presence of the learner will prejudice the disciplinary proceedings because he/she will tamper with evidence or intimidate witnesses.⁴⁷⁰

However, the suspension of a learner prior to a disciplinary hearing must not be a standard practice in every case.⁴⁷¹ This form of suspension is only reserved for cases where the learner is suspected of committing a serious misconduct. The school governing body must however not make preliminary suspension mandatory for suspicion of every serious misconduct. Each case must be determined on its merits.

bribes or attempts to bribe any person in respect of any test or examination, with the intention of enabling himself or herself, or any other person, to gain an unfair advantage; (e) uses hate speech, makes himself or herself guilty of racism, sexism, sexual harassment, possesses or distributes pornographic material or engages in any act of public indecency; (f) endangers the safety or threatens fellow learners or educators, disrupts the school programme or violates the rights of others; (g) falsely identifies himself or herself, or knowingly and wilfully supplies false information or falsifies documentation to gain an unfair advantage at school; (h) has repeatedly been found guilty of transgressing the learner's code of conduct; or (i) conducts himself or herself, in the opinion of the governing body, in a disgraceful, improper or unbecoming manner, may be guilty of serious misconduct.

⁴⁶⁸ Deacon and Merabe 2015:s 9(1) note.

⁴⁶⁹ SASA:s 20(1)(a).

⁴⁷⁰ Deacon and Merabe:s 9(1) note.

⁴⁷¹ Deacon and Merabe:s 9(1) note.

When the governing body suspends a learner in terms of section 9(1), as a precautionary measure, the governing body must give such a learner a reasonable opportunity to make representations on why he/she should not be suspended as a precautionary measure.⁴⁷² Thereafter, the governing body must consider and give weight to the representation made and decide whether to suspend the learner or not. If the governing body suspends a learner without giving him/her the opportunity to make a representation, such suspension will become unlawful and may be one of the grounds for the HOD to decline expulsion of such a learner in relation to the misconduct in question.

Should the governing body decide to suspend a learner as a precautionary measure, and after giving the learner a reasonable opportunity to make representation to it in relation to such suspension, the governing body must conduct disciplinary proceedings within seven school days after the suspension of such a learner.⁴⁷³ It is therefore implied that the suspension of a learner as a precautionary measure should be confined to seven school days,⁴⁷⁴ unless the school governing body requests the HOD for approval for continuation of the suspension of such a learner.⁴⁷⁵ This means once the learner is suspended as a precautionary measure, the governing body is compelled by the legislator to conduct the disciplinary proceedings within seven school days after the suspension of such a learner.

It needs to be pointed out that currently the legislator does not prescribe a time frame to the governing body to conduct disciplinary proceedings against a learner who is not on suspension. There is also a need to provide school governing bodies with the time frame to institute disciplinary proceedings against a learner, who is not on suspension, as a precautionary measure.

⁴⁷² Deacon and Merabe:s 9(1) note.

⁴⁷³ SASA:s 9(1A).

⁴⁷⁴ SASA:s 9(1A).

⁴⁷⁵ SASA:s 9(1B).

Moreover, section 9(1) of SASA appears to be unreasonable - its unreasonableness lies in the following: it requires every learner who is suspected of serious misconduct to make representation. Not all learners in lower grades in primary or special schools have the mental capability to make meaningful representations. This provision does not take into account the age differences of learners, their maturity and stage of development, gender, background, or any other relevant characteristics of that child.⁴⁷⁶

Further, section 9(1) of SASA does not request the school governing body to consider and apply its mind to the representation made by the learner. This means SASA only requires the school governing body to grant the learner a reasonable opportunity to make representations in relation to suspension, but does not require the school governing body to take such representation into account when taking a decision.

Section 9(1B) of SASA provides that if disciplinary proceedings are not conducted within seven school days after the suspension of a learner, the governing body must obtain the approval of the HOD for continuation of the suspension of such a learner.⁴⁷⁷ The legislation does not guide the stakeholder as to what may constitute valid reasons for not conducting disciplinary proceedings within seven school days. What if the reasons for not conducting the disciplinary proceedings within the stipulated time frame are attributable to the actions of the school governing body? All these issues are not addressed by the legislator.

In section 9(1B), the use of the phrase “must obtain the approval of the Head of Department for the continuation of the suspension” is ambiguous. Firstly, this provision guarantees the approval of the HOD. Secondly, the provision does not guide the school governing body on how to obtain the approval of the HOD. Thirdly, the provision does not give the HOD the power to consider the request/application and to apply his/ her mind.

⁴⁷⁶ See Children’s Act 35/2005:s 7(1)(g).

⁴⁷⁷ SASA:s 9(1B).

In relation to section 9(1B), amendments should be effected to state that the governing body should also furnish the HOD with reasons for not conducting the disciplinary proceedings within seven school days - as contemplated by section 9(1A).⁴⁷⁸ Also this subsection should be clear in stating that the school governing body must “apply” for the approval of the HOD, and the HOD must consider such an application. It should also provide a time frame for the HOD to consider and finalise the application for continuation of the suspension. Another point left unaddressed with regard to section 9(1B) is whether the HOD needs to afford the school governing body a reasonable opportunity to submit representation if he/she is going to take a decision that will materially or adversely affect the expectations or rights of the school governing body.⁴⁷⁹

When the HOD considers a section 9(1B) request, he/she must take into account whether the school governing body’s failure to conduct the proceedings within seven school days was arbitrary, capricious, on an abuse of discretion, or upon unlawful procedure.⁴⁸⁰ The HOD must also take into account the best interests of the learner involved; other learners’ right to education may also not be infringed unreasonably.⁴⁸¹

The governing body is not permitted to continue with the suspension of a learner without the approval of the HOD. However, the latter should not unreasonably delay responding to the request of the governing body. The HOD must deal with the request as expeditiously as possible because there is often a possibility of violating the rights of the involved learner and other learners’ right to basic education.⁴⁸²

The legislator does not guide the school governing on what to do if the HOD turns down its request for the continuation of the suspension of the learner. The legislation is silent on whether the school governing body must accept the HOD’s

⁴⁷⁸ SASA.

⁴⁷⁹ See Promotion of Administrative Justice Act 3 of 2000:s 3.

⁴⁸⁰ See PAJA 3/2000: s 6(2)(e).

⁴⁸¹ Deacon and Merabe:s 9(1) note.

⁴⁸² Constitution 1996:s 29(1).

decision as final, or appeal to the MEC, or apply to the High Court for an order to force the HOD to grant his/her approval. All these issues are not addressed by the legislator.

4.3 SUSPENSION OR RECOMMENDATION FOR EXPULSION OF A LEARNER FOLLOWING DISCIPLINARY PROCEEDINGS

In terms of section 9(1C)(a) of SASA,⁴⁸³ if a learner is found guilty of serious misconduct during the disciplinary proceedings, a governing body may impose the suspension of such a learner for a period not longer than seven school days.⁴⁸⁴ A learner, who was suspended prior to the disciplinary proceedings as a precautionary measure, can also be suspended for another period not longer than seven school days, if such a learner is found guilty of a serious misconduct during the disciplinary proceedings.⁴⁸⁵ In such a case, a learner would have been suspended for a period of 14 school days. This period of suspension is legitimate in terms of the prescripts of SASA.⁴⁸⁶ In terms of section 9(1C) of SASA, there are three alternatives available to the school governing body if a learner is found guilty of serious misconduct. These alternatives are either to:

1. *Impose the suspension of such learner for a period not longer than seven school days;*⁴⁸⁷ or
2. *Impose any other sanction contemplated in the code of conduct of the public school;*⁴⁸⁸ or
3. *Make a recommendation to the Head of Department to expel such a learner from the public school.*⁴⁸⁹

⁴⁸³ SASA.

⁴⁸⁴ SASA:s 9(1C)(a).

⁴⁸⁵ SASA:s 9(1) and 9(1C)(a).

⁴⁸⁶ SASA.

⁴⁸⁷ SASA:s 9(1C)(a).

⁴⁸⁸ SASA:s 9(1C)(a).

⁴⁸⁹ SASA:s 9(1C)(b).

In section 9(1C) the legislator made use of the word “or” which implies that the school governing body has the discretion to impose only one of these sanctions. That means, the school governing body cannot impose a sanction of suspension on a learner and also recommend for expulsion. The school governing body must impose only one sanction, either suspension, or allow the learner at school and recommend for his/her expulsion. Expulsion as a sanction lies with the discretion of the HOD whether to impose it or not.⁴⁹⁰

In practice, school governing bodies interpret SASA differently. They suspend a learner at the end of disciplinary proceedings for a period not longer than seven school days and also make a recommendation to the HOD to expel such a learner from the school. Section 9(1C) uses “or” between suspension and recommendation to the HOD to expel such a learner from the school. This implies that the school governing body should choose only one sanction it wants to impose on the learner who is found guilty of a serious misconduct. Had the legislator intended to allow suspension plus recommendation to the HOD to expel the learner, the legislator should not have used the word “or” in section 9(1C), therefore making it appear as if the school governing should choose only one option. If the legislator intended suspension and recommendation to the HOD to expel the learner, then the appropriate words to be used would be “and/or”.

Furthermore, paragraph 3(1) of the Free State Regulations Regarding the Discipline of Learners⁴⁹¹ also makes use of the word “or” between suspension and expulsion, therefore implying that the school governing body cannot apply both of them.

Section 9(1C) of SASA may jeopardise the safety of other learners and staff members of a school when dealing with a learner who poses a danger to the safety of others because in line with this subsection the school governing body should not suspend the learner and recommend to the HOD to expel such a

⁴⁹⁰ SASA:s 9(2)(a).

⁴⁹¹ PN: 156/2001.

learner. There are circumstances which call for suspension as a precautionary measure and suspension at the disciplinary proceedings, coupled with a recommendation to the HOD to expel the learner.

Another subsection in SASA contradicts section 9(1C). In terms of section 9(1E) of SASA, a governing body may suspend or extend the suspension of a learner for a period not longer than 14 days, pending the decision of the HOD whether or not to expel such a learner from a public school. This means the school governing body can suspend and recommend to the HOD to expel such a learner. Under section 9(1E), the HOD may decide to expel the same learner for the misconduct he/she has been duly suspended for in terms of section 9(1C)(a).

According to the doctrine of *double jeopardy*,⁴⁹² once the school governing body imposes suspension on the learner for a particular misconduct, the HOD cannot impose expulsion or any other sanctions on the same learner for the same misconduct he/she was suspended for. Although this principle is mostly raised in criminal and labour law proceedings, in education law it still does not sound correct for the school governing to sanction a learner to suspension and the HOD also to sanction him/her to expulsion for the same misconduct.

There is an embedded principle in the South African legal system that no person may be punished twice for the same offence.⁴⁹³ In this regard, section 9(1E) of SASA does not take into account the best interests of learners as it allows suspension for a period not longer than 14 days pending the decision of the HOD whether or not to expel such a learner. This means that the HOD is given the power to expel a learner who has already been suspended by the school governing body for the same misconduct.

⁴⁹² Double jeopardy is a procedural defence that forbids a defendant from being tried again on the same or similar charges following a legitimate acquittal or conviction. See <https://wikipedia.org/?t>

⁴⁹³ http://www.labour.co.za/view_item.asp?id=1378. 16/06/2015.

4.4 RECOMMENDATION TO THE HOD TO EXPEL A LEARNER FROM A PUBLIC SCHOOL

A learner at a public school may be expelled only by the HOD if found guilty of serious misconduct after fair disciplinary proceedings.⁴⁹⁴ Only the HOD or a person delegated by him/her has the authority to expel a learner from a school.⁴⁹⁵ With regard to expulsion, a governing body may only recommend to the HOD to expel a learner; it should not itself expel such learner from a public school.⁴⁹⁶

The recommendation by the school governing body to the HOD to expel a learner is a prerequisite and an indispensable element for the expulsion of a learner from a public school.⁴⁹⁷ The HOD cannot of his/her own accord expel a learner from a public school without a recommendation. In accordance with the administrative law principles, the HOD's power to expel learners under section 9 of SASA is dependent on the preconditions of a recommendation by the governing body.⁴⁹⁸ This is in line with the principle that state functionaries may only do what the law empowers them to do.⁴⁹⁹

It must be explicit from the papers that the governing body requests the HOD to expel the learner concerned. The governing body may not merely forward the disciplinary documents (such as the charge against the learner, the letter inviting the learner to the hearing, the minutes of the hearing, and the letter communicating the outcome of the hearing) to the HOD without clearly recommending to him/her to expel the learner.

⁴⁹⁴ SASA:s 9(2).

⁴⁹⁵ Deacon and Merabe:s 9(1E) note.

⁴⁹⁶ See SASA:9(1C)(b); and s 9(2).

⁴⁹⁷ See *Kimberley Junior School and Another v Head of the Northern Cape Department of Education and Others* [2009] 4 All SA 135 (SCA):12.

⁴⁹⁸ *Kimberley Junior School and Another v Head of the Northern Cape Department of Education and Others* [2009] 4 All SA 135 (SCA):12.

⁴⁹⁹ See *Head of Department: Department of Education, Free State Province v Welkom High School and Another, Head of Department: Department of Education, Free State Province v Harmony High School and Another* (766/2011, 767/2011) [2012] ZASCA 150; 2012 (6) SA 525 (SCA); [2012] 4 All SA 614 (SCA) (28 September 2012):1.

Once the governing body has made the recommendation, the HOD must consider it and must decide whether or not to expel the learner within 14 days of receiving such a recommendation.⁵⁰⁰ In the case of *Maritzburg College v Dlamini NO and Others*⁵⁰¹ the school brought an application to court against the HOD of the KwaZulu-Natal Department of Education for delaying in responding to its recommendation to expel two learners. In the founding affidavit, the school related the following history of delay by the HOD to respond to their recommendation for expulsion:

- (i) in the case of another learner, the school apparently waited a year for a decision from the HOD.*
- (ii) in the case of one pupil, the governing body recommended for expulsion and allegedly waited for 21 months for a response from the HOD.*
- (ii) in yet another matter, 11 months apparently lapsed without response from the HOD on a recommendation for expulsion.*

In addressing the tendency of the HOD to delay in responding to a recommendation for the expulsion of a learner, the court stated that:⁵⁰²

I find it disturbing (to put it mildly) that a public official had to be galvanized into action to do his duty only when served with a court application. Even more disturbing is HOD's attitude as spelt out in paragraph 11 of his answering affidavit that there is "... no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me". HOD then goes on in the paragraph to state that to expect him to make a decision within 2 months was "utterly unreasonable ". This attitude not only ignores the obligations of the Governing Bodies to maintain discipline and good standards at the school, but more importantly totally disregards the rights of the pupils who stand in the shadow of expulsion. They have a right to know expeditiously whether they are going to be expelled so that they may be taken up in another school.

⁵⁰⁰ Act 84/1996:s 9(1D).

⁵⁰¹ [2005] JOL 15075 (N).

⁵⁰² *Maritzburg College v Dlamini NO and Others* [2005] JOL 15075(N).

The above statement of the court indicates that failure by the HOD to respond expeditiously to a recommendation for expulsion of a learner adversely affects the governing body as they are charged with the maintenance of discipline. It also adversely affects the right of the learner who is waiting for the final outcome of the HOD on the case and other learners at the school as they have a direct interest in the outcome of the recommendation.

The court was shocked by the three instances mentioned above where the pupils had to wait between a year and 21 months for a decision by the HOD on their expulsion. The court indicated its displeasure at the attitude of the HOD of the KwaZulu-Natal Department of Education and forewarned that:

*Consideration must be given in future, where litigants (that is schools) are forced to come to court to compel public servants to carry out their duties where they have failed to do so, that such officials be ordered to pay the costs incurred, personally. There is no justification for taxpayers' money being used to pay legal costs incurred consequent upon a public servant failing to carry out the duties he is obliged to by virtue of his office.*⁵⁰³

The judgement in this case illustrates how serious the court views school discipline and the duty to respond to a recommendation within the stipulated time frame. To avoid a re-occurrence of the delays in responding to recommendations for expulsion, officials must be ordered to pay the costs incurred, personally.

4.4.1 Expulsion of a learner from a school hostel

In terms of section 20 of SASA,⁵⁰⁴ the school governing body must administer and control the school's property and buildings and grounds occupied by the school, including school hostels; but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the MEC or HOD in terms of any law or policy.

⁵⁰³ *Maritzburg College v Dlamini NO & Others* [2005] JOL 15075(N).

⁵⁰⁴ SASA:s 20(1)(g).

In *Tsona v Principal, Victoria Girls High School*,⁵⁰⁵ the court described the word “administer” as it appeared in section 20(1)(g) of SASA, and explained that it is used in a wider sense than merely to maintain the school hostel in a physical sense. Accordingly, the court indicated that the power to administer a school hostel by the governing body would by necessary implication include the power to regulate the good governance of hostels, including the right to formulate rules for the maintenance of good discipline in hostels and the concomitant right to suspend and expel a learner (boarder) who has been found guilty of serious misconduct in terms of the existing hostel rules.⁵⁰⁶

The Provincial Departments of Education constantly are approached by desperate parents of learners who have been suspended or expelled from school hostels. In SASA there is no explicit provision which enables an HOD to deal with the discipline of learners in school hostels.

In *Tshona’s case*, a 16-year-old female learner in Grade 9 was expelled from the school hostel by the governing body of Victoria Girls High School. In determining the matter the court held that:⁵⁰⁷

The expulsion of a learner from a school hostel clearly does not entail the expulsion of the learner from the school and, therefore, does not violate such learner’s right to schooling as enshrined in section 29 of the Constitution of the RSA, 1996.

The power to administer school hostels is vested in the governing body.⁵⁰⁸ Therefore the parent of a suspended or expelled learner from a school hostel must approach the High Court for the appropriate relief. However, approaching the High Court could be costly for parents; it is therefore necessary for the legislator to bestow the powers on the Provincial Department of Education to deal with discipline in school hostels.

⁵⁰⁵ *Tsona v Principal, Victoria Girls High School, and Others* 2007 (5) SA 66 (E).

⁵⁰⁶ *Tshona v Principal, Victoria Girls High School, and Others* 2007 (5) SA 66 (E).

⁵⁰⁷ *Tshona v Principal, Victoria Girls High School, and Others* 2007 (5) SA 66 (E).

⁵⁰⁸ SASA:s 20(1)(g).

4.4.2 Recommendation for expulsion and fair disciplinary procedure

The school governing body must conduct fair disciplinary proceedings before it recommends for expulsion of the learner to the HOD.⁵⁰⁹ If the HOD is dissatisfied with the propriety of the disciplinary procedure, he/she may decline to order expulsion for that reason.⁵¹⁰ Once the HOD accepts the propriety of the procedure, he/she is bound to determine the matter on substantive grounds.⁵¹¹

4.5 ALTERNATIVES AVAILABLE TO THE HOD WHEN CONSIDERING RECOMMENDATION FOR EXPULSION

In terms of section 9 of SASA, the HOD has four alternatives when considering recommendation for expulsion. Firstly, the HOD may decide not to expel the learner; secondly, he/she may decide to expel the learner; thirdly, he/she may impose suitable sanction on the learner; and lastly, the HOD may refer the matter back to the governing body to impose alternative sanction in terms of the code of conduct, other than expulsion.⁵¹²

4.5.1 Decision by the HOD not to expel a learner

Section 9(1D) of SASA⁵¹³ provides that the HOD must consider the recommendation by the governing body, and must decide whether or not to expel a learner within 14 days of receiving such recommendation. This provision gives the HOD the legislative power to decline the expulsion of the learner. The HOD must do so on good cause shown. The HOD's decision must always be lawful,

⁵⁰⁹ SASA:s 9(2)(b).

⁵¹⁰ *Queens College Boys High School v MEC, Department of Education, Eastern Cape Government* (454/08) [2008] ZAECHC 165 (21 October 2008):16.

⁵¹¹ Above: para 16; and see *Head, Western Cape Education Department and others v Governing Body, Point High School and Others* [2008] ZASCA 48; 2008 (5) SA 18 (SCA):10.

⁵¹² SASA:s 9(1D), 9(8) &9(9).

⁵¹³ 84/1996.

reasonable and procedurally fair.⁵¹⁴ In *Queens College Boys High School v MEC, Department of Education, Eastern Cape*,⁵¹⁵ the Eastern Cape High Court held that the HOD, in considering an expulsion recommendation, is required to act reasonably and strike a reasonable equilibrium between the different factors; but the factors themselves are not determinative of any particular equilibrium. As to which equilibrium is the best in the circumstances is left to the HOD.⁵¹⁶

In *George Randell Primary School v the MEC for Department of Education*, the Eastern Cape High Court *obiter dicta* held that the HOD is authorised by law to reject the recommendation.⁵¹⁷

Nevertheless, the HOD cannot decline expulsion without valid reasons and without following the correct procedure. If he/she decides not to expel the learner he/she must give the governing body written reasons why he/she intends not to expel. The school governing should be afforded an opportunity to consider and respond to the reasons.⁵¹⁸ The school governing body has the legislative obligation to establish and maintain good discipline in schools.⁵¹⁹ Therefore, if the HOD is inclined to turn down the school governing body's recommendation to expel a learner, his/her decision must be administratively fair.⁵²⁰ Although an expulsion is an extreme measure for dealing with misconduct, HODs should be

⁵¹⁴ Constitution 1996:s 33(1).

⁵¹⁵ *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* Eastern Cape Provincial Division, unreported case 454/08:11.

⁵¹⁶ Above:11.

⁵¹⁷ *George Randell Primary School v The Member of the Executive Council and Others* [2010] (663/09) ZAECBHC 17:11.

⁵¹⁸ Constitution 108/1996: s 33(2) and Promotion of Administrative Justice Act 3/2000:s 5.

⁵¹⁹ See SASA:s 8(1) and (2).

⁵²⁰ PAJA s 3(2) states that: (2) (a) a fair administrative procedure depends on the circumstances of each case:

- (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (l)—
 - (a) adequate notice of the nature and purpose of the proposed administrative action;
 - (b) a reasonable opportunity to make representations;
 - (c) a clear statement of the administrative action;
 - (d) adequate notice of any right of review or internal appeal, where applicable; and
 - (e) adequate notice of the right to request reasons in terms of section 5.

careful not to overemphasise the right to education of the accused learner to the detriment of overall discipline in a school.⁵²¹

In *Governing Body of Tafelberg School v Head of Western Cape Education Department*,⁵²² the HOD of the Western Cape Department of Education refused the expulsion of a learner; the Western Cape High Court held that the governing body's legitimate interest in and statutory protected obligation to maintain proper discipline at the school was directly and substantially affected by the HOD's decision. Since the current education legislation does not give the governing body the right to appeal the decision of the HOD to the MEC, the aggrieved school's governing body must approach the High Court for appropriate relief.

In addition, in terms of PAJA⁵²³ the court may reverse the decision of the HOD, if it is found to be in error for any of the following reasons:

- (1) *in violation of constitutional provisions;*
- (2) *in excess of the statutory authority or its jurisdiction;*
- (3) *made upon unlawful procedure;*
- (4) *affected by other error of law;*
- (5) *unsupported by substantial evidence, or*
- (6) *arbitrary, or an abuse of discretion.*

4.5.2 Section 9(8) and (9) of SASA

In terms of section 9(8) of SASA, if the HOD decides not to expel a learner as recommended by the governing body, the HOD may, after consultation with the

⁵²¹ Reyneke 2013:178.

⁵²² *Governing Body of Tafelberg School v Head of Western Cape Education Department* [1999] 4 All SA 573 (C):1. In this case, the HOD reinstated a learner without allowing the governing body the opportunity to consider and respond to new representation.

⁵²³ PAJA 3/2000:s 6(2).

governing body, impose a suitable sanction on the learner.⁵²⁴ These provisions contain grey areas. The legislator does not guide the HOD how to consult and on the contents of such consultation.⁵²⁵ Further, the legislator does not stipulate to the HOD the suitable sanctions envisaged by section 9(8) of SASA.

Due to lack of legislative instruments the HOD will impose what he/she subjectively thinks is suitable. The lack of clear legislative guidance elevates the chances of a judicial battle between school governing bodies and Provincial Departments of Education. What the HOD may consider appropriate, the school governing body and fellow learners may consider inappropriate.

Consultation, as contemplated by section 9(8), must precede the decision of the HOD in relation to such recommendation. In the case of *Tafelberg*,⁵²⁶ the court held that the school governing body has an interest in ensuring that discipline at the school is not undermined. The school governing body is burdened with the continued maintenance of good discipline at a school in the face of the HOD's decision that a learner, who has been found guilty of serious misconduct, should not be expelled.⁵²⁷ It is important for the HOD to consult with the governing body before he/she decides not to expel the learner and impose another sanction that he/she considers suitable.

Principles of natural justice and procedurally fair administrative action⁵²⁸ are built into section 9(8) of SASA. If the HOD decides not to expel a learner, such a decision becomes an administrative action which may materially and adversely affect the rights or legitimate expectations of the governing body.⁵²⁹ The school governing body and the HOD must liaise in a spirit of cooperative governance with the mutual object of establishing a purposeful and disciplined school environment.

⁵²⁴ SASA:s 9(8).

⁵²⁵ See Chapter 2.

⁵²⁶ *Governing Body of Tafelberg School v Head of Western Cape Education Department* [1999] 4 All SA 573 (C):page 579.

⁵²⁷ Above:579.

⁵²⁸ PAJA 3/2000:s 3.

⁵²⁹ PAJA 3/2000:s 3(1).

In *Head of Department of Education Free State Province v Welkom High School and Harmony High School*, the Constitution Court stated that:⁵³⁰

The governing body and HOD are organs of state. In terms of section 41 (1)(h) of the Constitution they have an unequivocal obligation to co-operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, coordinating their actions, and avoiding legal proceedings against one another.

Clearly good discipline in schools is a matter of common interest between the school governing bodies and the HODs. In the case of *George Randell Primary School v MEC for Department of Education Eastern Cape and Others*, the court reaffirmed the provisions of section 9(8) and (9) and held that:⁵³¹

It was not open to the HOD to ... avoid effective consultations with the governing body on the decision he took not to expel the learner and refuse to impose a suitable sanction on the learner. The HOD was obliged to impose a suitable sanction or to remit the matter back to the governing body to impose an alternative sanction immediately upon rejecting the recommendation of the governing body.

In this case, the Eastern Cape High Court held that the HOD breached the provisions of section 9 of SASA and the Court thus set aside the decision of the HOD.⁵³²

If the HOD decides to act in terms of section 9(8) or 9(9) of SASA such a decision will adversely affect the rights of the school governing body, and therefore the HOD will have to consult the school governing body and duly consider the discussion or presentation made by the school governing body. When consulting, in line with section 9(8), the HOD should consult with a flexible mind, open to persuasion.

⁵³⁰ *Head of Department of Education, Free State Province v Welkom and Harmony High Schools and Others*:para 141.

⁵³¹ *George Randell Primary School v The MEC of Education Department Eastern Cape Education*:9.

⁵³² Above.

Furthermore, it is important to note that section 9(9)⁵³³ does not demand the HOD to consult with the school governing body should he/she decide to refer the matter back to the governing body to impose an alternative sanction in terms of the code of conduct, other than expulsion. Unlike subsection (8), subsection (9) implies that the HOD does not need to consult if he/she refers the matter back to the governing body to impose a sanction in terms of the school code of conduct. This subsection fails to realise that the reason why the governing body sends a recommendation to the HOD is to rid the school of the learner involved. The HOD's decision to refer the matter back to the school governing body to impose an alternative sanction may adversely affect the legitimate expectation of the school governing body. Therefore, the HOD has to consult the governing body when acting in terms of subsection (9). In addition, section 9(9)⁵³⁴ is open to abuse in cases where the HOD does not want to apply his mind to the matter; he/she will merely refer the matter back to the school governing body to impose an alternative sanction in the code of conduct.

4.5.3 Decision to expel the learner by the HOD

In terms of section 9(1D),⁵³⁵ the HOD may decide to expel a learner from the school within 14 days of receiving such recommendation. The legislator does not guide the governing body about the process that he/she should follow when expelling the learner and the factors to be taken into account.

According to the current education legislation, it is not clear to the HOD whether he/she should afford the learner the opportunity to state his/her case and follow all administrative action decision procedures by giving notice to the learner, the opportunity to state his/her case, and the reasons for the decision. However, it is safe for the HOD to give the involved learner a chance to state his/her case

⁵³³ SASA.

⁵³⁴ SASA.

⁵³⁵ SASA.

before taking a final decision to expel him/her even though the school governing body could have given the learner opportunity to be heard..⁵³⁶

Should the learner be expelled by the HOD, the learner will have the right to lodge an appeal with the MEC within 14 days of receiving the notice of expulsion,⁵³⁷ as a result such an expulsion will be suspended until the MEC gives his/her final decision on the appeal.

A learner who has appealed, must, pending the outcome of the appeal be given access to education in the manner determined by the HOD.⁵³⁸ In terms of section 9(7),⁵³⁹ in determining the manner of attendance, the HOD must take reasonable measures to protect the rights of other learners at the public school and may consider an alternative method of providing education to such a learner. On this point, the Western Cape Regulations⁵⁴⁰ provide that the alternative method of providing education to such a learner may include ensuring that the learner is admitted to another school within the province.

The HOD may also demand supervision of the learner by either the school's principal or departmental officials; depending on the nature of the circumstances of the case, the HOD may order the learner to study at home while educators take work to him/her or isolate the learner from other learners. The purpose for determining the manner of attendance is to protect the very same learner, other learners, and the school's staff and property.

If the MEC upholds the appeal of a learner who has been expelled from a public school, the MEC must ensure that a suitable sanction is imposed on the learner within 14 days of the date on which the appeal was upheld.

Moreover, for the purpose of the imposition of a suitable sanction, the MEC must follow the processes that are followed by the HOD when imposing a suitable

⁵³⁶ PAJA 3/2000:s 3.

⁵³⁷ SASA:s 9(4).

⁵³⁸ SASA:s 9(6).

⁵³⁹ SASA.

⁵⁴⁰ Western Cape PN 365/2011:para 10(4)(b).

sanction in terms of section 9(8) and (9). The MEC cannot unilaterally decide to reinstate the learner in the school without the proper consultation with the governing body. The MEC must also consult with the governing body before imposing the so-called suitable sanction on the learner, or if the MEC decides not to impose a sanction on the learner he/she must refer the matter back to the governing body for an alternative sanction in terms of the code of conduct, other than expulsion.⁵⁴¹ If the learner is ultimately expelled, his/her name will be removed from the school's admission register.⁵⁴²

4.6 EXPULSION OF A LEARNER WHO IS SUBJECT TO COMPULSORY SCHOOL ATTENDANCE

A learner is subject to compulsory school attendance from the first school day of the year in which such learner reaches the age of seven until the last school day of the year in which such learner reaches the age of 15, or the ninth grade, whichever occurs first.⁵⁴³ In terms of section 9(5) of SASA,⁵⁴⁴ if a learner who is subject to compulsory attendance in terms of section 3(1) is expelled from a public school, the HOD must make an alternative arrangement for his/her placement at another public school.

Placement in another school will not automatically remedy the poor discipline of such a learner. The legislator must make it peremptory to also refer the learner to educational support services and not just pass the buck to another school which is not acquainted with the behaviour of the learner.⁵⁴⁵

⁵⁴¹ SASA:s 9(11).

⁵⁴² GN 2432/1998:12(c).

⁵⁴³ SASA:s 3(1).

⁵⁴⁴ SASA.

⁵⁴⁵ See Chapter 2.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This dissertation evaluated the legislative provisions with regard to school discipline and determined whether these provisions provide sufficient guidelines to education stakeholders to ensure that discipline is effectively established and maintained in schools. The study commenced with a discussion on consultation in regards to adopting a code of conduct for learners at school.⁵⁴⁶

The regulations and policies relevant to school discipline were evaluated to determine whether these provide sufficient guidance to the stakeholders in establishing and maintaining school discipline.⁵⁴⁷ Finally, legislative provisions with regard to school discipline, particularly on suspension and expulsion as sanctions to enforce school discipline were explored, and the conclusion and recommendations below are proposed.

5.2 CONSULTATION IN ADOPTING A CODE OF CONDUCT FOR LEARNERS

Regarding consultation, this study found that the legislator does not provide clear guidelines to school governing bodies on how to consult, and on the criteria to be followed for consultation. The legislation is silent on the legal standing of the code of conduct if the governing body did not consult stakeholders, as prescribed by section 8(1) of SASA, or on what resort is available to them.⁵⁴⁸ The legislator

⁵⁴⁶ See Chapter 2.

⁵⁴⁷ See Chapter 3.

⁵⁴⁸ SASA.

also does not demand the reviewing of a code of conduct by the governing body.⁵⁴⁹

Recommendations:

- Failure or neglect to involve relevant stakeholders when adopting a code of conduct for learners is a direct violation of section 8(1) of SASA. However, legislation does not protect this right because it does not nullify the code of conduct that was drafted without consultation of all relevant stakeholders. Moreover, the Department of Education does not play an active role in making relevant stakeholders aware of their right to be consulted in adopting a code of conduct.
- Furthermore, the Department of Education's Admission Policy⁵⁵⁰ prescribes that the code of conduct for learners of a school should be made available to a parent, by the principal, when applying for admission of a learner. The Policy does not state that parents must be consulted about the code of conduct. The same applies for learners who enroll at a school; they are merely given the code of conduct to acknowledge receipt thereof by signature. The code of conduct is also given to new educators to familiarise themselves with the contents thereof.
- Therefore, it is recommended that the legislator must develop a law or promulgate legislative instruments which will:
 - Provide clear guidelines to the school governing body, parents, learners and educators on the contents of the consultation and the minimum obligations to be met.
 - Offer resort to the stakeholders, if they were not consulted.
 - Mandate the school governing body to review the code of conduct in consultation with all the stakeholders.

⁵⁴⁹ See Chapter and SASA:s 8.

⁵⁵⁰ GN 2432/1998:14.

- Involve the provincial Departments of Education when school governing bodies adopt a code of conduct.⁵⁵¹

5.3 EXEMPTIONS IN RESPECT OF COMPLIANCE WITH THE CODE OF CONDUCT

In the *MEC for Education KZN v Pillay*,⁵⁵² the Constitutional Court affirmed that the issue being disputed was the inadequacies of the code of conduct to provide for reasonable accommodation and the procedure to apply for exemption. To date, several years after the Constitutional judgement in *Pillay's* case, the legislator has not developed legislation to provide procedural requirements for exemption in respect of compliance with the code of conduct based on cultural and religious practices. Therefore, in relation to application for exemption from the code of conduct, there is still no clarity.

Recommendations:

The legislator should be proactive and develop or amend the legislation and regulations to root out religious intolerance in the code of conduct, by:

- Setting procedural requirements for exemption,⁵⁵³ for instance:
 - Affected learners may be requested to submit a written application to the governing body for total or partial exemption from one or

⁵⁵¹ It is clear that the Department of Education has a direct interest in the contents of the code of conduct of schools. In the case of *Pillay*, one of the issues was the lawfulness of the code of conduct which did not make exemption from complying with it. In the Free State's unreported case of *Lerato Radebe* the issue was the code of conduct which disallowed the growing of hair into dreadlocks; also in the case of *Antonie v Governing Body, Settlers High School and HOD Western Cape Education Department* [2002] (4) SA 738, the issue was the contents of the code of conduct, which prohibited the wearing of a cap.

⁵⁵² 2008 (1) SA 474 (CC):38.

⁵⁵³ *MEC Education v Pillay*:110.

more of the items contained in the code of conduct on cultural or religious rights.

- This application must identify the specific rule that is offensive to the learner's religious or cultural right as contained in the Constitution.⁵⁵⁴
- Such an application must include full reasons, as well as confirmative evidence that the learner belongs to that specific religion or culture, and that the religious or cultural practices, rules and obligations are in conflict with the school's code of conduct.⁵⁵⁵
- Application for deviations from the standard rules must be based on core religious beliefs inherent to such religion or culture.⁵⁵⁶
- The governing body must consider the application and, if it is satisfied that the application is justified in terms of the Constitutional principles, the approval should be granted in writing.⁵⁵⁷
- Setting time frames for the school governing body within which the application must be finalised.
- Providing an aggrieved learner the right to be provided with written reasons for refusal and the right to appeal to the MEC.
- Enforcing cooperative governance and intergovernmental relations between the Department of Education and the South African Human Rights Commission (SAHRC) to educate and train school governing body members on the Bill of Rights. In terms of the Constitution,⁵⁵⁸ the SAHRC has the power to educate on human rights and promote respect for human rights and a culture of human rights.⁵⁵⁹ On the other hand, the HOD, out of funds appropriated for this purpose by the provincial legislature, must establish a programme to provide continuing training to governing bodies

⁵⁵⁴ Department of Education 2008. *Example of a Code of Conduct for a School*:8.

⁵⁵⁵ FEDSAS 2010:9.

⁵⁵⁶ Department of Education 2008:9.

⁵⁵⁷ Department of Education 2008:9.

⁵⁵⁸ Constitution 1996:s 184(2)(d).

⁵⁵⁹ SAHRC Act 40/2013:s 2.

to promote the effective performance of their functions, or to enable them to assume additional functions.⁵⁶⁰

- Section 8(4) of SASA provides that nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such a learner. These legislative provisions should be amended as they give the code of conduct undue supremacy.

5.4 SUPPORT MEASURES AND STRUCTURES FOR COUNSELLING

In terms of section 8(5)(b) of SASA, the code of conduct must also provide for support measures or structures for counselling a learner involved in disciplinary proceedings. The sequence of section 8(5)(a) and (b) of SASA shows the retributive nature of SASA. Provisions for due process right, which involves disciplinary proceedings against the learner, come before provisions for support measures and structures for counselling the learner. Therefore, it reiterates the idea that the learner should be the subject of disciplinary proceedings before he/she becomes eligible for support.

The legislator should use “Education Support Services”, instead of “support measures or structure for counselling” because of the latter misconception and lack of defining it by the legislator. Support Education Services, as suggested, encompass all education-related health, social work, vocational and general guidance and counselling, and other psychological programmes and services to learners with special education needs in mainstream schools.⁵⁶¹

Recommendations:

Legislation, regulations and/or guidelines with regard to support measures and structures should be developed and should address the following:

⁵⁶⁰ SASA:s 19(2).

⁵⁶¹ Department of Education White Paper on Education and Training 196/1995 Part 2 Chapter 5:para 27; Also see Chapter 2.

- Schools should be encouraged to provide support measures and structures for counselling to all learners from the earliest point when a learner's attitude or academic performance deteriorates. Early intervention to address all social problems or barriers to learning is critical to enhance children's development and educational gain.⁵⁶²
- Provisions of support should not be limited to a learner involved in disciplinary proceedings.
- Steps should be taken to guide the establishment of networks to ensure that learners have access to the support services provided by other state departments and other service providers.⁵⁶³ In this regard, cooperative governance principles and intergovernmental relations between the Department of Education and the Department of Social Development should be enforced to ensure that learners have access to appropriate social assistance.
- Clarify the respective roles of the stakeholders in providing support to learners.
- Ensure that support is not limited to counselling.
- The budget of Provincial Departments of Education should be reviewed and reformulated to cater for support services.
- New conditional allocation⁵⁶⁴ funding from the national government should be established for the provision of support services to learners.
- Educators should be equipped/trained to identify learners who need support.

⁵⁶² See Chapter 2.

⁵⁶³ Reyneke 2013a:541.

⁵⁶⁴ In terms of the Division of Revenue Act 2/2013, a "conditional allocation" means an allocation to a province or municipality from the national government's share of revenue raised nationally, envisaged in s 214(1)(c) of the Constitution, as set out in Schedule 4, 5, 6 or 7.

- Government departments need to work together to develop a broad framework and legislative instrument that encourages support to learners from their respective geographical powers.

5.5 INCOMPREHENSION OF PROHIBITION OF INITIATION PRACTICES

Section 10A(1) of SASA provides that:

A person may not conduct or participate in any initiation practices against a learner at a school or in a hostel accommodating learners of a school.

Learners have the right to a safe environment that is conducive to education, including security of property, security of person, well-cared-for school facilities, school furniture and equipment, toilet facilities, absence of harassment in attending classes, writing tests and examinations and partaking in extramural activities or sport.⁵⁶⁵

Recommendations:

The Regulations on the prohibition of initiation practices should be amended to address the following:

- The responsibilities of the Department of Education should also be included in the Regulations so as to play a part in prohibiting initiation practices. At present, the Regulations do not incorporate the Department of Education in efforts to prevent initiation practices in schools; this duty is placed exclusively on the school governing body.
- Regulations should enforce the principle of cooperative governance and intergovernmental relations between the Department of Education and the SAHRC to raise awareness amongst learners of unlawful initiation practices.

⁵⁶⁵ See Chapter 3; and GN 24165 Regulations to Prohibit Initiation Practices in Schools 2002:3.5.1.

- The school governing body should be guided on the appropriate sanctions to be imposed or action to be taken if a learner has been found guilty of unlawful initiation practices.
- The Regulations should be amended and provide clarity to the principal on how he/she should ensure that no initiation practices take place. The Regulations must clarify to the principal what he/she must do, or see to it that it is done, to prevent initiation practices.
- The Regulations should clearly prescribe training of the members of school governing bodies on initiation practices.
- Reporting channels for incidents of initiation practices should be established.
- The code of conduct should be mandated to prohibit initiation practices in schools.

5.6 SEARCH AND SEIZURE AND DRUG TESTING AT SCHOOLS

Section 8A(2) provides that:

Subject to subsection (3), the principal or his or her delegate may, at random, search any group of learners, or the property of a group of learners, for any dangerous object or illegal drug, if a fair and reasonable suspicion has been established—

(a) that a dangerous object or an illegal drug may be found on school premises or during a school activity; or

(b) that one or more learners on school premises or during a school activity are in possession of dangerous objects or illegal drugs.

Section 8A(2) states: “... may, ... search any group of learners or the property of a group of learners”. The implication of this phrase is that a search must be

conducted of a group of learners only. This phrase brings a delay in the eradication of drug use in schools, or the possession of dangerous objects.

Thus, the principal cannot search an individual learner, despite the strong and fair suspicion that an illegal drug may be found on the learner, or that the learner will test positive for drug use. The reference to the word “*group*” places unnecessary limitation on the part of the school authorities. The phrase “*group of learners*”, as used in section 8A(2), may hamper the learning and teaching process if compared to a search of suspected individual learners. If there is a fair and reasonable suspicion against an individual learner, why should a search be conducted of a “*group of learners*”?

In addition, this provision mandates a principal and his delegates to conduct police-like duties. This could result in a principal and educators (the delegates) shifting their focus from their core function - which is the teaching and learning of learners.

Recommendations:

Section 8A of SASA and the regulations and/or guidelines on drug-related misconduct and the possession of an illegal substance should be amended and should address the following:

- The words “*any group of learners*” should be deleted and a provision should be inserted which will make the search of a suspected individual or individuals possible. There are no convincing reasons for the search, or the urine or any other non-invasive test of “*any group of learners*”, whilst there is a reasonable and fair suspicion against an individual learner. Limiting a search to only a “*group of learners*” will result in an unreasonable and unconstitutional search of other innocent learners, who are not even suspected of being in possession of an illegal substance.

- A person specifically trained in administering a drug test should administer it⁵⁶⁶; not educators, unless they are specifically trained.
- Other than search and seizure, as mentioned in section 8A of SASA, the legislator should take proactive steps by prescribing preventive programmes.
- The Department of Education's role should be incorporated in an effort to eradicate drug-related misconduct and possession of dangerous objects or illegal drugs at schools. This function cannot be left to principals and their delegates alone.
- Enforce cooperative governance principles between the Department of Education and the South African Police Services. The Police Services should conduct search and seizure operations at South African schools. It is not fair to compel principals and educators to usurp the functions of the Police Services.

5.7 SAFETY AT SCHOOLS

Section 61(a) of SASA⁵⁶⁷ provides that:

The Minister may make regulations to provide for safety measures at public and independent schools.

Therefore, in 2001, the Minister promulgated Regulations for Safety Measures at Public Schools⁵⁶⁸ to provide for the safety of learners and educators at schools and to declare schools drug free and dangerous object free zones. All learners have the right to learn in a safe and protective school environment. The aforesaid Regulations for Safety Measures at Public Schools place a huge responsibility on principals and their delegates in keeping schools safe.

⁵⁶⁶ SAHRC 2007:8.

⁵⁶⁷ SASA; and see Chapter 3

⁵⁶⁸ PG 1040/2001; and see Chapter 3.

5.7.1 Action plans to counter threats of violence in schools

Para 9(5) of the Regulations for Safety Measures at Public Schools⁵⁶⁹ provides that-

Schools must develop action plans to counter threats of violence that could have a negative impact on school activities, and to implement regulation 4(1).

A huge responsibility is placed on schools to develop action plans to counter threats of violence. The action plans must ensure the safety of all learners, staff members and parents during school activities.⁵⁷⁰

In terms of the provision cited above, schools are solely responsible to develop action plans to counter threats of violence. This responsibility is unbearable for schools. The Regulations⁵⁷¹ do not guide schools on how to develop action plans to counter threats of violence, what the contents of the action plans should be, and who should be involved in the process.

Recommendations:

- With regard to the Regulations for Safety Measures at Public Schools,⁵⁷² it should be amended to add a preventive planning strategy, involving all stakeholders, to eradicate the possession of dangerous objects on school premises and the use and possession of drugs.
- Paragraph 9(5) of the Regulations for Safety Measures at Public Schools⁵⁷³ must be reviewed and the responsibility to develop action plans to counter threats of violence should be placed on the Provincial Departments of Education, with the assistance of the South African Police Services. Schools and Provincial Departments of Education should

⁵⁶⁹ 1040/2001.

⁵⁷⁰ PG 1040/2001: para 9(5); "school activity" means any official educational, cultural, recreational or social activity of the school within or outside the school premises in terms of SASA s 1.

⁵⁷¹ PG 1040/2001.

⁵⁷² PG 1040/2001.

⁵⁷³ PG 1040/2001; and see Chapter 3.

cooperate if and when the South African Police Services need their assistance. Recently, the Free State Department of Education and the Department of Police, in partnership with the National Department of Police, have launched a project to improve safety at schools following incidents of gang violence, as well as other violent crimes, in schools throughout the Free State Province.⁵⁷⁴

- The Regulations⁵⁷⁵ should be reviewed to include the role of the provincial Departments of Education in an effort to create a safe school environment, free from drugs and dangerous weapon, dedicated to the improvement of quality learning.
- The Regulations⁵⁷⁶ should make security guards, metal detectors, surveillance cameras and other electronic sensors, to minimise the possession of dangerous objects/weapons on school premises, standard practice. However, all these measures will not completely eliminate violence among learners, but will reduce the use of dangerous objects and the grave consequences thereof. Section 5A(2)(ix) of SASA⁵⁷⁷ provides that the norms and standards for basic infrastructure must provide for perimeter security.

5.8 SUSPENSION AS A PRECAUTIONARY MEASURE

Section 9(1) of SASA⁵⁷⁸ provides that:

The governing body may, on reasonable grounds and as a precautionary measure, suspend a learner who is suspected of serious misconduct from attending school, but

⁵⁷⁴ <http://www.education.fs.gov.za/?p=2779>. 14/02/2014. The Departments concluded a Memorandum of Understanding and agreed to work together to improve safety in schools.

⁵⁷⁵ 1040/2001.

⁵⁷⁶ 1040/2001.

⁵⁷⁷ 84/1996.

⁵⁷⁸ SASA.

may only enforce such suspension after the learner has been granted a reasonable opportunity to make representations to it in relation to such suspension.

A governing body has the legislative power to suspend a learner prior to disciplinary proceedings, as a precautionary measure for allegedly committing a serious misconduct.⁵⁷⁹ When the governing body suspends a learner in terms of section 9(1) as a precautionary measure, the governing body must give such a learner a reasonable opportunity to make representations on why he/she should not be suspended as a precautionary measure.⁵⁸⁰

In terms of SASA,⁵⁸¹ compulsory school attendance starts on the first school day of the year in which a learner reaches the age of seven until the last school day of the year in which such a learner reaches the age of 15, or the ninth grade, whichever occurs first. Now, this implies that a seven-year-old learner may be suspended as a precautionary measure, based on his/her representation without involving the parents of such a learner. As outlined earlier, this provision does not take into account the age differences of learners, maturity, background, gender and stage of development, or any other relevant characteristics of the child.⁵⁸²

In addition, section 9(1)⁵⁸³ does not mandate the school governing body to consider and apply its mind to the representation made by the learner. Therefore, the school governing body may allow the learner to make a representation, only as window-dressing to be compliant with the provision, and not consider such a representation. Suspension of a learner as a precautionary measure may have a grave impact on the right of the learner to receive education; therefore, it is important to involve the parents of the learner, who is subject to compulsory school-going age, before implementing such a suspension.

⁵⁷⁹ Deacon and Merabe:s 9(1) note.

⁵⁸⁰ Deacon and Merabe:s 9(1) note; and see Chapter 4.

⁵⁸¹ SASA:s 3(1).

⁵⁸² Children's Act 38/2005:s 7(1)(g). See Chapter 4.

⁵⁸³ SASA.

Recommendations:

Section 9(1) of SASA⁵⁸⁴ must be amended to give effect to the following:

- To take into account the age differences of learners, maturity, background and stage of development, or any other relevant characteristics of the child before the school governing body requests the learner to make a representation.
- To request the parents to make a representation, especially if the learner is subject to compulsory school-going age.
- The school governing body should be mandated to:
 - give due consideration to any such representations made;
 - for sufficient reasons, not to suspend as initially intended, or reverse suspension; and
 - report such suspension to the HOD.

5.9 EXTENSION FOR SUSPENSION

Section 9(1B) provides that:⁵⁸⁵

If disciplinary proceedings are not conducted within seven school days after the suspension of a learner, the governing body must obtain the approval of the Head of Department for continuation of the suspension of such learner.

In this respect, the legislation does not guide the governing body on what may constitute valid reasons for not conducting disciplinary proceedings within seven school days.

⁵⁸⁴ SASA: see Chapter 4.

⁵⁸⁵ SASA.

The use of the phrase “*must obtain the approval of the Head of Department for the continuation of the suspension*” is ambiguous. This provision guarantees the approval of the HOD. The provision does not indicate to the school governing body how to obtain such approval of the HOD. The provision does not give the HOD the discretion to consider the request or application.

Recommendations:

- The formulation of section 9(1B) should be amended to clarify that the governing body should “apply” for the approval of the HOD for continuation of the suspension of such a learner. Such application should contain the reasons for the continuation of the suspension, why the disciplinary proceedings were not conducted within the prescribed time frame, the possible date of the disciplinary proceedings, and any other relevant information on the matter.
- Section 9(1B) should be amended to give the HOD the power to consider the application and to apply his/her mind whether he/she approves it or not.

5.10 VAGUENESS OF SECTION 9(1C) AND SECTION 9(1E)

Section 9(1C) provides that:⁵⁸⁶

A governing body may, if a learner is found guilty of serious misconduct during the disciplinary proceedings contemplated in section 8—

- (a) *impose the suspension of such learner for a period not longer than seven school days or any other sanction contemplated in the code of conduct of the public school; or*
- (b) *make a recommendation to the Head of Department to expel such learner from the public school.*

⁵⁸⁶ SASA.

The legislator makes use of the word “or”, which means the school governing has the discretion to impose only one of the sanctions. The use of the word “or” in section 9(1C)(a) of SASA⁵⁸⁷ implies that the school governing body cannot impose a sanction of suspension and recommend for expulsion.

Contrary to section 9(1C), section 9(1E) of SASA⁵⁸⁸ provides that:

A governing body may suspend or extend the suspension of a learner for a period not longer than 14 days pending the decision of the HOD whether or not to expel such learner from the public school.

Section 9(1E) allows for the governing body to suspend, and to recommend for expulsion.⁵⁸⁹

Recommendation:

The legislator should remove the above uncertainty between section 9(1C) and 9(1E) by clarifying whether the learner may be suspended, and also be recommended for expulsion.⁵⁹⁰

5.11 SECTION 9(8) AND SECTION 9(9) OF SASA

Section 9(8) provides that.⁵⁹¹

If the Head of Department decides not to expel a learner as contemplated in subsection (2), the Head of Department may, after consultation with the governing body, impose a suitable sanction on the learner.

This provision does not guide the HOD on the contents of such consultation and how to conduct it.⁵⁹² The legislator does not provide guidance as to what could be a suitable sanction as it appears in section 9(8).

⁵⁸⁷ SASA.

⁵⁸⁸ SASA.

⁵⁸⁹ SASA.

⁵⁹⁰ See Chapter 4.

⁵⁹¹ SASA.

In terms of section 9(9):

If the Head of Department decides not to impose a sanction on the learner, the Head of Department must refer the matter back to the governing body for an alternative sanction in terms of the code of conduct contemplated in section 8, other than expulsion.

Unlike subsection (8), section 9(9)⁵⁹³ does not request the HOD to consult with the school governing body when he/she refers the matter back to the governing body to impose an alternative sanction in terms of the code of conduct, other than expulsion. Should the HOD decide to act in terms of section 9(9), such a decision will adversely affect the rights of the governing body.

Recommendations:

- The legislator must develop SASA to provide guidance to the HOD on the criteria to apply when considering a recommendation for expulsion of a learner.
- The legislator should provide guidance on how to determine a suitable sanction.
- The legislator should mandate the HOD to consult the school governing when referring the matter back to the governing body in terms of section 9(9).

5.12 CONCLUSION

From the evaluation of this study it is evident that the legislative provisions with regard to school discipline do not provide sufficient guidelines to education stakeholders to ensure that discipline is established and maintained effectively in South African schools. It is therefore essential for legislative instruments to

⁵⁹² See Chapter 2 and 4.

⁵⁹³ SASA.

address the ambiguities of the current legislative provisions with regard to school discipline.

During the evaluation, it was found that unbearable legislative responsibility is placed on school governing bodies to oversee discipline in schools. To address the challenges of poor discipline in schools, the provincial Departments of Education and school governing bodies, cooperation between other organs of state, and active intergovernmental relations are indispensable. There are multiple factors that result in learners misbehaving at school and during school hours. Most of those factors fall within the powers and geographical functions of other organs of state and are interrelated. Schools can be utilised as channels to promote access among learners to a range of public services in areas such as health, poverty alleviation, psychosocial support, security, sport and culture; and that will have positive results in school discipline.

To effectively establish a disciplined and purposeful school environment, the legislator should provide instruments which recognise the importance of cooperative governance and intergovernmental relations between the relevant organs of state, which will impact positively on the holistic development of all learners in South African schools.

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