

Learner Discipline In Schools

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Rika Joubert

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Preface

Discipline is essential for effective teaching and learning. It is not possible to teach or learn in an environment that is disorderly, disruptive and unsafe. Creating and maintaining a safe, disciplined school environment is one of the many challenges facing principals and educators in schools today. Many principals and educators are finding it increasingly difficult to maintain discipline in schools in the wake of new education legislation and regulations that regulate discipline and punishment in schools. Although legislation, including the *Bill of Rights* that protects learners from the abuse and the misuse of punishment, is supported and necessary, the banning of corporal punishment in schools has been received with mixed feelings. Many principals and educators find themselves unable to cope with large schools and classes, especially where there has been a complete breakdown of the culture of teaching and learning, and discipline. Moreover, many educators have not been exposed to or trained in alternative disciplinary strategies. The new education legislation has also clamped down on the way in which educators manage the discipline in schools and mete out punishment by implementing far more rigorous procedures, which must be followed.

The *Bill of Rights* as well as national and provincial education legislation have created a new rights culture in schools and changed the way in which discipline is managed in schools today. However, this does not mean that educators' "hands are tied", as is the perception among many and that they have no control over learners.

The law has created a new legal context and it is important for principals and educators to know the law relating to school discipline and punishment, and to be familiar with legal concepts, principles and procedures so that they can continue building and maintaining effective schools.

The purpose of this monograph is to give an overview of the legal framework for school discipline and punishment and to provide basic information on a range of critical issues for easy reference.

Since the first edition of this monograph nine years ago, a variety of amendments to education laws have been promulgated, of which many have an impact on learner discipline. Court cases have regularly been decided, and articles and books were published that all have to be taken into account in this new edition.

Full acknowledgement is given to the initial author, Joan Squelch, still a much appreciated colleague and friend, who now stays in Perth, Australia. Parts of the original version have been left untouched, while other parts have been adapted or taken out.

Rika Joubert (2008)

Chapter One

Discipline and Effective Schools

Outline of this Chapter

In this chapter the importance of good discipline for effective schools is discussed and some of the factors that contribute to the development of a disciplined school environment are highlighted.

Good discipline is one of the key characteristics of an effective school. Discipline underpins every aspect of school life and without discipline effective teaching and learning cannot take place. Society expects schools to be orderly and to produce well-educated and well-behaves people. Public concern about poor school results, learner misbehaviour and dysfunctional schools is often reported in the media and the subject of widespread debate. Society in general and parents in particular expect schools to perform well and to maintain a high level of discipline and safety and to keep disruptions to a minimum.

The fact that learner discipline constitutes an acute problem in South African schools is also clear from studies conducted by De Klerk & Rens (2003), Maree & Cherian (2004), Oosthuizen, Roux & Van der Walt (2003); and from popular South African media reports with headings such as “Inside city’s school from hell” (Bateman, 2007:1), “Pupils still victims of brutality at school” (SAPA, 2006:6) as well as from speeches delivered by the current Minister of Education, Naledi Pandor with headings such as “Legislation supports the creation of

safer schools” (Department of Education: 20 Oct. 2006) and “School discipline and safety” (Department of Education: 21 Nov. 2006). While some educators feel unfulfilled and some are ready to leave teaching because they can no longer tolerate dealing with disrespectful and uncommitted learners, Charles (2002: 2) contends that there is on the other hand great numbers of very successful educators, working in all types of schools with all types of learners, who find teaching joyful and rewarding.

1.1 Discipline and Punishment Defined

In the context of South African schooling discipline is often understood more narrowly as punishment and as a result many mistakenly equate discipline with punishment. Dreikurs (1992:80) points out that most people, educators and parents alike, use the word “discipline” to mean control through punitive measures. “To many people it signifies physical punishment; to others, rigid control of rules and regulations and autocratic authority” asserts Dreikurs. Through discipline, children are able to learn self-control, self-direction, competence, and a sense of caring. Discipline is a positive approach to teach a child self-control and confidence. Therefore, discipline techniques focus on what educators want the child to learn, and what the child is capable of learning.

Discipline is a process, not a single act. Good discipline does not happen by chance. It needs to be purposefully planned. It is the basis for teaching children how to be in harmony with themselves and get along with other people. The ultimate goal of discipline is for children to understand their own behaviour, take initiative and be responsible for their choices, and respect themselves and others. In other words, children will internalize this positive process of thinking and behaving.

Punishment, on the other hand, focuses on the misbehaviour and

may do little or nothing to help a child behave better in the future. They maintain that the adult who punishes the child teaches the child that the adult, rather than the child, is responsible for the way the child behaves. While Kight and Roseboro (1998:2-3) believe that punishment has negative effects on the children, such as inducing shame, guilt, anxiety, increased aggression, lack of independence and lack of caring for others, and greater problems with parents, educators and other children. Punishment is a facet of discipline, that involves actions taken in response to inappropriate behaviour in order to correct or modify behaviour and to restore harmonious relations. Discipline is more proactive in nature whereas punishment is more reactive.

Discipline is about *positive* behaviour management aimed at promoting appropriate behaviour and developing in learners self-discipline and self-control. According to Rogers (1998:11) discipline is “a teacher directed-activity whereby we seek to lead, guide, direct, manage or confront a learner about behaviour that disrupt the rights of others.” Rogers distinguishes between *preventive* discipline, *corrective* discipline and *supportive* discipline. Preventive discipline is concerned with basic rights and clear rules and consequences. Corrective discipline refers to educators actions that are carries out to correct disruptive, antisocial or deviant behaviour (i.e. positive terminology for punishment). Supportive discipline is concerned with ensuring that “correction” is received fairly and re-establishing positive working relationships with disciplined learners.

Punishment, on the other hand, is a facet of discipline that involved actions taken in response to inappropriate behaviour in order to correct or modify behaviour and to restore harmonious relations. Punishment takes many forms, some which are limited by law. The types of punishment and their legal limits are dealt with in *Chapter Five*.

1.2 Creating a Disciplined School Environment

Good discipline does not happen by chance. It needs to be purposefully managed. Although there are various reasons for learners' misbehaviour, the school environment is as much a factor as home circumstances and personality. Therefore, it is necessary to create a positive, disciplined school environment aimed at *preventing* disciplinary problems. The following factors are essential for preventing disciplinary problems.

◆ **Effective leadership**

The school management team, especially the principal, are the senior administrators in a school and, as figures of authority, are expected to create an orderly, harmonious school environment and lead by example.

◆ **Clear communication**

The principal and the school governing body must clearly communicate the school's mission or educational philosophy and lay down the values and standards that learners are expected to adhere to. Schools prospects should contain a copy of the school rules and possible punishments. Every parent and learner should also have a copy of the school's code of conduct (*see Chapter Four*). Parents and learners must understand the consequences of breaking school rules.

◆ **Good planning by educators**

Most discipline problems occur in the classroom and a major source of problems is poor planning and preparation. Educators who lack classroom management skills and do not plan their lessons have less control over their learners. Learners often display inappropriate behaviour because they are bored, unmotivated or find the schoolwork irrelevant or difficult. Good planning entails:

- knowing the learners
- preparing and planning lessons in advance
- setting work that is appropriate to learners' age and ability
- arranging the classroom in an organised manner
- keeping up to date with the subject
- using appropriate teaching strategies and aids
- using a wide variety of teaching materials
- having clear and simple classroom rules

1.3 Whole-school Approach

Discipline or the management of behaviour is demanding and complex and can best be achieved by a whole-school approach. Discipline is not about focusing on an individual's misbehaviour when it occurs. Instead, it involves adopting a holistic and integrated approach to developing and maintaining a positive learning environment that encourages and affirms appropriate behaviour at all times in all circumstances. Such a holistic approach involves viewing the school as an integrated system and seeing how the various interrelated parts can work together and contribute to sustainable behaviour management. This implies involving the whole school community in discipline. Lund (1996:3) cites the following reasons for developing a whole-school behaviour policy:

- To provide an opportunity to put shared values about the ways school communities should behave into practice.
- To develop a positive reputation for the school community.
- To enable members of the school community to behave appropriately towards each other and to co-operate in teaching and learning.
- To provide a positive school ethos, conducive to teaching and learning.
- To enable each learner to have an appropriate environment for

learning and each educator to have a suitable environment for teaching.

- To define what is meant by appropriate and inappropriate behaviour.
- To enable appropriate rewards and punishments to be developed.

Chapter Two

Legal Framework for School Discipline

Outline of this Chapter

This chapter describes the legal framework for school discipline and punishment. The sources of law are described and disciplinary examples are given.

New legislation, for example the Schools Act (as amended) influence the way in which discipline traditionally was maintained in schools. Many learners have the misconception that their fundamental rights protect them from any disciplinary measures at school. It is true that education legislation, both national and provincial, as well as the Bill of rights changed the way in which discipline is managed at schools. It is also true that our society expects schools to ensure that learners become well-educated and well-behaved citizens. In order to create a safe, disciplined school environment, it has become necessary to investigate and implement the legal principles pertaining to discipline.

2.1 Sources of Law

Rules, regulations and legal principles that are relevant to school discipline, and which form the basis of discipline policies and procedures are found in the following sources of law.

◆ Legislation

Legislation law is made by an organ of the state vested with legislative authority (i.e. the power to do so). These laws are embodied in writing and are known as “acts” (or statutes). Legislation originates from national parliament and the nine provincial legislatures. Both the national parliament and provincial legislatures generate enabling or primary legislation from which secondary or subordinate legislation flows. With regard to education, national and provincial legislatures have concurrent powers (Schedule 4 of the *Constitution*). This means that they share powers with regards to primary and secondary education. The following acts provide the legal framework for school discipline:

- The Constitution of the Republic of South Africa, 1996 (hereafter Constitution)
- The National Education Policy Act 27 of 1996
- The South African Schools Act 84 of 1996 (hereafter Schools Act)
- The Children’s Act of 2005,
- The provincial acts of the respective provinces.

Chapter 2 of the *Constitution* (the *Bill of Rights*) and the provisions in the *Schools Act* that pertain to discipline will be discussed in full in the next chapters.

An example of subordinate legislation on discipline that was passed by the national parliament is the *Guidelines for the Consideration of Governing Bodies in adopting a Code of Conduct of Learners* (Government Notice 766 of 1998).

◆ Common law

Common law is that part of the law that is not enacted by legislation, that is, non-statutory law. It has developed through historical events or customs and is found in the works of legal writers and in

case law. South African common law developed from Roman-Dutch law and English law.

Common law gives educators certain powers to discipline learners. These powers derive mainly from the fact that we regard educators as acting *in loco parentis* (i.e. in the place of the parent). In the absence of parents, educators assume certain rights and responsibilities such as supervision and discipline. All the same, educators' powers are not unlimited. An important common law principle that regulates an educator's actions is the rule of natural justice. The rules of natural justice are now embodied in section 33 of the Constitution. Because the rules of natural justice are so important for school discipline, a brief explanation of each rule is given here.

◆ **Rules of natural justice**

The rules of natural justice usually find application in investigations where the rights, privileges or freedoms of individuals could be affected, for example, when a learner is suspended or expelled from school. Anyone whose rights, freedoms or privileges are affected by the action of an administrator must be given an opportunity to be heard on the matter. This is the *audi alteram partem* rule. Any consideration that may count against a party affected by a decision must be communicated to him or her to enable the person to put his or her case. The administrative organ (i.e. the principle or governing body) exercising the discretion (i.e. making the decision) must give reason for its actions. The administrative organ must be impartial and free from bias (See Chapter 3, par. 3.1)

◆ **Case law**

Case law comprises court decisions, the most important of which are recorded in law reports. Case law provides important information and guidelines on many educational issues. Courts play an important role in interpreting primary and secondary legislation, for

example, clarifying concepts and principles, enforcing regulations, reviewing procedures, resolving disputes and protecting people's rights.

Example: MEC for Education: Kwazulu-Natal v Pillay 2008 1 SA 474 (CC)

During the school holidays in September 2004 Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. Sunali Pillay was not allowed to wear the nose stud as it was in contravention of the Code of Conduct of Durban Girl's High School. Mrs Pillay wrote to the Department of Education seeking clarity about its position, since she believed that the Governing Body's decision violated her daughter's constitutional right to practice her religious and cultural traditions. Ms Pillay was informed that the MEC supported the School's approach. Then Ms Pillay took the matter to the Equality Court. The Equality Court held that although a prima facie case of discrimination had been made out, the discrimination was not unfair. This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court. The High Court held that the conduct of the School was discriminatory against Sunali and was unfair in terms of the Equality Act. The School then applied for leave to appeal to the Constitutional Court against the decision of the Pietermaritzburg High Court. The Constitutional Court found that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act. The School's Governing Body was ordered to amend the Code of Conduct to provide for reasonable accommodation for deviations from the Code of Conduct on religious and cultural grounds and include a procedure for the application and granting of those exemptions.

Various other court cases will be discussed in the following chapters.

◆ **International law**

International law is a body of rules and principles that govern the relations between states. International law that is relevant to school discipline is international human rights law. 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. This does not mean that courts must apply international law, but there is an obligation to consider whether South African law is in line with international law. For example, in a case dealing with corporal punishment, the courts may consider European Convention for the Protection of Human Rights and Fundamental Freedoms.

◆ **Foreign law**

Foreign law include domestic law and case law of other countries. In terms of section 39(1)(c) when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law. In other words, the courts are not obliged to consider or apply foreign law. However, South African courts, especially in the absence of South African precedents or legal opinion, often refer to foreign law to assist in developing legal arguments and clarifying legal principles and concepts.

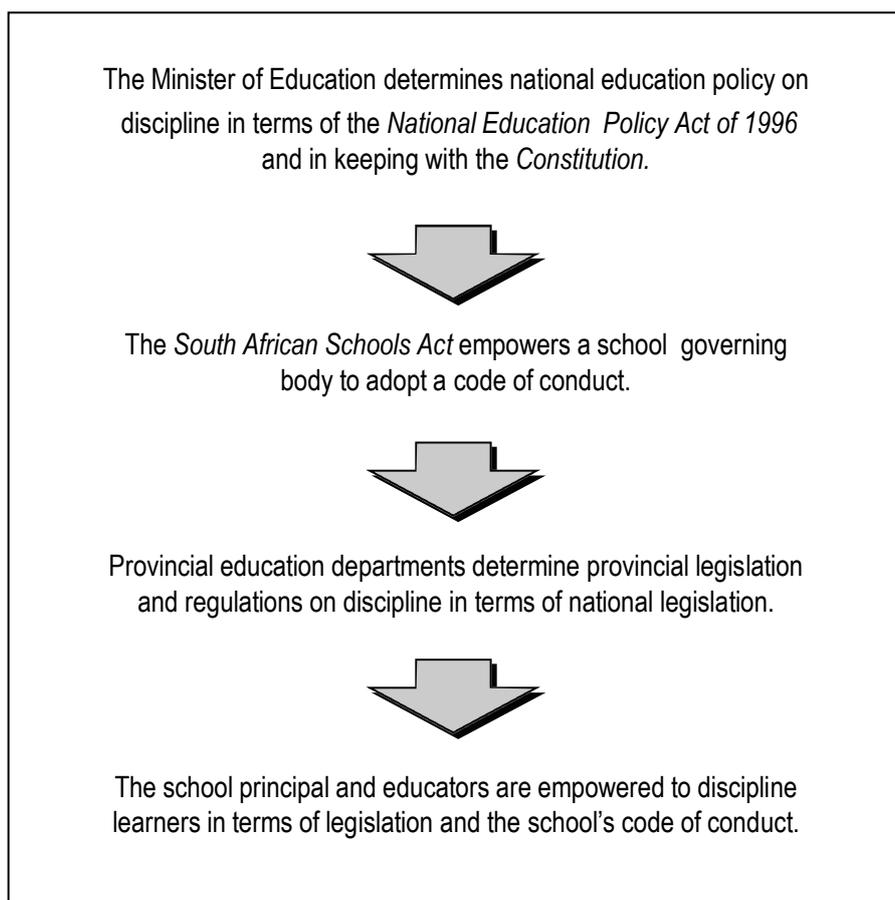
2.2 Delegation of Authority

Principals and educators have both original and delegated authority to discipline and punish learners: original authority in terms of their status as educators; delegated authority in terms of their position *in loco parentis*, that is, to act in the place of the parent. This has given educators the right to act as a reasonable parent when supervising, disciplining and punishing children. The importance of this doctrine, however, has diminished and is somewhat outdated. The authority to manage school discipline and mete out punish-

ment is regulated by law and delegated to educators.

The chart below (Figure 1) shows how authority is delegated within the legal framework:

Figure 1: Delegation of authority



Chapter Three

Discipline, Punishment and Human Rights

Outline of this Chapter

The purpose of this chapter is to explain the impact of the protections of human rights on discipline in schools. Over the years, attitudes towards discipline and punishment have changed with increasing attention being given to the protection of children's rights and freedoms.

With an increasing emphasis on the protection of basic human rights and on the need to protect children against harsh and cruel treatment attitudes towards discipline and punishment have changed considerably since the middle of the 20th Century.

Considering the growing emphasis on the protection of human rights, it was inevitable that increasing attention would be given to issues such as child abuse and corporal punishment in schools. Inflicting physical pain on children is no longer accepted as a form of controlling behaviour or of correcting inappropriate behaviour. By the 1980's, corporal punishment had been banned in many democratic countries. South Africa only recently joined the ranks when it outlawed corporal punishment in 1996. Besides corporal punishment, human rights have also impacted on other areas of discipline such as suspension, due process, conducting searches and detaining learners.

While views and values have changed drastically in modern times, this

attitude still forms part of the ethos of some schools and communities. For example, in 1999, Christian Education South Africa (CESA), a voluntary association of independent Christian schools, sought a court order declaring section 10 of the South African Schools Act, 1996, which prohibits corporal punishment, unconstitutional and invalid. CESA argued that corporal punishment is sanctioned by common law and forms part of the Christian beliefs of the parents. However, the Port Elizabeth High Court held that none of the biblical passages that CESA relied on suggested that people other than parents had a right to use a rod. The court noted that guidelines found in the biblical passage were no longer appropriate, nor did they form part of Christian religious doctrine (*Christian Education SA v Minister of the Government of the Republic of South Africa*).

The Constitution of the Republic of South Africa, 1996, is the supreme law of the country and education legislation, regulations and school policies may not be in conflict with it. As already mentioned, chapter 2 of the Constitution contains the Bill of Rights. The following are some of the provisions in the Bill of Rights that have a direct bearing on school discipline and punishment:

3.1 Influence of Human Rights on Discipline

Although not primarily a human rights document, the UN Charter laid the foundations for the adoption of the Universal Declaration of Human Rights in 1948. This has since been followed by a number of significant human rights conventions, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant of Economic, Social and Cultural Rights (ICESCR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Convention on the Rights on the Child in 1999 (CRC).

The Constitution commits us to the establishment of a society

based on democratic values such as human dignity, equality and freedom. As with all the values contained in the Constitution, our rights come with the intention of not infringing on other people's rights. Furthermore, the Constitution also confirms the values of "accountability, responsiveness and openness" (Section 1). Within schools, the rule of law is the guarantor of accountability, for it holds us all to a common code of appropriate behaviour. Accountability means that we are all responsible for our individual behaviour. There can be no rights without responsibilities – whether as parents, educators or learners.

Schools cannot function effectively if there is not mutual respect between educators and parents, and effective learning cannot happen if there is not mutual respect between educators and learners.

Considering the growing emphasis on the protection of human rights, it was inevitable that increasing attention would be given to issues such as child abuse and corporal punishment in schools. Although controversial, the use of corporal punishment is widely viewed as a form of child abuse and its use is discouraged as a means of punishment. Inflicting physical pain on children is no longer accepted as a form of controlling behaviour and correcting inappropriate behaviour. Besides its influence on corporal punishment, human rights have also impacted on other areas of discipline such as suspension, due process, conducting searches and detaining learners.

3.2 School Discipline and the Bill of Rights

The Constitution is the supreme law of the country and therefore all law, including education legislation, regulations and school policies may not be in conflict with it. Chapter 2 of the Constitution contains the Bill of Rights. The following are some of the provisions in the Bill of Rights that have a direct bearing on school discipline

and punishment.

3.2.1 Explaining the word “right”

Before discussing some of the rights that need to be considered in school discipline, it is useful to examine the meaning of the term of “rights”. Let us start by distinguishing between “rights, liberties and freedoms” learners have. The word “liberties” tends to be very broad and enables a person to do anything, which is not specifically prohibited by law. Fundamental “freedoms” which are stated in the *Bill of Rights* normally include freedom of religion (section 15) and freedom of association (section 18) and freedom of expression (section 16). A “right” is something granted to a person, which requires positive action from the government to ensure the right. For example, the right to education (section 29), to privacy (section 14), to an environment that is not harmful to their health or wellbeing (section 24).

3.2.2 Accommodating constitutional rights in the Code of Conduct

It is important to include essential rights guaranteed in the Constitution in the Code of Conduct and to indicate how each rights will be dealt with in the school (see Government Notice 766 of 1998 on which this discussion is based).

◆ Democracy

The Bill of Rights in the Constitution enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. The school must protect, promote and fulfil the rights identified in the Bill of Rights by ensuring that all learners and other stakeholders at a school have the democratic rights to due process and to participate in decision-making about matters affecting them at the school.

◆ Equality

No form of unfair discrimination against a learner or educator is permitted and all learners shall enjoy equal treatment before the law and shall receive equal protection and benefits of the law.

The concept “unfair discrimination” was analysed by the Constitutional Court in *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) par 23 and 28 and defined as follows:

Treating persons differently in a way which impairs their fundamental dignity as human beings who are inherently equal in dignity. *Unfair discrimination* refers to any situation where people are treated differently without justification. Discrimination in education on the basis of disability, sex and race may be some of the most glaring examples of unfair discrimination.

The Sunali Pillay case (*MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC)) analyses the concepts of equality and unfair discrimination.

Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. When she returned to school after the holidays, Ms Pillay was informed that her daughter was not allowed to wear the nose stud as it was in contravention of the Code of Conduct. The code of conduct of the Durban Girls’ High School (DGHS) stated the following about wearing jewellery:

“Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn.”

Mrs Pillay explained that she and Sunali came from a South Indian family that intends to maintain cultural identity by upholding the traditions of the women before them. The insertion of the nose stud

was part of a time-honoured family tradition. It entailed that a young woman's nose was pierced and a stud inserted when she reached physical maturity as an indication that she had become eligible for marriage. Mrs Pillay took the case to the Equality Court. This Court determined that the discrimination was not unfair. This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court. The High Court held that the conduct of the school was discriminatory against Sunali and was unfair in terms of the Equality Act.

In the appeal case against the decision of the High Court, that the school discriminated against Sunali, the Department of Education contended that the High Court erred in characterising the matter as an equality claim within the contemplation of the Equality Act. It argued that there can be no case for discrimination where it cannot be said that there is a "dominant group" that is treated better than Sunali.

However, the Constitutional Court held that the ground of discrimination is religion or culture as the school's Code of Conduct has a disparate impact on certain religions and cultures. The norm embodied by the Code of Conduct is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners such as Hindu's who are unable to express themselves fully and must attend school in an environment that does not completely accept them.

◆ **Respect and dignity**

Fundamentally, human rights are built on human dignity. Educators maintaining discipline in school should exercise care not to infringe this right. Belittling, name-calling and humiliating learners in

front of their peers are examples of how learners' dignity may be infringed. Out of the values of human dignity flow the practices of compassion, kindness and respect which are at the very core of making schools places where the culture of teaching and the culture of learning thrive. Violations of human dignity may occur during disciplinary action, in the daily interaction between educators and learners (which is an inherently unequal relationship), during initiation programmes or ceremonies for newcomers to an institution, during informal interactions on the playground where bullying is an ever-present threat nowadays, and in any other relationship in which the temptation to treat people with contempt is present.

◆ **Freedom and security of the person (s 12)**

This section provides that everyone has the right to freedom and security of the person and the right to bodily and psychological integrity. This includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. Therefore, in the school context, punishment may not be unreasonable, cruel or degrading. Punishment is considered to be unreasonable if:

- it is excessive and negligently administered;
- it results in physical or psychological injury;
- it is not in proportion to the offence;
- there is not sufficient cause for punishment; and
- it does not suit the age of the learner.

◆ **Justice administration (s 33)**

In terms of this provision everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Those whose rights have been adversely affected by administrative action have the right to be given written reason for the action. In the school context, just administrative action is particularly relevant in the area

of school discipline. For example, when a governing body suspends a learner, the learner is entitled to a fair hearing (administrative action).

◆ **Privacy**

Every learner also has the right to have his/her privacy respected, which includes the right not to have his/her person or property searched or his/her possessions seized. However, the principal or an educator has the legal authority to conduct a search based on his/her reasonable suspicion (sufficient information) of any learner or property in possession of the learner for a dangerous weapon, firearm, drugs, or harmful dangerous substance, stolen property, or pornographic material brought on to the school property. The searcher must use search methods that are reasonable in scope and could be performed in terms of Section 8A of the South African Schools Act (see Chapter 7). During a search human dignity shall be observed and persons of their own gender, preferably in the presence of at least one other person shall search learners in private. A record must be kept of the search proceedings and the outcome.

◆ **The right to basic education**

The right to basic education is one of the basic rights guaranteed in the Constitution. The Schools Act provides that education is compulsory for learners from the year in which such learners reach the age of 7 years until the last school day of the year in which such learners turn 15 years or the ninth grade. The right to education includes the right to attend all classes, to learn and be taught in all approved subjects to be informed regularly about school progress, to make use of all school facilities, and to have the potential of all learners fully developed. The Schools Act also makes provision for due process before a learner may be removed or expelled from a

school. The right of a learner to education cannot be taken away when the learner is expelled from school. Therefore, in the case of expulsion, the Head of Department must find a school place for an expelled learner who is of school-going age. It is important to emphasise that a learner who falls pregnant may not be prevented from attending school as such prevention will impinge on her Constitutional right to education.

◆ **Right to a safe school environment**

Children's rights, included in the Constitution (section 28) stipulate that every learner has the right not to be treated or punishment in a cruel, inhuman degrading manner. The Schools Act in section 10 abolishes corporal punishment and educators and learners have to learn the importance of mediation and co-operation, to seek and negotiate non-violent solutions to conflict and differences and to make use of due process. Furthermore, learners have the right to a clean and safe environment that is conducive to education. This includes security of property, well-cared for school facilities, school furniture and equipment, clean toilets, water and a green environment absence of harassment in attending classes and writing tests and writing examinations.

◆ **Freedom of expression**

The right to freedom of expression in section 16 of the Bill of Rights protects all forms of communication, including its contents and those to whom it is addressed. Freedom of expression in the school context is manifested in many ways (e.g. freedom to speak, to publish in the school magazine, to wear symbolic items, and through dress and hairstyle). The right to freedom of expression is not absolute and is normally balanced by competing rights and freedoms and the public interest. In the education situation freedom of expression should be balanced by specific educational interests and

the competing rights and freedoms of other learners and educators (e.g. the right of the learner or educator to have his/her personal information kept private and confidential; the right of the learner or educator to have his human dignity and integrity protected from defamatory or racist propaganda; and protecting the public (education) interest from expression that is harmful and defamatory. Freedom of expression can take different forms and includes not only the written and spoken word, but also music, dress, symbols, gestures and other forms of conduct by which someone's views are conveyed. It also includes the right of the individual not to express any view, and pressure on a person to express a view on a particular matter would violate his/her right to freedom of expression. However, learners' rights to enjoy freedom of expression are not absolute. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited, as the disruption of schools is unacceptable. Learners have the right to agreed procedures with the governing body for expressing and resolving school-related grievances, including due process a method of appeal and a right to assemble peacefully on the school property at a time and place designated by the principal. Problems or issues should, as far as possible, be resolved at the school. In *Danielle Antonie v Governing Body, The Settlers High School & Head of Western Cape Education Department (2002) (4) SA 738* a learner challenged the school governing body's decision to suspend her from school for five days. Having converted to Rastafarianism, Danielle wore a dreadlock hairstyle and a black cap. The school governing body charged the fifteen-year-old Grade 10 learner with serious misconduct (and found her guilty) of defiance of the school code of conduct that required that "the hair must be tied up if below the collar". The court ruled in her favour and set the suspension aside, agreeing that the punishment

could have had both a negative effect on her development and her future career, as well as infringed her dignity and self-esteem. Apart from the question of human dignity, the court commended on the application of the right to freedom of expression, explaining that it is a constitutional right that has an effect on a school's code of conduct. The court decided that that "freedom of expression" includes aspects such as the freedom of choosing clothing and hairstyles.

◆ **Freedom of religion, belief and opinion**

Religious freedom is guaranteed in the Constitution. At the same time provision is made that school-governing bodies can decide on the religious observance to be implemented in the school. In this regard the South African Schools Act (section 7) states that, subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary. The governing body of a school may make rules regarding religious observances. As stated above, the only limitation that is prescribed is that staff and learners may not be forced to attend religious observances and that the observances are conducted on an equitable basis. With regard to the religious observances of their children, parents have the right to make requests concerning dress, food and the participation in certain activities that are forbidden by a particular religion.

3.2.3 The limitation clause

Fundamental rights and freedoms are not absolute and may therefore be limited. For example, a learner does not have an absolute right not to be searched while at school, because educators' and learners' rights to safety and security of the person must be respected and protected. Therefore, if a learner is believed to be car-

rying a gun, he or she may be searched. However, Bray (2005:29) states that a law that limits a right is an infringement of that right. If the limitation takes place in accordance with the provisions of the *Bill of Rights*, such an infringement or limitation will be “justifiable”.

In terms of section 36 of the *Bill of Rights*, rights may be *limited only in terms of law of general application* and to the extent that the *limitation is reasonable and justifiable* in an open democratic society based on human dignity, equality and freedom. In the first instance, this means that:

- rules of law that limit rights must be made known and must be understandable
- laws that limit rights may not be made only for a specific person or case

For example, a school governing body may not simply decide to suspend a learner from school; there must be a legal rule of general application that allows a governing body to suspend learners. The Schools Act, in section 9, clearly authorises governing bodies to suspend learners in certain circumstances and this applies to all school learners.

In the second instance, there must be an appropriate balance between the limitation of the right and the purpose for which the right is being limited. The following factors must be considered when deciding whether the limitation of a right is reasonable and justifiable (s 36(1)):

- the nature of the right
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relation between the limitation and its purpose
- whether there are less restrictive means to achieve the purpose.

Chapter Four

The Role of a Code of Conduct

Outline of this Chapter

The purpose of this chapter is to explain the legal requirements for developing and implementing a code of conduct for schools and to provide an outline of a basic code of conduct.

All public schools are required to have a code of conduct. This forms part of a school's domestic "legislation" and must be drafted within the legal framework that was set out in *Chapters Two and Three*.

4.1 The Purpose of a Code of Conduct

A safe, secure and positive environment is a prerequisite for effective learning. Such an environment is possible only when respect for self and others and the promotion of self-discipline are cornerstones of all behaviours. Schools operating in such an environment recognise that learners have needs to be met and work effectively towards meeting these needs. These needs include the need for belonging, affection, achievement, power, fun, but also to be safe and secure. If these needs are not satisfied learners may look for destructive means to draw attention to their needs. The way in which learners behave has a direct impact on the discipline within the school and school authorities have traditionally regulated the behaviour of learners so as to ensure that the school environment will be conducive to teaching and learning. However, traditional

mechanisms had been more concerned with punishment than reward in maintaining school discipline.

Discipline is more than a response to negative behaviour. Discipline could be approached from a more positive perspective in which it is aimed at inculcating self-control, character, orderliness and efficiency. Within such an approach, reward for positive behaviour is essential to support learners in developing such qualities as self-control, obedience, responsibility and striving towards good conduct. It is within such a context that a Code of Conduct for learners should be seen.

Phrased differently, a Code of Conduct is aimed at creating a discipline and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process in a context where learners feel safe and secure. School discipline and a Code of Conduct are thus intricately linked and cannot really be separated. The main purpose of a Code of Conduct for learners is to create order and discipline and to inculcate self-discipline and character.

4.2 Legal Requirements for a Code of Conduct

The legal basis for the development of a code of conduct is section 8 of the Schools Act. This section states:

- (1) Subject to any applicable provincial 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.
- (2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.
- (3) The Minister may, after consultation with the Council of Education Ministers, determine the guidelines for the consideration of governing bodies in adopting a code of conduct for learners.

- (4) 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.
- (5) A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.

4.2.1 Duty of governing bodies

One of the more important aspects of the Schools Act relates to establishment of school governing bodies. At the heart of this is the idea of a partnership between all people with an interest in education – parents, educators, learners, members of their local communities and various education departments. One of the tasks of a school governing body is the adoption of a Code of Conduct for learners after consulting with learners, parents and educators. According to Guidelines for the consideration of governing bodies in adopting a code of conduct for learners (Department of Education, 1998. Government Notice 776 of 1998), the Code of Conduct –

“must inform the learners of the way in which they should conduct themselves at school in preparation for their conduct and safety in civil society. It must set a standard or moral behaviour for learners and equip them with the expertise, knowledge and skills they would be expected to evince as worthy and responsible citizens. It must promote the civic responsibilities of the school and it must develop leadership. The main focus of the Code of Conduct must be positive discipline; it must not be punitive and punishment orientated but facilitate constructive learning.”

In other words, governing bodies do not have a choice in this matter. Even if the school has a code of conduct, it is still necessary to revise and develop the code so that it is in keeping with the Bill of Rights, Schools Act and provincial legislation.

4.2.2 What is a Code of Conduct

A Code of Conduct is a written statement of rules and principles that apply to a specific group of people like professionals or learners within a school. The Code of Conduct establishes rules for co-existence, order and interpersonal relationships in the school. The intention is to create an environment in which learners behave with courtesy, tolerance and consideration towards others, and refrain from aggressive and abusive behaviour such as intimidation, bullying, victimisation, physical or verbal abuse. A Code of Conduct should therefore not only highlight the expectations, values and beliefs of a group member, but should also contain a description of the forms of conduct that will be encouraged as well as those forms of conduct that will be discouraged as well as those forms of conduct that are undesirable and the response of the school to them. A Code of Conduct should therefore include the school rules and restitution applicable if rules are not adhered to.

It is important to emphasise at this point that school rules are subordinate legislation directed at regulating actions between and among learners; learners and the school; and learners and educators. Being sub-ordinate legislation, the Code of Conduct has legal status, but must be subjected to the Constitution, the Schools and provincial legislation. The Code of Conduct must reflect the constitutional democracy, human rights and transparent communication, which underpin South African society

4.2.3 Consultation

How the code of conduct is developed, written and enforced is very important. The Schools Act recognises the importance of involving the whole community in developing the code of conduct. Section 8(1) clearly states that parents, educators and learners must

be consulted. These groups must be given an opportunity to give their input. A discipline policy that is developed by a consensus of the school community is more likely to work and be effective, than one that is imposed from above by the principle of governing body. A participatory decision-making process is likely to ensure a genuine commitment on the part of educators, parents and learners to successfully implement the code. An open discussion with educators, parents and learners will help bring about a better understanding of their perceptions of and problems with discipline in the school.

4.3 Developing a Code of Conduct

Although numerous approaches to the development of a Code of Conduct and school rules could be identified, two deserve specific attention. Traditionally, an authoritarian approach to the development of rules and a Code of Conduct was followed. The basic assumption in this approach is that the education manager (school principal) has both the knowledge and the legitimate power to make the rules of a school. This approach by its very nature has great appeal as it gives the school principal/teacher a sense of security and control. Although it may have a number of advantages (e.g. it is less time consuming and thus has less impact on lesson time), it may prompt student aversion and aggression. This may even result in a situation where the school principal has to rely on coercive power to ensure the effective implementation of the rules laid down.

By contrast, a school may opt for a more inclusive process such as is described by the Schools Act (section 8) and Government Notice 776 of 1998. The basic assumption of this approach is rooted in democratic considerations (such as referent, expert and legitimate power). The school principal and educators share ideas with learn-

ers and their parents in an effort to develop a social contract on which the Code of Conduct and school rules will be based. As an inclusive process to give learners a feel of ownership of rules and at the same time it communicates respect for learners' needs and ideas. In the end, the school governing body must approve the Code of Conduct developed.

Although schools will adopt different approaches to consultation, the following process ensures that parents, educators and learners are included from the outset and given the opportunity to discuss, deliberate and review discipline needs and problems in the school. The challenge to the discipline committee will be to strike a balance between creating opportunities for discussion and moving through the process quickly and efficiently.

4.3.1 Awareness rising

During this initial stage, newsletters can be used to inform the various parties of the need to develop and/or revise the code of conduct, and to explain how the governing body plans to involve various groups and individuals in the process.

Such an inclusive process normally involves a small group of stakeholders (task team) that develop the basic principles, values and rules that should apply within the school. This document is then circulated and discussed with all the stakeholder groups and input and suggestions are invited to refine the document. The guidelines set out in Government Notice 776 of 1998 recommends that the Code of Conduct should suit the development of the learners (i.e. it should differentiate between primary and secondary school learners). It should be appropriate to the different school levels and school types (e.g. technical high schools may have a need for certain rules that could be superfluous in another school). The language used must be easily understandable to make the content ac-

cessible and the format should be user-friendly.

4.3.2 Drafting the Code of Conduct

Once sufficient information has been gathered, the discipline committee should draft a code of conduct as a consensus document. In drafting a Code of Conduct, specific attention should be paid to misconduct and restitution. It is also necessary to distinguish between misconduct and off-task behaviour. Off-task behaviour is behaviour that is not necessarily disrupting the school or class situation and includes behaviour such as daydreaming, doodling or talking. In contrast, misconduct is behaviour that interferes with the orderly running of a school, classroom teaching, the rights of others, in physically or psychologically unsafe, or destroys property. Misconduct can furthermore be divided into minor infringements (fiddling with a suitcase while the educator is talking), moderate infringements (bunking class or not attending a lesson) and serious misconduct (assault, drug trafficking).

In the event that a learner makes himself/herself guilty of misconduct, proper restitution or punishment must be considered. Learners must understand why action is taken against them and why their conduct is considered as misconduct and why they are to be disciplined or punished. The punishment must suit the offence. Effective restitution will have the following characteristics:

- It will include a plan for future actions.
- The people involved will see it as adequate compensation.
- It will require effort on the part of the offender.
- It does not in any way encourage further offences.
- It will be natural and logic and relevant to the inappropriate actions.
- It will avoid harmful criticism and the creation of feelings of guilt or anger.

- It will avoid feelings of resentment or being overextended.

A pre-established set of consequences is satisfactory but ideally true restitution allows all parties freedom to negotiate appropriate consequences and avoid a situation where rules are rigidly applied without taking the context and the character of the offender into consideration. This does not mean that rules should not be consistently applied, but it does mean that reasonableness and fairness should also be considered while taking personal circumstances into account in dealing with misconduct.

4.3.3 Implementation

After the consultation phase, the school governing body must adopt the Code of Conduct before it becomes official policy. Once it has been adopted, each stakeholder must receive a copy thereof. The stakeholder must also be consulted when the Code of Conduct is reviewed annually or when any amendments are made. Once the Code of Conduct has been approved, every learner and parent should receive a copy and sign acceptance thereof. All key stakeholders should be committed to the Code of Conduct despite its being directed specifically at learners.

4.3.4 Review

The code of conduct is not a static document. It should be reviewed and revised on an ongoing basis. As new discipline issues, rules, regulations and procedures arise, these must be communicated to the school and included in the code of conduct.

4.4 Components of a Code of Conduct

The Code of Conduct adopted by a school, could contain a set of moral values, norms and principles which the school community should uphold and promote as part of the roles and responsibilities

of various stakeholders in the creation of a proper learning environment in schools (Notice 776 of 1998). Furthermore, it should include the mission statement of the school, the school rules, must define misconduct and due process to be followed when rules are infringed and also provide for legitimate disciplinary measures.

4.4.1 The preamble

It was stated earlier that a Code of Conduct could be classified as subordinate legislation. It is therefore essential to indicate the legal basis (i.e. Constitution, Schools Act and provincial legislation) of the Code of Conduct to ensure the legal status of the document.

The preamble should direct the Code of Conduct towards a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all school. In this regard, the Code of Conduct should be linked to the Constitution and the South African Schools Act and reaffirm the basic rights of learners.

The preamble to the Code of Conduct may, for example, emphasise that every learner has the right to learn and that no person has the right to disrupt the learning of others. Similarly, it may state that learners have freedom of self-expression, but that all learners are expected to act and speak with courtesy and with respect for the ideas, rights of learners, rights, and property of others. Apart from reaffirming the rights of learners, the preamble may also state the purpose and the intent of the Code of Conduct.

Example: In the Code of Conduct of Excellent High School it is stated that:

“A school is a community. All members of the school seek to:

- provide learning opportunities so that students acquire the skills and competencies necessary to participate and contribute to

society

- foster a respect for the rights and needs of others, while developing a sense of responsibility for one's behaviour
- value individual and group achievement in all aspects of life and celebrate success
- promote the benefits of helping and working co-operatively with others
- provide a safe, happy, non-coercive, caring environment, which is conducive to working and learning".

4.4.2 Mission statement

A school must have a reason or existence that supersedes the simplistic answer: "To provide education". A mission statement is a comprehensive statement of purpose that permeates everything a school does and can be seen in all the daily activities of a school. It succinctly describes the rationale for the school's existence and the aspirations of its people and thus serves as the strategic driving force of all actions and plans to be developed by the school. A mission statement serves as the basis for school development planning, sets strategic priorities for budget allocations and provides the broad parameters within which a Code of Conduct should be phrased.

4.4.3 Rules of conduct

We live in a time when learners are quick to remind educator of their rights. It has become commonplace to hear educators complain about a sense of loss of control and discipline and to blame the loss on the fact that learners have unbridled rights. This is a fallacy. No rights are absolute. The Constitution makes it clear that rights may be limited provided that the limitation is reasonable, justifiable and does not constitute any form of discrimination. All the rules, including school rules, imply some form of limitation of

rights. The Schools Act (section 8(4)), makes it clear that nothing shall exempt a learner from complying with the Code of Conduct of the school. Furthermore, an educator at the school shall have the same rights as a parent to control and discipline the learner according to the Code of Conduct during the time the learner is in attendance at the school, any classroom, school function or school excursion or school related activities.

School rules are designed to regulate the general organisation of the school, and the relationships between the principal, educators and learners (Notice 776, 1998). Classroom rules are designed to give effect specifically to the relationship between educators and learners in the classroom. For the purpose of our discussion, school rules and classroom rules will be discussed separately.

School rules should be based on the following important principles:

- School rules should be directed at *effective teaching and learning*. This implies that school rules should be directed at securing the commitment of learners to learn and to develop their full potential (academically, occupationally, socially, spiritually and in sport, art and culture). They should actively participate in the learning process and decision making and have the opportunity to talk about their problems. At the same time, learners can expect educators to maintain a high standard of professional ethics and to be present to teach their classes, assist learners with learning difficulties, report on their progress and to look after their well-being.
- School rules must fall within the *confines of existing law* and may not contradict or contravene existing legislation. School rules should also be consistent with the Code of Conduct as a whole. Burden (1995) argues that all disciplinary regulations must be substantiated on the basis of being reasonable and necessary. Oosthuizen *et. al.* (2000) concurs with this as they state that school rules must be equitable, fair and reasonable and that the rules of natural justice must apply in applying school rules.

- Learners should be *involved with the formulation* of school and classroom rules and school rules must be stated in precise terms to ensure that all parties know exactly what is meant by a specific rule. Oosthuizen *et. al.* (2000) also stresses the importance of school rules to be comprehensive.
- School rules cannot be divorced from the *disciplinary system* to be used in the school. The consequences of breaking the rules and the punitive measures or restitution that will apply if rules are infringed must be clearly stated. It is essential to remember that school rules should make provision for fundamental fairness and fair warning and that the punishment must fit the offence. It is important that all learners know and adhere to school and classroom rules. Ignorance of these rules is not an acceptable excuse (see Notice 776 of 1998). Learners may not be punished for the acts of others.
- School rules should make provision to accommodate the *needs and expectations of the community* and school environment, the wishes of parents, and the school type and school level.
- School rules will remain applicable unless *revised*. In revising school rules, which could be done on an annual basis, a fair notice period for revision must be given and all stakeholders must be consulted.
- Every learner should be provided with a *copy of the school rules* at the beginning of each school year and young learners at primary school should be informed verbally of school rules.

4.4.4 Drafting school rules

In drafting school rules, schools should address the following categories of rules:

- Rules relating to *learner behaviour* towards educators, learner leaders and fellow learners. Examples of this type of rule include: “Learners should at all times act politely, with honesty and obediently. When learners encounter adults, whether visitors, parents of staff they must stand if they are seated and must greet the adult politely.”

- *Orderliness and punctuality.* Maintaining order and discipline is of cardinal importance for effective learning. Rules of this nature are aimed at reaffirming learners' commitment to do their schoolwork during classes, complete assigned homework and catch up on work missed because of absence. Disruption of the school or teaching and learning situation is unacceptable. Typical rules of this type include: *"The school starts at 07:45 and no late coming will be allowed. Learners must line up in neat rows at their respective classrooms immediately after the bell has rung for the start of the school or after breaks."*
- *Security and care of school property.* Schools are intended to be used by all the learners attending the school and it is the obligation of every learner to protect and carefully use all the facilities and equipment so that others that come after them can also enjoy the benefit of the facilities (Notice 776). Specific school rules should promote the care and security of the school property and it should be made clear that damage or destruction of property is a punishable offence. A few examples of school rules in this regard are: *"School property and the property of others may not be removed, damaged, defaced or dirtied. Learners who damage or write on desks, walls, doors or any other surface will be held liable for all repair costs incurred."*
- *Safety for learners.* The school environment should be such that learners are free of fear of being intimidated, victimised or assaulted. Verbal and/or written threats directed at any learner/teacher/non-teaching staff member should be strictly forbidden. There should be a relationship of mutual trust and respect between learners and educators. Any product, materials or goods that may be harmful to the health and welfare of learners should be prohibited on the school grounds (see Schools Act, section 8A and the Regulations for Safety Measures at Public Schools (2001) as amended in 2006)
- Typical rules aimed at securing the safety of learners, include: *"Fighting, harassment, verbal abuse and foul language are strictly forbidden. The use, as well as the possession of any tobacco product, is forbidden. To be in possession of, passing on, hiding,*

using, displaying alcohol and/or drugs is strictly forbidden. Being in possession of, using or spreading pornographic/offensive material, on the school grounds or on public transport, is strictly forbidden. Explosive devices are strictly prohibited on the school grounds. Dangerous weapons, or replicas thereof, are not allowed on the school grounds. Causing of false alarms in connection with the presence of explosives or regarding the breaking out of fires is strictly prohibited.”

- *School attendance.* The right of learners to basic education places the obligation on them to attend school regularly during school hours. Should a learner be absent his/her parent or legal guardian must notify the school to explain the absence. Typical rules that cover school attendance include: “All learners must attend school daily and must be on the school premises by 07:30. Learners who arrive at school late must obtain a letter of permission from the teacher in charge of the latecomers before they will be allowed into their register class. Learners may not leave the school grounds during breaks. A learner may not be absent from a lesson or the school grounds without permission from the principal. A learner who has been absent must hand an absentee letter, from his/her parent/guardian. In the event of learners being absent for three or more consecutive school days, a medical certificate must be provided. Wherever possible parents should inform the school by telephone of the reasons for absence.”
- *Cleanliness and care for school.* Rules pertaining to cleanliness of the school grounds. Classrooms and other areas are important to promote a feeling of pride and respect for the school among learners. These rules should also promote a sense of care for the school. Typical rules of this nature include: “Refuse must be thrown into refuse bins on the school grounds or into the waste bins in the classroom. Water and electricity may not be used unnecessarily. Taps must not be left dripping and lights may not be left on without reason.”
- *Dress code.* School rules should also include rules pertaining to school uniforms, hair rules, and wearing of jewellery. These rules

are very often written in terms of the unique needs of the school and community, but may include rules like: *“The learners’ hair must always be clean and neat. Learners may not colour, dye, bleach or highlight the hair. No extravagant hairstyles (e.g. Rasta hair and dread locks) will be tolerated. No moustaches and/or beards are allowed and facial hair must be shaved.”*(See Chapter Ten)

- *Rules of a general nature.* The unique circumstances of a school and the school type may demand that certain rules are made that may apply only to the specific school. These rules may include rules relating to the use of cars, motorcycles, bicycles and/or public transport to ensure the safety of the learners. It could also include rules pertaining to special facilities and areas in the school. In this regard a school may develop rules for the use of the school library, laboratories, workshops, gymnasium, sport-fields and sport-equipment. Rules may also cover the event of learners falling ill during school hours and making use of the sickbay.

4.4.5 Disciplinary procedures

The Schools Act requires the code of conduct to include appropriate disciplinary procedures, that is, the steps that will be followed when disciplining learners. Procedures must operate fairly to ensure learners are treated fairly and justly, and not punishment for offences they did not commit. In other words, the code of conduct must provide for “due process” of safeguards against unfair and arbitrary treatment. This is discussed in Chapter Five.

4.4.6 Appeal process

The Schools Act also recognises the right to appeal. Learners and their parents may appeal against a disciplinary decision with which they are not satisfied. For example, if a governing body suspends a learner he or she may lodge an appeal with the principal or disciplinary committee, and learners and parents may appeal to the Mem-

ber of the Executive Council (MEC) against a decision to expel a learner (s 9(4) of the Schools Act). Therefore, the appeal procedure should be included in the code of conduct.

Chapter Five

Due Process

Outline of this Chapter

In this chapter the meaning and content of due process is explained and practical guidelines on how to conduct a disciplinary hearing are given.

In terms of section 8(1) of the Schools Act, it is an obligatory duty of school governing bodies to adopt a code of conduct and within the code of conduct make provision for due process (s 8(5)). The term “due process” is uncommon in South African legal literature. It is found in American legal literature and specifically the Fifth and Fourteenth Amendments to the Constitution of the United States, which require the state to provide “due process” to an individual prior to taking from that person “life, liberty and property” (Kemerer & Walsh, 1994:238).

Although the concept is not defined in the Schools Act, it essentially means fair procedure – a process that should meet the standards of fundamental fairness. The inclusion of the term due process in the Schools Act raises the question of whether it is synonymous with our law rules of natural justice (see Chapter Three). While both concepts encompass the principles of procedural fairness, they are not synonymous.

5.1 The Content of the Right to Due Process

Due process encompasses the rules of natural justice as well as all the principles of procedural fairness that are contemplated under section 33 of the Bill of Rights, in order to give individuals the full benefit of their rights. Therefore, when applying due process in practice, for example when a learner is suspended of misconduct, governing bodies will need to comply with the basic elements of procedural fairness, as discussed below, which are found in common law and statute and protected by the Constitution. Due process includes both procedural due process, which refers to the appropriateness and fairness of rules. The distinction is important because the actions of a school governing body will not only be reviewed in terms of the procedures it followed, but the rules applied by the governing body and decisions taken may also be reviewed for reasonableness and fairness.

5.1.1 Application of due process

When applying due process in practice, for example before a learner can be suspended for misconduct, the governing body will need to comply with the basic elements of procedural fairness. Due process includes both procedural process and substantive due process.

Procedural due process refers to fair procedures that include the following steps:

- The learner must be informed, in a language that is understandable to him/her, of the charge against him/her before the disciplinary hearing takes place.
- The learners must be given the opportunity to stat his/her case. In this respect the principle of audi alteram partem is important.
- The learners must be allowed to be represented.
- Reasons must be given for the decision take by the disciplinary

committee.

- The learner has the right to appeal against the decision.

Substantive due process refers to the appropriateness and fairness of the rules.

In some disciplinary cases, it is necessary to conduct a preliminary investigation to collect evidence, which will determine whether or not there are sufficient grounds for a disciplinary enquiry (hearing). This also applies to cases of serious misconduct, for example, if a learner is alleged to be selling drugs at school.

A disciplinary hearing that is substantively fair needs to give clear reason for the disciplinary action. In other words, before conducting a disciplinary hearing the school must have enough evidence and good reason for the hearing to take place. The actions taken against the learner must be appropriate to the specific offence and the age of the learner. The type of punishment that the Disciplinary Committee decides on must not be too severe for the offence that was committed.

It is important to realise that, even if a learner commits a very serious offence, the decision of the governing body to suspend the learner, could be set aside if it fails to give the learner a hearing.

5.1.2 Impartial tribunal

In serious cases, especially when dealing with suspension, it would be necessary to allow a special disciplinary committee, of which the principal may still be a member, to hear the case. Generally, any educator, parent or learner who was involved in the incident that led to the suspension should not be involved in any decision regarding the incident. They could, however, be called as witnesses.

Whenever disciplinary proceedings are pending before any governing body, and it appears to such governing body that it would ex-

pose a witness under the age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the governing body may, if practicable, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary (Schools Act, section 8(7)). If a governing body appoints an intermediary under subsection (7), the governing body may direct that the relevant witness must give his or her evidence at any place which –

- (a) is informally arranged to put that witness at ease;
- (b) is arranged in a manner in which any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
- (c) enables the governing body and any person whose presence is necessary at the relevant proceedings to hear, through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony (subsection 9).

The parties to a hearing should consist of at least the following people:

- Chairperson (often the chairperson of the SGB)
- Principal and/or deputy principle
- Educator
- Parent governors
- Learner representative (in secondary schools)
- Accused learner
- Witnesses

The principal may act as the prosecutor or appoint any educator to represent the case against the learner. Remember if the principal acts as the prosecutor then he/she may not be part of the disciplinary Committee during the hearing!

In the case of *Michael de Kock v HoD of the Department of Educa-*

tion in the Western Cape, the Governing Body of the High School Overberg and the Minister of Education (case 12533/98) it is clear that school principals need to be careful how they play their dual role in disciplinary hearings. In this case both the principal and deputy principal had caught a boy with dagga in his possession and had confronted him with such possession. During the disciplinary hearing both of them had given evidence before the disciplinary committee and had been cross-examined by the boy's attorney and after the principal himself had actively taken part in cross-examining the boy. The Court held that gross irregularity had taken place in that the principal and deputy principal simultaneously acted as witness, prosecutor and judge. Therefore, it cannot be said that the boy had a fair trial before the disciplinary committee as required by section 9 of the Schools Act.

5.1.3 Right to information

The fundamental right to information is necessary for the exercise or protection of any right is provided for in section 32 of the Constitution. At common law, the audi alteram partem rule also requires that all relevant information, especially of a prejudicial nature, be communicated to the person who may be affected by an administrative decision. This ensures that the person concerned may prepare for his or her case, and will not be unfairly prejudiced. In practice this means that the learners and their parents must have access to all information about the alleged misconduct that the school intends to use during the disciplinary hearing.

5.1.4 Right to representation

A party to a hearing is usually entitled to legal representation only where such assistance is necessary to ensure a fair hearing. It is accepted, though, that a person who is party to a complex case or

situation, which has serious consequences, may not be able to properly put his or her case without assistance. Therefore, when a statute does not provide for legal representation, cognisance should be taken of the person's position and competence to put his or her case. A learner must be accompanied by his or her parent or a person designated by the parent at disciplinary proceedings, unless good cause is shown by the governing body for the continuation of the proceedings in the absence of the parent or the person designated by the parent (section 8(6)).

5.2 The Disciplinary Hearing

A disciplinary hearing is similar to a court case held at a school. The tribunal of Disciplinary Committee appointed by the SGB must follow due process in conducting the hearing.

5.2.1 Steps to be followed

The following steps should be followed:

- The learner must be informed in a written notice of the charges against him or her. There must be enough particulars of the alleged misconduct. Particulars of the place, date and time of hearing must be given. The learner must be given enough time to prepare for the hearing.
- Further particulars, which the learner may reasonably require to properly defend himself or herself must be provided in time.
- The learner may be represented or assisted by a legal adviser, parent, educator, member of the Representative Council of Learners or other suitable person.
- A person who investigated a complaint/ alleged misconduct cannot chair a hearing into such complaint/alleged misconduct.
- At the beginning of the hearing the prosecutor must explain the charge to the learner.
- The Chairperson of the Disciplinary Committee must then ask

the learner whether he/she admits or denies the charge as set out. The learner must then respond. Should the learner fail to respond, the learner will be deemed to have denied the charge.

- If the learner admits to the charge, the following procedure must be followed.

5.2.2 Role of the chairperson

- The Chairperson must question the learner with reference to the alleged facts comprising the misconduct.
- If, upon questioning the learner, it appears that his/her version totally differs from the facts outlined by the prosecutor, or if the Chairperson is not satisfied that the learner is really guilty of the charge, the Chairperson must write down that the learner denies the charge.
- If the Disciplinary Committee, or the majority of its members, is satisfied that the learner is guilty of the charge, the Disciplinary Committee must recommend to the SGB to find the learner guilty of the charge.

5.2.3 If the learner denies the charge

- The prosecutor may call witnesses or present other evidence in respect of the allegations against the learner;
- The learner, or his/her representative, may question any witness and examine any evidence presented by the prosecutor;
- After all the evidence has been led against the learner, the learner or his/her representative may call witnesses or present other evidence in support of his/her denial of the charge;
- The prosecutor may question any witness and examine any evidence presented on behalf of the learner;
- The Disciplinary Committee may question any witness or examine any evidence at any time;
- After all the evidence has been presented, first the prosecutor and then the learner or his/her representative may address the Disciplinary Committee.

5.2.4 Adjourn to consider the facts

After listening to both sides of the case, the Disciplinary Committee must adjourn the hearing to a specified time and date. During this adjournment the Disciplinary Committee must decide whether, the learner has been proved guilty of the charge.

5.2.5 Convey the decision

- After careful deliberation, the Chairperson must convey the decision, punishment and the reasons for the decision to the parties present. The reasons must be fair, just and based on relevant information.
- If the Disciplinary Committee (who was appointed by the SGB) decides that the learners should be expelled from the school, The SGB must make a recommendation to the Head of Department and must suspend the learner from the school pending the decision of the Head of Department on whether the learner is to be expelled.

If the Disciplinary Committee decides to suspend the learner, the suspension takes immediate effect unless the Head of Department orders otherwise. Where the learner is suspended, as a correctional measure, a copy of the record, with a suitable covering letter, must be send to the District Office. The school must keep one copy of the documentation presented at the hearing and letters send to the learner and his/her parents.

5.2.6 Appeal

- A learner or his/her parents may appeal to the Head of Department against the Disciplinary Committees findings of guilt against a penalty of suspension (See Schools Act, section 9 (4)).
- If the learner is found not guilty of the charge, the Disciplinary Committee must, if the learner so requests, publish its findings in the school.

Chapter Six

Forms of Punishment and Legal Limits

Outline of this Chapter

In this chapter various types of punishment are described. The legal consequences and limits are pointed out.

While positive school rules are needed for schools to be effective, it is also necessary to have punishments (corrective discipline) for those who break the rules and disrupt school activities. The types of sanctions that schools may impose are determined and regulated by law. While some punishments are lawful others such as corporal punishment and confinement, are prohibited. Moreover, some punishments that are permissible must be used with caution.

6.1 Consideration for Punishment

When a learner is punished, it is necessary for the educator to:

- explain what school rule was broken;
- explain the consequence of breaking the rule;
- explain the punishment; and
- record the punishment, especially for serious incidents and punishments.

At common law, punishment should be:

- fair and reasonable

- in proportion to the offence
- lawful; and
- consistently applied.

Lund (1996:43-45) also states that disciplinary incidents should be dealt with as soon as possible and that punishment should not be given in anger or in haste. Moreover, once the punishment has been administered, the case must be closed and learner and educator should start again with a clean slate to discourage the educator and/or learner from holding a grudge.

6.2 Legal Limits of Punishment

Punishment is a penalty or corrective measure inflicted on a person who has transgressed a school rule and is guilty of misconduct. When learners break school rules there are various punishments that might be used; some are totally illegal, others are only marginally lawful.

6.2.1 Corporal punishment

Section 10 of the Schools Act prohibits the use of corporal punishment in public and private schools. Corporal punishment includes slapping, pushing or shoving, and rough handling. Parents *may not* give the principal or educators permission to use corporal punishment on their children; nor may parents (instead of a principal or educator) administer corporal punishment to their own children on school property. Anyone who ignores this regulation commits an offence and can be charged in a court of law.

6.2.2 Expulsion and suspension

School authorities may exclude learners from school whose conduct interferes with or disrupts the function of the school, who habitually defy school rules, who pose a threat to other learners or

educators and whose conduct is wilfully insubordinate. Their exclusion may be of a temporary (suspension) or permanent nature (expulsion). Suspension and expulsion are, however, reserved for serious offences and misdemeanours which demonstrate persistence and wilfulness in pursuing the offending behaviour:

◆ **In terms of section 9 of the *Schools Act*:**

The Schools Act in Section 9 determines the following with regard to suspension and expulsion of learners: (the amendments to the 1996 Schools Act are indicated in brackets)

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

[Subs. (1) amended by s. 7 of Act 48/99 and substituted by s. 2 of Act 24/2005]

- (1A) A governing body must conduct disciplinary proceedings in the manner contemplated in section 8 against a learner within seven school days after the suspension of such learner.

[Subs. (1A) inserted by s. 2 of Act 24/2005]

- (1B) 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 the continuation of the suspension of such learner.

[Subs. (1B) inserted by s. 2 of Act 24/2005]

- (1C) 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.

[Subs. (1C) inserted by s. 2 of Act 24/2005]

- (1D) A Head of Department must consider the recommendation by the governing body referred to in subsection (1C)(b) and must

decide whether or not to expel a learner within 14 days of receiving such recommendation.

[Subs. (1D) inserted by s. 2 of Act 24/2005]

- (1E) A governing body may suspend or extend the suspension of a learner for a period not longer than 14 days pending the decision by the Head of Department whether or not to expel such learner from the public school.

[Subs. (1E) inserted by s. 2 of Act 24/2005]

- (2) A learner at a public school may be expelled only -

- (a) by the Head of Department; and
- (b) if found guilty of serious misconduct after disciplinary proceedings contemplated in section 8 were conducted.

[Subs. (2) substituted by s. 2 of Act 24/2005]

- (3) The Member of the Executive Council must determine by notice in the *Provincial Gazette* -

- (a) the behaviour by a learner at a public school which may constitute serious misconduct;
- (b) disciplinary proceedings to be followed in such cases;
- (c) provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings.

- (4) A learner or the parent of a learner who has been expelled from a public school may appeal against the decision of the Head of Department to the Member of the Executive Council within 14 days of receiving the notice of expulsion.

[Subs. (4) substituted by s. 2 of Act 24/2005]

- (5) If a learner who is subject to compulsory attendance in terms of section 3(1) is expelled from a public school, the Head of Department must make an alternative arrangement for his or her placement at a public school.

- (6) A learner who has appealed in the manner contemplated in subsection (4), must, pending the outcome of the appeal, be given access to education in the manner determined by the Head of Department.

[Subs. (6) added by s. 2 of Act 24/2005]

- (7) The Head of Department, in determining the manner of attendance contemplated in subsection (6) -
- (a) must take reasonable measures to protect the rights of other learners at the public school: and
 - (b) may consider an alternative method of providing education to the learner contemplated in subsection (6).

[Subs. (7) added by s. 2 of Act 24/2005]

- (8) 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.

[Subs. (8) added by s. 2 of Act 24/2005]

- (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.

[Subs. (9) added by s. 2 of Act 24/2005]

- (10) The governing body must implement the sanction contemplated in subsection (8).

[Subs. (10) added by s. 2 of Act 24/2005]

◆ **Offences that may lead to suspension**

In terms of Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (1998) offences that may lead to suspension include, but are not limited to, the following:

- (a) conduct which endangers the safety and violates the rights of others;
- (b) possession, the threat or use of a dangerous weapon;
- (c) possession, use, transmission or visible evidence of narcotic or unauthorised drugs, alcohol or intoxicants of any kind;
- (d) fighting, assault and physical bullying;
- (e) immoral behaviour or profanity;
- (f) falsely identifying oneself;
- (g) harmful graffiti, hate speech, sexism, racism;

- (h) theft or possession of stolen property including test or examination papers prior to the writing of tests or examinations;
- (i) unlawful action, vandalism, or destroying or defacing school property;
- (k) disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees and learners;
- (l) repeated violations of school rules or the code of conduct;
- (m) criminal and oppressive behaviour such as rape and gender based harassment;
- (n) victimisation, bullying and intimidation of others;
- (o) infringement of examination rules; and
- (p) knowingly and wilfully supplying false information or falsifying documentation to gain an unfair advantage at school.

In 2000 the Department of Education published a document “Alternatives to Corporal Punishment: A practical guide for educators. This document provides guidelines for drafting a code of conduct and dealing with misconduct.

The document suggests the following alternatives to corporal punishment to be carried out at different levels of misconduct:

◆ **Level 1 - Misconduct inside the classroom**

Failing to be in class on time, bunking classes, failing to finish homework, failing to respond to reasonable instructions, being dishonest with minor consequences.

Disciplinary action carried out by class educators: verbal warnings, community service, demerits, additional work, detention, etc.

◆ **Level 2 - Misconduct by breaking school rules**

Frequently repeating Level 1 misconduct and not responding to disciplinary measures taken by the educator, smoking or carrying

tobacco, leaving school without permission, using abusive language, interrupting education in the classroom, showing disrespect for another person, minor vandalism such as graffiti, being dishonest with more serious consequences.

Disciplinary action carried out by higher authorities, such as the head of department, for example, disciplinary talk with the learner, talks with parents or guardians, written warnings, daily report taken by learner and signed by educators, etc.

◆ **Level 3 - A serious misconduct or serious violation of school codes**

Repeating Level 2 misconduct, where action taken by the school authorities is considered ineffective, inflicting minor injury on another person. gambling, being severely disruptive of classes, forging documents or signatures with minor consequences, using racist, sexist or other discriminatory behaviour, possessing pornographic, racist or sexist materials, possessing dangerous weapons, theft, vandalism, cheating during exams, etc.

On this level disciplinary action carried out by the principal or referred to an outside agency for counselling is recommended. Learners should receive written warnings of the possibility of suspension from the school, referral to a counsellor or community service.

◆ **Level 4 - Very serious misconduct or very serious violations of school codes**

Repeating Level 3 misconduct where disciplinary action has been ineffective, threatening another person with a dangerous weapon, causing intentional limited injury to another person, verbally threatening another person's safety, engaging in sexual abuse, selling drugs, possessing or using alcohol or drugs or being drunk , dis-

rupting the entire school etc. On this level a formal disciplinary hearing should take place.

6.2.3 Suspension, expulsion and the right to education

Learners have a right to basic education and are also compelled to attend school by law. Therefore, suspension and expulsion do not prevent a learner who is within the compulsory school-going age from attending another school. In the case of expulsion, the Head of Department of a province must find a place for an expelled learner until the learner is beyond the compulsory school-going age.

6.2.4 Sending learners home

A learner may not be sent home for trivial reasons such as incorrect uniform or not having the necessary books, unless the learner is being wilfully disobedient. Removal from school may only be done for serious offences; this amounts to suspension and it must therefore be done in accordance with the regulations.

6.2.5 Detention

Detention may take the form of isolation during class, during break or after school. Imposing detention must, however, be done in a fair and reasonable way, and should also be guided by common sense. Before detaining a learner, it is important to consider a few legal implications. Too often educators detain learners after school without thinking about the consequences. This is not to say that learners may not be detained, but it must be done in a responsible way. Educator could find themselves in serious trouble if they detained a child after school for misbehaving as a result the child is stranded at school or has to walk home because he or she has missed the school bus or taxi. Some of the most important factors to bear in mind are:

- the seriousness of the offence;
- the age of the learner
- the distance the learner has to travel home; and
- the availability of transport.

When arranging detention, educators should give the learner and parents fair warning in writing, the use of detention in a school should be included in the school rules and brochures, and made known to all the learners and parents. The detention room must also be a place where learners are required to do serious work. Educators who send learners to detention should set work for the learners.

6.2.6 Daily reports

Disruptive learners may be required to report to the principal or another senior educator on a daily basis for a specific period of time. This should make learners realise that they are being closely watched. Alternatively, a learner may be required to carry a report sheet that is complete by each of the learner's educators and then handed to the principal or deputy principal at the end of the day.

6.2.7 Behaviour management contacts

A written contract may be drawn up between the educator and learner (and the parent if need be), that sets out specific goals for the learner, with appropriate conditions. A contract implies a two-way process and the school should undertake to provide the necessary counselling and/or a behaviour management support programme. Withdrawal of a learner from the school may not be a term in the contract. The normal procedures for suspension must be followed and complied with.

6.2.8 Time-out

Time-out is another common method of punishing learners. If a learner is very disruptive or violent, abusive, refuses to settle down and is preventing the educator from teaching, he or she can be removed from the classroom or isolated from the other learners. However, when a learner is required to stand or sit in a corner, possibly with his or her back to the class, or to stand next to the educator's desk or sit at a desk that has been isolated from the others, it is more likely to humiliate the person and provoke resentment than to correct behaviour positively. Educators then run the risk of infringing the child's right to dignity (s10 of the Bill of Rights) and the right "not to be treated or punished in a cruel, inhuman and degrading way" (s12(1)(e) of the Bill of Rights). Alternatively, learners are often instructed to stand outside the classroom until the next lesson begins or until the educator decides to call them back into the classroom. This may result in the learner wandering off and getting up to even more mischief or standing at the window performing antics to attract the attention of classmates.

If educators are going to use time-out so that learners can "cool off" and reflect on their misbehaviour, there should be a time-out room where the learners are sent and where they can be supervised. This may, for example, be an office next to the secretary or principal's office. Educators should avoid sending learners out of the classroom too often and for long periods at a time, as this would be unlawful. By placing a learner outside the classroom the learner is being deprived of his or her right to education.

6.2.9 Withdrawal of privileges

A learner may be punished by withdrawing certain privileges, for example, preventing a learner from participating in sport or cultural

activity, going on a school trip or being a class representative. If a privilege is withdrawn, care must be taken to follow due process and to ensure that the learner's schoolwork is not compromised. For example, a learner should not be prevented from watching a film that is part of the English syllabus.

In the case *Western Cape Residents' Association obo Williams and Another v Parow High School 2006 (3) SA 542 (C)* the school informed all grade 12 learners at the beginning of the school year, that attendance of the matric farewell function was a privilege and would be accorded only to those learners whose conduct, both academic and otherwise, merited it. The school then did not invite a learner to this function. The school decided that because of her disciplinary problems and lack of respect for authority, she had forfeited her right to attend the function. The Court held that the granting of privilege as a reward for good behaviour was one of the tools that could be used to teach students discipline and respect for authority. Withholding privilege was not an infringement of the student's rights to equality and dignity. In fact, granting a privilege to a student who had not earned it might constitute an infringement of the rights to equality and dignity of those learners who had earned it. Obviously, the right to freedom of expression did not entitle a learner to be ill-disciplined or rude.

6.2.10 Assigning extra work

Giving learners additional written schoolwork, for example writing an essay, copying sections from a textbook or doing extra maths, is a common form of punishment. However, educators also need to be careful when assigning extra school work. Although this is not unlawful, it does detract from the value and purpose of schoolwork and can result in learners developing negative attitudes towards a particular subject. Moreover, educators must be careful not to pun-

ish learners for poor work performance, for example, for not completing work, where it may be because of lack of understanding and ability. Extra work may also be counter-productive in motivating learners to work diligently.

6.2.11 Community work

Learners may be given community work as a means of punishment. This may include cleaning classrooms and toilets, washing windows, picking up litter and weeding the garden. It may also involve learners helping out at a charity organisation. This is especially useful for learners who appear to lack responsibility and consideration for others. Community work must be supervised and should not be done during class time.

6.2.12 A points system

Many schools use a system whereby points are either awarded for good behaviour or deducted for misbehaviour. For example, learners begin a school year with 500 points and thereafter points are deducted for misbehaviour. Alternatively, learners begin with zero points and then accumulate points for good behaviour. The main criticism against such a system is that there is often great deal of inconsistency in the way in which points are rewarded or deducted. The fact that the consequence will only be applied after the learner who misbehaved has attained a number of negative points, thus taking such as the long period before consequences can be applied indicates some flaws in the system. Some schools do not have adequate resources to employ this strategy as a disciplinary measure. Moreover, learners, especially in the secondary school, are inclined not to take the system seriously.

Chapter Seven

Conducting Searches

Outline of this Chapter

In this chapter the requirements and legal limits of conducting searches in schools are discussed. While learners have the right not to be searched, this right can be limited in the school context in the interest of school health and safety.

Prin cipals and educators are often faced with the dilemma of whether or not to search learners and their property. When conducting searches and seizures, it is important to take cognisance of the Bill of Rights, specifically the child's right to privacy (s 14) and the right to respect and protect his or her dignity (s 10).

7.1 Right to Privacy

In terms of section 14 of the Constitution, everyone has the right to privacy, which includes the right not to have:

- (a) their person or home searched;
- (b) their property searched
- (c) their possessions seized;
- (d) the privacy of their communication infringed.

At first glance it would appear that principals and educators may not search learners and their property, or confiscate items belonging to the learners as this would be contrary to the spirit and con-

tent of section 14. However, in terms of section 36 (limitation of rights) this may be limited to reasonable and justifiable limitations imposed by law of general application. This right might be limited where it might be necessary in certain circumstances for school officials to conduct searches of persons and property, for example, when searching for illegal drugs, alcohol or dangerous weapons.

7.2 General Legal Requirements and Limits

In terms of the Schools Act section 8A:

8A. Random search and seizure and drug testing at schools

- (1) Unless authorised by the principal for legitimate educational purposes, no person may bring a dangerous object or illegal drug onto school premises or have such object or drug in his or her possession on school premises or during any school activity.
- (2) 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.
- (3) (a) A search contemplated in subsection (2) 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.
- (b) When conducting a search contemplated in subsection (2), the principal or his or her delegate must do so in a manner that is reasonable and proportional to the suspected illegal activity.

- (4) 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;
 - (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
 - (d) be done if it does not extend to a search of a body cavity of the learner.
- (5) Any dangerous object or illegal drug that has been seized must be -
- (a) 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).
- (6) If the police cannot collect the dangerous object or illegal drug from the school immediately, the principal or his or 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).
- (7) The police officer who receives the dangerous object or illegal drug must issue an official receipt for it to the principal or to his or her delegate.

In the first instance, the *purpose of the search* is of the utmost importance. Before a search is carried out, there must be *reasonable suspicion* that a crime has been committed or is about to be committed. There must be enough reliable information to justify a search and it must be deemed necessary for maintaining discipline. Secondly, it is important to consider the *place being searched*. One has to take care not to infringe a person's right to privacy and dignity. The closer the search is to the person, the higher the risk of privacy invasion. The highest degree of invasion would be a strip-search and should be avoided, while a lower degree of invasion is searching a school desk. Thirdly, the person doing the search must have the authority to do so. Boys and girls should be separate and searched by a person of the same gender.

7.2.1 The standard of "reasonableness"

Because of inadequate legal reference in South Africa, we can at this stage only speculate on what the court's definition of reasonableness would be. It is, however, a factor which must be considered when faced with such issues. Therefore, it may be constructive to consider international trends.

The reasonableness standard was applied in a USA case, *New Jersey v TLO* 469 U.S. 325 (1985), one of the few school search and seizure cases decided by the US Supreme Court. In this case a teacher saw a learner and a friend smoking in a toilet. This was a violation of a school rule. The learners were questioned by the vice-principal. The first learner admitted to smoking, but *TLO* denied smoking and to being a smoker. The principal then asked to see *TLO's* purse which she reluctantly provided. After opening the purse, the principal immediately saw a packet of cigarettes. Possession of cigarettes was not a violation of school rules, but it did support the eye witness testimony that *TLO* had been smoking. Once

the principal had removed the cigarettes, he noticed rolling papers, which he associated with marijuana use. He then conducted a thorough search of the purse and discovered a small quantity of marijuana, a pipe, numerous one dollar bills, plastic bags, a list of people who owed money and two letters implicating her in drug sales. The evidence was turned over to the police and delinquency charges were filed. Although *TLO* at first confessed to selling drugs, she later claimed that the evidence provided by school officials should be suppressed because the items were seized in violation of her Fourth Amendment right which protects the right of citizens “to be secure in their persons, houses, papers and effects against unreasonable search and seizure.”

In deciding the case, the Supreme Court held that the Fourth Amendment applies to searches conducted by public school officials. It was decided that to meet constitutional scrutiny, such searches need to be reasonable. In examining the events leading up to the search, the Court ruled that the search would be found reasonable if it were: (1) justified at its inception, i.e. were there reasonable grounds for suspecting that the search would turn up evidence that the learner had violated either the law or a school rule and (2) reasonably related in scope to the circumstances that justified the search in the first place, i.e., were the measures adopted reasonably related to the objectives of the search and not excessively intrusive in the light of the age and sex of the learner and the nature of the offence. In the *TLO* case both searches were held to be reasonable. The report that she was smoking justified the first search for cigarettes, while the discovery of rolling papers prompted a reasonable suspicion that the purse contained marijuana. The Court found that a reasonable suspicion was sufficient considering the relative minor intrusion into the learner’s privacy (Camp et al, 1989).

Once the standard of reasonable suspicion has been met, reasonable scope is considered. The place or person identified through reasonable suspicion has a direct bearing on the scope of the search. The closer the search comes to the person, the higher the intrusiveness and, as a result, the higher the scope of the search.

A very high degree of intrusiveness would be a strip-search of a person. The lowest degree would be the search of an inanimate object such as a desk. Educators, delegated by the principal, who intend conducting searches, should decide on the degree of intrusiveness.

A search of a learner's personal belongings, such as a bag and purse requires a higher standard of protection than a search of a desk, because it involves personal belongings in which the learner has a higher expectation of privacy. While desks are the property of the school, personal belongings are the property of the learner. When a school employee actually touches a learner's clothing while engaged in a search, the search becomes more invasive. Thus searching pockets or doing a pat-down or strip-search might impact on the learner's dignity which is protected by section 10 of the *Constitution*.

The most controversial search of learners is the strip-search and in general is considered impermissible. In the USA for instance, the courts have determined that strip-searches require more than just "reasonable suspicion". Because of the intrusive nature of strip-searches, school officials should have "probable cause" (i.e. a high level of justification) that the learner is in possession of illegal substances or a weapon that may threaten the safety of other learners. A body cavity search is the most serious and intrusive and should never be conducted by school officials or educators.

7.3 Police and Canine Searches

With the increasing problem of drugs in schools today, school officials are turning to the police and their trained dogs to sniff out drugs in schools. Police require a valid search warrant before they may conduct a search in a school. There is no clear policy on canine searches in schools. Looking abroad, in the USA, some courts have expressed reservations about canine searches and have been reluctant to accept canine searches in some circumstances as it was considered to be too intrusive of a learner's rights to privacy.

7.4 Metal Detectors

Metal detectors used for conducting searches are commonly found in airports, courthouses, shopping centres and some businesses. Although based on "suspicionless searches", they are permissible because they are designed to protect the public and they are directed at everyone and not at a particular person. In response to the growing problem of crime and violence in schools, more schools are considering using metal detectors or scanning devices to screen learners. This is controversial and costly in terms of equipment and personnel. However, if metal detectors are in general permissible, a public institution such as a school should be able to use metal detectors if they are intended to protect the safety of learners and personnel, as well as the general public, and to reduce the level of crime and violence in schools.

7.5 Cameras on School Grounds and in Classrooms

In many schools CCTV cameras have been installed in corridors and in classrooms to protect learners, staff members and the school property. School governing bodies may decide to install these cameras to monitor learners' behaviour and to act as a deterrent against school violence and vandalism. Before installing these cam-

eras the purpose and advantages thereof should be discussed with all staff members and learners.

Installing cameras in classrooms, corridors and school grounds is not an invasion of the privacy of staff members or learners. However, if these cameras are used for unreasonable policing of educators it might lead to concerns and unhappiness.

7.6 Practical Guidelines for Conducting Searches

- Educators and other school officials can be held liable if a learner can show that the person conducting the search acted with malice and was unfair.
- Prior to undertaking a search, the principal or educator must have reasonable suspicion that one or more learners have engaged in a wrongful act.
- Searches should be authorised by the principal.
- Schools should have a clear set of rules and regulations dealing with searches and seizures.
- If a learner refused to be searched, and it is not a matter of urgency, call the parents or guardian. If the parent refuses, hand the matter over to the police.
- Strip-searches are generally not permitted and must be avoided.
- If the police are conducting the search, the school authorities should ensure that a proper search warrant is obtained.
- Parents and learners must be informed of the school's procedures for conducting searches.

Chapter Eight

Bullying in Schools

Outline of this Chapter

Bullying in schools is a serious problem that needs to be dealt with in the code of conduct or a separate policy. In this chapter the nature and consequence of bullying are discussed and the legal implications for school governors are highlighted.

Bullying is one of the most underestimated problems in schools today. It is something that people prefer to ignore and simply pass off as nasty children picking on others. Bullying, however, is serious and prevalent in many schools. Behr (2000:47) in a study conducted at middle to upper-class school in Gauteng Province found that 45.5% of 608 learners experienced bullying at least once a year. 84% testified that they witnessed events of bullying once, while almost half witnessed bullying on three or more occasions that year. Similarly, De Wet (2006) in her study that was conducted in the Free State province states that bullying is a reality in the daily life of most of the learners.

In South Africa, the majority of schools, if not all, experience bullying. This is still experienced even after the government has encouraged all schools to have a code of conduct for learners that also address bullying problems. Nearly 40% of South African children are victims of bullying and children who are bullied are victims of bullying and may even commit suicide. Also bullies are more likely to be arrested for committing a crime and more likely to abuse their spouses in later life.

Bullying happens in every school regardless of race or class (Department of Education, 1999).

Research on bullying in England suggests that four out of five children are affected by bullying and in a study involving 25 secondary schools, 83% of the boys and 67% of the girls admitted to bullying behaviour. Similar research in the USA indicates that one in seven learners is either a bully or has been a victim of a bully. In research conducted in primary schools in South Carolina, of the 2 289 learners surveyed on bullying, two-thirds said they had been bullied, more than 64% thought bullying was a problem and more than 83% said that they would like school more if bullying was dealt with. In South Africa, the research on bullying completed by De Wet (2003, 2005 and 2008) confirms that bullying is part of the daily lives of children in schools and more so in school hostels.

8.1 Nature of Bullying

Bullying has profound consequences for the bullied. Although the definitions of bullying vary, it does come in many forms ranging from subtle verbal comments and negative gestures to overt physical aggression. Reports on bullying cite examples of learners being physically assaulted, in some instances resulting in death, some have been thrown down staircases and others locked in closets. Bullying does not have to be physical. It can be psychological or emotional, and very subtle, which can be even more distressing than physical abuse.

8.2 Who are the Bullies and Bullied?

A characteristic feature of bullying is that it is unprovoked and repeated behaviour. Victims of bullying often display vulnerable features, such as anxiety, shyness and insecurity, and/or they may be overweight, physically small or handicapped in some way. Bullies,

on the other hand, are often underachievers and prone to antisocial behaviour. The effects of bullying on learners are far-reaching. They often become withdrawn, fearful, anxious, depressed and insecure, and develop stress-related symptoms such as persistent headaches and stomach ailments. Some children have even contemplated or committed suicide. Moreover, the effects of bullying can be long-lasting, and may persist into adult life.

8.3 Response to Bullying

A real problem with bullying is that educators and parents often don't spot bullying, or they brush it aside as nasty behaviour, not wishing to make too much out of it. This is made worse by the fact that children who are bullied are afraid to speak out of fear of further bullying. Parents who know their children are being bullied are also sometimes reluctant to approach the school because they feel intimidated and fear that their children might be victimised even more. But, bullying needs to be brought into the open and dealt with. This will require a joint effort by educators, parents, learners and professional welfare workers. Bullying can be reduced if schools are aware of the problem and have a policy in place for dealing with bullies and the bullied.

8.4 Combating Bullying

All schools should have anti-bullying strategies, starting with the school's code of conduct. Schools can have a separate policy on bullying, as an addendum to the code of conduct, or it can be incorporated into the overall code of conduct, provided it is very clear. Questionnaires on bullying are useful for gathering information about the extent and nature of bullying in a school. This information can be used as a springboard for identifying problem areas, creating awareness, developing lessons for classroom discussion

and developing anti-bullying strategies. To find out about the extent of bullying in your school, conduct a basic survey using the checklist provided in *Appendix C*.

8.5 Legal Duty and Liability

Schools cannot afford to be complacent about bullying. The school has a *legal duty* to provide children with a safe and secure environment, and to protect them from deviant behaviour that affects their well-being and infringes their basic rights to security, human dignity, privacy and education. A question that arises is whether an educator or principal is negligent if he or she fails to take the *necessary steps* to prevent bullying and to impose adequate levels of discipline. If the negligence can be proved, it is certainly possible for schools to be held liable.

The legal rules that control and direct the management and operation of bullying in South African public schools are part of the Bill of Rights, international children's rights conventions, common law (law of delict, the educator's duty of care, the *in loco parentis* principle), case law and criminal law. A thorough knowledge of the phenomenon "bullying" is necessary to enable educators to identify the applicable legal rules contained in the legal sources discussed in previous chapters.

Chapter Nine

Criminal Behaviour in Schools

Outline of this Chapter

The purpose of this chapter is to briefly explain the legal content of some of the more common crimes committed by learners at school, and the legal capacity of learners.

Crime and violence are on the increase in schools and educators have to deal with a range of criminal acts perpetrated by learners. Some of the more prevalent crimes include drug abuse, vandalism, theft, assault and sexual offences. Such criminal misconduct must be reported by the school and investigated by the police, and referred to the court if necessary.

9.1 Criminal Capacity of Learners

Learners, like all citizens, are subject to the laws of the country. But, depending on their age, learners vary in criminal capacity, or criminal accountability. However, under certain circumstances they can be held liable for their unlawful act on school premises. A person has capacity if he or she has the “mental abilities require by the law to be held responsible and liable for his [her] unlawful conduct” (Snyman, 1995:145). The mental abilities, which a person must have, are the ability to appreciate the wrongfulness of the conduct and the ability to conduct oneself in accordance with such appreciation of the wrongfulness of the conduct (Snyman,

1995:146). If a person lacks these abilities, he or she cannot be held criminally liable for an unlawful act or omission.

Criminal capacity may be completely or partially absent because of age. For instance, a child who is under the age of 7 (who has not had a 7th birthday) lacks criminal capacity and therefore cannot be held liable for unlawful conduct. After a child's 7th birthday but before completing the 14th year (i.e. he or she has not had a 14th birthday), the child is *rebuttably presumed* to lack criminal capacity. In other words, the child is presumed to lack capacity but he or she *could* be held liable (accountable) if the State can prove *beyond reasonable doubt* that the child was capable of appreciating the nature and consequences of his or her conduct. Therefore, a 12 year-old learner who vandalises school property can be held liable if it is proved that the learner was aware what he or she was doing, was wrong. After the age of 14, a child has full capacity and therefore can be held liable for unlawful conduct.

9.2 Criminal and Civil Law

Criminal law is part of public law and deals with crimes directed against public interests such as theft, rape, assault and murder. In criminal law the State prosecutes the offender and metes out the punishment. Civil law forms part of private law and deals with delicts (wrong acts) directed at private interest. In civil law a private party institutes legal action with the result that a guilty party may be ordered to pay damages to the injured party. For example, if an educator carelessly (negligently) injures a learner at school, the matter is usually decided by a civil court action against the educator in his or her personal capacity.

Criminal acts committed by learners may give rise to both criminal and civil actions. For example, if a learner stabs and seriously injures another learner, the state may prosecute the learner for assault

and the parents of the injured learner may also institute a civil action for damages to pay for hospital fees, for example. If the school and/or state take no action against the learner who has committed a crime, the parents acting on behalf of the injured learner may still institute a civil action against the offender for damages.

9.3 Drugs in Schools

The presence of drugs in schools is a major concern and keeping schools free of drugs is one of the more difficult tasks facing school personnel. The use and abuse of drugs among school children and the availability of drugs in schools is on the increase. Catching culprits is one of the real difficulties in eradicating drugs in schools. Often educators have a very good idea that learners are using or selling drugs, but simply do not have the evidence. Also, learners are often afraid to report other learners who are dealing with drugs for fear of victimisation by the offenders. As difficult and as unpleasant as the task may be, school personnel have little option but to tackle the drug issue head on and to keep their schools free of drugs. After all, possession, use and sale of illegal drugs are criminal offences and learners, like all citizens, are subject to the laws of the country.

9.3.1 Conducting searches

Conducting searches is one of the few means available to school personnel to find out if a learner is in possession of drugs. However, school principals are often reluctant to conduct searches because they are concerned about infringing learners' rights to privacy and dignity, and the right to freedom from illegal searches. But, there is no absolute right to privacy or to be free from all searches. These rights must be balanced against the right and duty of school personnel to provide learners with a disciplined, orderly

and secure school environment. The law therefore recognises that searches are a means of maintaining discipline and enforcing school rules. See *Chapter Seven*,

9.3.2. Drug testing

The Schools Act (s. 8) states the following with regard to random drug testing in schools:

- (8) The principal or his or her delegate may at random administer a urine or other non-invasive test to any group of learners that is on fair and reasonable grounds suspected of using illegal drugs, after taking into account all relevant factors contemplated in subsection (3).
- (9) 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 labeled with full particulars as contemplated in subsection (5), with the necessary changes; and
 - (e) a device contemplated in subsection (11) is used.
- (10) The principal or his or 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.
- (11) The Minister must -
 - (a) identify the device with which the test contemplated in subsection (8) is to be done and the procedure to be followed; and
 - (b) publish the name of this device, and any other relevant information about it, in the Gazette.
- (12) 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.
- (13) Any disciplinary proceedings in respect of a learner must be conducted in terms of the code of conduct contemplated in section 8.
- (14) No criminal proceedings may be instituted by the school against a learner in respect of whom -
- (a) a search contemplated in subsection (2) was conducted and a dangerous object or illegal drug was found; or
 - (b) a test contemplated in subsection (8) was conducted, which proved to be positive.

[S. 8A inserted by s. 7 of Act 31/2007]

The purpose of the National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions (Published under General Notice 3427 in *Government Gazette* 24172 of 13 December 2002) is to help 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, while assisting and supporting learners with a drug problem, as long as they are prepared to co-operate with educators and other professionals involved in the treatment and rehabilitation process.

Testing for drugs is one way of determining if a learner is using drugs. In some countries, school districts have approved drug testing programmes in schools. In South Africa no decision has been made yet about the device (see Schools Act, s. 11) that may be used for drug testing. Until such time as there is clarity on this issue, schools may not subject learners to compulsory drug testing. A learner, who is a minor, may also not give the school permission to administer a drug test. If the school principal knows, or is fairly certain, that learners are taking drugs, he or she may advise or request parents to have their children tested. Schools may not test learners

for drugs without parents' permission.

If a learner has been found guilty of using, possessing or selling drugs and is disciplined, part of the requirements for staying at the school of being re-admitted may be compulsory participation in a drug awareness and rehabilitation programme, and regular testing arranged by the parents or guardian.

9.3.3 General guidelines

- Schools should have a policy on drugs that is additional (an appendix) to the general code of conduct (see *Appendix D*).
- Educators, parents and learners must be informed of the school's procedures for conducting searches.
- Educators and learners should know what procedures to follow in emergency situations.
- A team of support staff should be identified and trained to provide counselling to learners. This team should consist of at least a senior person in management, a school governor, a school psychologist or guidance educator and a representative from a drug rehabilitation organisation.
- Drug education programmes should be an ongoing initiative in schools.

9.4 Crimes Against Persons and Property

In this section, a brief explanation is given of some of the most common criminal acts occurring in schools and the consequences that these acts may have.

9.4.1 Vandalism

Vandalism is the malicious damage to property is one of the most prevalent crimes committed against schools. A person commits malicious injury to property he or she *unlawfully* and *intentionally* damages movable or immovable property belonging to another.

This crime overlaps with certain instances of theft and arson. Therefore, learners who deliberately break windows and doors of classrooms, burn school buildings, destroy desks and equipment, commit a crime and may be liable for their actions (see criminal capacity above). If learners are found guilty of vandalism, the school can require the parents to make reparations by replacing damaged property or by paying for the damage to be repaired.

9.4.2 Theft

Theft of school property and the property of others is all too common in schools today. A person commits theft if he or she *unlawfully* and *intentionally* appropriates (removes/takes) that belong to another person (natural or juristic person). Learners may be suspended or expelled for theft provided the correct procedures have been followed (see s. 8 of the Schools Act). Cases of theft should be reported to the police and criminal action may be instituted against the learner.

9.4.3 Assault

Assault is a crime against bodily integrity. It involves the *unlawful* and *intentional use of force*, directly or indirectly, against another person or inspiring a belief in another person that force is immediately to be applied to him or her (Snyman, 1995). Therefore, in certain circumstances, bullying can also amount to assault (see *Chapter eight*). Assault can be committed even though there is no physical impact on the person's body. It can be committed if X threatens Y with immediate violence. For example, a learner threatens to beat up an educator if the educator does not pass him or her, and the educator genuinely *believes* and fears the threat. If the educator did not believe the learner, there is no assault. If a learner threatens an educator or fellow learner with a firearm and the treat

is believed to be real, the fact that the firearm might be loaded or a fake (e.g. a toy gun) will not afford the learner a defence. School personnel are cautioned not to dismiss incidents of assault as mere “playground scuffles” but to take strict action where necessary an appropriate.

9.4.4 Possession and use of firearms and dangerous weapons

An increasing number of learners are bringing firearms and other dangerous weapons, which are creating a threat to the safety and security of all learners and school personnel. The school’s code of conduct should spell out the types of weapons that are prohibited and which will be confiscated. Objects such as knives, daggers and spears that are designed to be used as weapons are readily identifiable as dangerous weapons and can be immediately confiscated. However, other objects that are not weapons but could be used as weapons such as scissors, cricket bats, screwdrivers and stones may be designated as dangerous weapons and confiscated if the learner has or intends to use them as a weapon. Learners may be searched if there is reasonable suspicion to believe that they are in possession of firearms or other dangerous weapons.

9.4.5 Sexual offences

In their report on school-based violence the South African Human Rights Commission says sexual and gender-based violence occurs in educational settings with most incidences targeted against girls by male educators and class-mates. There are also increased reports of violence being targeted against lesbian, gay, bisexual and trans-gendered young people. Sexual and gender-based violence can be exacerbated by the government’s failure to enact and implement laws that provide learners with explicit protection from discrimination (South African Human Rights Commission, 2008).

Inappropriate and unlawful sexual relationship between learners and educators, and between learners are commonplace in schools. The *Sexual Offences Act of 1957* creates a number of offences relating to sexual intercourse or sexually indecent acts. Of particular relevance is section 14, which prohibits sexual intercourse or the performance of immoral or indecent acts with youths below a certain age, even with their consent. Section 14(1) provides that any male person commits an offence if he has or attempts to have sexual intercourse with a girl under the age of 16; commits or attempts to commit an indecent act with such a girl (or boy under the age of 19); or entices such a girl or boy to commit an immoral or indecent act. Consent by the girl or boy is not a defence. If a male has intercourse with an underage girl without her consent, it amounts to rape. The punishment for the crime is imprisonment or a fine. In schools, this seems to be a particular problem and is often ignored. If the male learner is deemed to have criminal capacity, he can be punished in a court. Section 14(3) deals exactly with the same conduct as section 14 (1) but with the sexes reversed. Thus section 14 (3) punishes sexual intercourse or indecent acts committed by females in respect of boys under sixteen and girls under 19.

The South African Council for Educators (SACE) regulates the ethics of professional behaviour of educators through a Code of Conduct for Educators. The Code of Conduct for educators determines that educators should promote gender equality and refrain from any form of sexual relationship with the learners or sexual harassment (physical or otherwise) of learners. The Employment of Educators Act, Act 76 of 1998 clearly spells out in section 17 (g) that sexual harassment of learners by educators is a form of serious misconduct.

In *K v Minister of Safety and Security*, a 20-year old female was stranded far from home after her boyfriend abandoned her. Three

policemen in uniform offered to take her home. Her gratitude turned into horror when they subsequently raped her. In its judgment the Constitutional Court said the opportunity to commit a crime would not have arisen but for the trust the applicant placed in the policemen and the nature of their employment. When the policemen in uniform raped the applicant, they were simultaneously failing to perform their duties to protect the applicant. They not only did not protect her, they infringed her rights to dignity and security of the person (Constitution, sections 10, 12). In doing so their employer the Minister of Safety and Security and their duty to protect was not met. The common-law principle of vicarious liability holds an employer liable for the wrongful deeds (delicts) committed by its employees where the employees are acting in the course and scope of their duties as employees. Therefore the respondent is vicariously liable for the conduct of the policemen. Similarly, a school is responsible for the care and welfare of its learners. Teachers and especially the school principal are entrusted with the care and safety of the learners. Abusing the special position in which their employment places them by sexually abusing learners would hold the school and the Department of Education liable.

School principals have a duty to protect learners from sexual offences and not to sweep the matter under the table. The code of conduct must clearly set out the rules and consequences regarding sexual offences. For example, in an incident involving the rape of a schoolgirl, a school governing body suspended two boys who confessed to committing the crime. After a hearing and discussion with the parents concerned, the governing body decided that 8 days suspension was sufficient with no further action taken (confidential report). In this case the governing body clearly failed in its duty to ensure that appropriate action is taken.



Chapter Ten

Uniform and Appearance Issues

Outline of this Chapter

In this chapter the disciplinary issues relating to school uniform and learners' appearance are discussed.

Disputes and conflict between educators and learners about learners' uniforms, hairstyles and general appearance have existed for as long as there have been schools. In fact, if one thinks about it, principals and educators spend an inordinate amount of time inspecting, measuring, cajoling, detaining and punishing learners for irregular items of clothing, hairstyles and hair lengths.

10.1 Right of Freedom of Expression

Section 16 of the *Bill of Rights* accords learners the right to freedom of expression. Widely defined, freedom of expression is more than just freedom of speech. Freedom of expression includes the right to speak, read, hear and wear. Therefore, it is extended to forms of expression as seen in a learner's choice of clothing and hairstyles. In the school context, freedom of expression is manifested in several ways, for example, in the freedom to speak (oral expression), to publish (written expression), to wear symbolic items (e.g. buttons advertising a particular political party) and through dress and hairstyle. However, the right to freedom of expression is

not unlimited and may be restricted or limited in the school context. For example, vulgar words and racial and sexual insults are not protected speech. Freedom of expression which leads to a substantial disruption in school activities or infringes the rights of other can be limited. In other words, complete freedom of expression on the part of learners is inconsistent with the school situation. Rights are not absolute and are qualified by the operational needs of the school.

Section 36 of the *Constitution* makes provision for the limitation of rights provided it is reasonable and justifiable in an open democratic society. Factors that must be taken into account when limiting individual rights include: the nature of the right, the importance of the purpose of maintaining an orderly teaching/learning environment, ensuring the safety of learners and educators, and enforcing regulations that are necessary for the proper functioning of the school. While the courts will generally defer to respect or comply with the authority of the school officials to determine and enforce reasonable disciplinary rules and regulations, school officials may not violate learners' constitutional rights. Thus, the onus is on school officials to demonstrate that the limitation of learners' rights is reasonable and for a valid purpose (see *Chapter two, par 2.1*).

10.2 Uniform

A school may prescribe a uniform and can insist that learners wear the uniform during school hours, on school trips and for official school activities after school hours. A learner may be punished for refusing to wear the prescribed uniform. However, a learner should not be sent home. When punishing a learner for not wearing a uniform or for wearing prohibited items, he or she must not be humiliated in any way. A learner may not be punished if the parent/guardian cannot afford to buy a school uniform.

Although the requirement to wear a school uniform does not deny learners the right to freedom of expression, schools need to be flexible and make provision for learners to wear items of clothing that are culturally significant and important, for example, permitting Muslim girls to wear their headscarves or trousers. In deciding on what items of clothing or other insignia will be allowed, the school governing body should consult widely with parents, religious leaders and appropriate organisations. A school has the right to prohibit clothing that is offensive and outrageous.

10.3 Hair

It would appear that the seemingly harmless rule regulating hairstyles is one of the most contentious school rules, and one that is regularly transgressed. To add to the woes of principals and educators, learners are now beginning to defend their choice of hairstyle and oppose the hair rule on the grounds of their constitutional right to freedom of expression (s 16).

In *Danielle Antonie v Governing Body of the Settlers High School and Head Western Cape Education Department* (2002) (4) (SA 738) a learner challenged the School Governing Body's decision to suspend her for five school days. Having converted to Rastafarianism, Danielle wore a dreadlock hairstyle and a black cap. The School Governing Body charged the fifteen-year-old Grade 10 learner with serious misconduct that required that "the hair must be tied up if below the collar".

Even though the applicant was not in class when she filed suit, her lawyer argued that the suspension had brought about a blot on her name and negative bearing on her permanent record.

The applicant, a fifteen year-old Grade 10 female learner who embraced the principles of the Rastafarian religion, grew her hair in

dreadlocks and covered her hair by wearing a cap. Although she had several times asked the principal's permission to wear this hair style to school, he forbade it. She was suspended from school for five days for serious misconduct because she had disobeyed the code of conduct for learners and disrupted the school. According to the school's code of conduct learners' hair had to be neat and tidy and this was specifically detailed in ten subsections of the code of conduct. Not one of these, however, prohibited the growing of dreadlocks and wearing the headgear.

The Guidelines for a Code of Conduct for Learners (Government Notice 776 of 1998) recommends that a code of conduct should contain a set of moral values, norms and principles for developing learners into responsible citizens. In this case the principal juxtaposed the learner's individual right to freedom of expression against the standards of the community and refused permission to wear dreadlocks, associated with the Rastafarian belief. One can assume that the school community viewed wearing a prescribed, neat hairstyle as an important aspect of the learners conduct. Applying the learner's best interests-perspective, the challenge for education managers in similar situations is to decide how to afford respect to the learner's right to freedom of expression without contradicting the norms and values of the community as reflected in the schools code of conduct.

The court argued that the growing of dreadlocks was prohibited by the code of conduct for learners. However, to assess this prohibition in a rigid manner would be in contrast with the values and principles of justice, fairness and reasonableness. The applicant's need to indulge in freedom of expression could not be seen as serious misconduct punishable by suspension. The school argued that the wearing of headgear and dreadlocks has caused disruption and uncertainty at school, but the court found that the school had

not acted in a spirit of mutual respect, reconciliation and tolerance, hence the setting aside of its defence by the court.

The court ruled in her favour and set the suspension aside, agreeing that the punishment could have both a negative effect on her development and her future career, as well as submerge her dignity and self-esteem. Apart from the question of human dignity, the court commented on the application of the right to freedom of expression, explaining that it is a constitutional right that has an effect on a school's Code of Conduct. The court decided that "freedom of expression" includes aspects such as the freedom of choosing clothing and hairstyles.

A simple fear that the disruption might occur is not sufficient (*Tinker v Des Moines Independent Community School* (1969) 393 US 503, 89 S.C.T. 733). The test provides a means for balancing the individual's right to free expression against the collective rights of learners to an orderly school environment. In this regard, educators will, no doubt, have considerable influence in deciding what constitutes an "orderly school environment" and what limits are reasonable.

However, in terms of the "substantial disruption test", restricting hairstyles and length may prove more difficult. Although hair rules are considered a necessary part of engendering a positive school image, self-discipline and ensuring a degree of conformity, it is difficult to demonstrate non-conformity will result in disorderly and disruptive behaviour in the school. For instance, in the USA the circuit courts of appeal have upheld the rights of learners to wear their hair as they please. In one case in which a school policy that prohibited "unusually long hair" was declared unconstitutional, the First Circuit Court of Appeals argued that there was "no inherent reason why decency, decorum, or good conduct" required a boy to

wear his hair short. Or does compelled conformity to conventional standards of appearance seem a justifiable part of the educational process (*Richards v Thurston*, 424 F 2d 1281 (1st Gr. 1970)).

There are conflicting views on whether or not learners' hair length and styles deserve constitutional protection on the basis of freedom of expression. While there may be a need to adopt a more flexible and sensible approach to the issue of hair, school may impose rules restricting hairstyles. However, school rules and regulations, in general, that are vague, unreasonable and not sufficiently connected to the needs and interests of the school may well be overturned by the courts.

10.4 Jewellery

Schools may also limit the wearing of jewellery. Jewellery that is offensive, outrageous and dangerous may be prohibited. For example, neck chains and earrings can be a danger for learners taking part in physical activities and rings and bracelets pose a danger in workshops. Rules concerning jewellery should also not be discriminatory.

In MEC for Education: Kwazulu-Natal v Pillay 2008 1 SA 474 (CC) Sunali Pillay was, until the end of 2006 a learner at Durban Girl's High School (DGHS). During the school holidays in September 2004 Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. When she returned to DGHS after the holidays, Ms Pillay was informed that her daughter was not allowed to wear the nose stud as it was in contravention of the code of conduct of the school. In May 2005, Ms Pillay was informed that the MEC supported the School's approach.

Ms Pillay took the matter to the Equality Court and obtained an interim order restraining the school from interfering, intimidating,

harassing, demeaning, humiliating or discriminating against Sunali. However, the Equality Court held that although a *prima facie* case of discrimination had been made out, the discrimination was not unfair. The Court held that no impairment to Sunali's dignity or of another interest of a comparably serious nature had occurred and concluded that DGHS had acted reasonably and fairly. This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court.

The High Court accordingly set aside the decision and order of the Equality Court and replaced it with an order declaring "null and void" the School's "decision, prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners" (*Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (EqC); 2006 10 BCLR 1237 (N)). The School then applied for leave to appeal to the Constitutional Court against the decision of the Pietermaritzburg High Court. The primary argument of the School was that allowing Sunali to wear the nose stud or allowing others like her similar exemptions would impact negatively on the discipline in schools and, as a result, on the quality of the education they provide.

Langa CJ found that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000). The discrimination has had a serious impact on Sunali and, although the evidence shows that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the stud would not have imposed an undue burden on DGHS. A reasonable accommodation would have been achieved by allowing Sunali to wear the nose stud. He therefore confirmed the High Court's finding of unfair discrimination. This judgement does not abolish school uniforms; it only requires that, as a general rule, schools should make

exemptions for sincerely held religious and cultural beliefs and practices.

In the same case O'Regan J held that, although the applicant argued that the nose-stud was part of religious practice, it is clear that its primary significance to her family arises from its associative meaning as part of their cultural identity, rather than from personal religious beliefs. The applicant has established that the wearing of the nose-stud is a matter of associative cultural significance, which was a matter of personal choice at least for the learner in this case, but that it is not part of a religious or personal belief of the applicant that it is necessary to wear the stud as part of her religious beliefs.

She however, confirmed that a code of conduct is entitled to establish neutral rules to govern the school uniform. The only cogent complaint to be directed at the code of conduct of DGHS is its failure to provide expressly for a fair exemption procedure. The principle of reasonable accommodation (See *Pillay*-case (EqC) and (N) above) requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is that they think their desire to follow a cultural practice warrants the grant of an exemption. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which in a significant way constructs their identity.

Appendix A

Appeal Form

If you wish to appeal against the decision of the governing body to suspend your child, please complete this form and return it to:

Name: _____ Date: _____

Address: _____

Dear _____

I wish to appeal against the decision of the governing body to suspend my child from school.

Name of child: _____ Grade: _____

Name of School: _____

Ground for appeal: _____

Please state the grounds on which you wish to appeal.

I understand that my appeal will be heard by an impartial appeals committee and that I have a right to attend the hearing.

Parent/guardian

I can be contacted at: _____

(Telephone number(s) and/or address)

Appendix B

Framework for a Code of Conduct

The following is a framework for a code of conduct that can be used as a basis for developing your school's code of conduct. Examples of the basic components are given.

Preamble

"Starlight" School's Code of Conduct is based on the following principles:

- Disciplined behaviour is essential for the well-being of the school and the successful achievement of the school's objectives.
- The code of conduct is based on educational principles that aim to allow the school to function as a harmonious community.
- The code of conduct aims to establish a safe and secure environment.
- The code of conduct endorses the basic rights of educators to teach and maintain orderly learning environments, and the rights of learners to learn in a secure, non-threatening environment.
- The code of conduct is aimed at promoting a climate of mutual self-respect, self-discipline and responsible behaviour.
- Disciplinary action will be fair, appropriate and consistently applied. It will be aimed at corrective measures and not punitive action.

General School Rules

All learners must:

- Behave in accordance with the code of conduct.
- Comply with the school attendance requirements.
- Dress according to the school's dress code.
- Treat others with respect and dignity.

Learners may not:

- smoke;
- be in possession of illegal drugs and alcohol;
- be in possession of any form of dangerous or illegal weapon;
- threaten another person physically or verbally;
- use racist, offensive or derogatory language;
- sexually harass another person;
- bully;
- steal; or
- vandalise school property.

Disciplinary Procedure

The disciplinary procedure involves three stages of disciplinary action, combined with the various forms of permissible sanctions.

- Level 1: Verbal warning
- Level 2: Written warning
- Level 3: Disciplinary hearing

Disciplinary Hearing

- (1) When serious offences are committed and verbal and/or written warnings are inadequate, the disciplinary committee will hold a disciplinary hearing before a decision is taken on what sanction should be imposed.

- (2) The hearing will be conducted according to procedurally fair rules.
- (3) The hearing will be held within a reasonable time after the event.
- (4) The learner's parents (or guardian) will be notified in writing of the offence which the learner has allegedly committed.
- (5) The learner and parents will be notified in writing of the date, time and venue of the hearing.
- (6) During the disciplinary hearing the learner will have the right to:
 - be represented or assisted by an adult;
 - be furnished with information relating to the charge;
 - present his or her case (i.e. to be heard); and
 - call witness.
- (7) The disciplinary committee shall keep a record of the proceedings and of the evidence.
- (8) The disciplinary committee shall make the final decision.
- (9) The learner and his or her parents (or guardian) will be informed in writing of the decision and be furnished with the reasons thereof.

Procedures for Disciplinary Appeals

- (1) If a learner or parent is dissatisfied with the disciplinary decision, excluding expulsion, he or she may appeal in writing to the principal or chairperson of the school governing body.
- (2) The principal or governing body shall appoint a board of appeals and arrange for the appeal to be heard within fourteen (14) days, unless otherwise agreed to by the parties.
- (3) The learner will have the rights to be represented or assisted by an adult.
- (4) No person who served on the disciplinary hearing which found the learner guilty may serve on the board of appeal.

- (5) A learner, or a parent of a learner, who has been expelled from the school may appeal to the Member of the Executive Council against the decision of the Head of Department.
- (6) The hearing of an appeal shall be conducted according to fair administrative practice.

Categories of Offences

The offences are categorised according to the seriousness of the offence. (Please note that this is not intended to be a complete list of offences.)

Category A: General offence

- Failure to observe school rules
- Arriving late for school/class
- Misuse of school property
- Using insulting or offensive language
- Insolence

Category B: Serious offences, including criminal offences

- Truancy
- Smoking
- Bullying or intimidation
- Fighting or behaving in a violent manner
- Being in possession of dangerous weapons
- Malicious damage to school property
- Assault or attempted assault
- Being in possession of, using or selling illegal drugs
- Being in possession of and drinking alcohol on school premises
- Theft
- Sexual harassment

Sanctions

Minor sanctions

A range of recognised disciplinary measures may be used by educators to maintain discipline in the school and their classrooms.

These include:

- a word of warning;
- a reprimanding look;
- withdrawal of privileges;
- additional work;
- referral to a senior member of staff.

Detention

Learners may be detained during break or after school. If a learner is given detention after school:

- parents must be given fair warning in writing.
- learners must be supervised during detention.

Suspension

Learners may be suspended from school by the governing body after a fair hearing as a correctional measure for a period not longer than one week or pending a decision by the Head of Department whether or not to expel a learner (s 9 of the *Schools Act*).

Expulsion

Expulsion may only be used in the case of very serious offences. Only the Head of Department may expel a learner from a public school.

Corporal Punishment

No corporal punishment may be administered to any learner.
Parents may not give educators permission to use corporal punishment (s 10 of the *Schools Act*).

Appendix C

Survey on Bullying

1. Have you been bullied at school this term?		Yes	No	
2. How many times have you been bullied this term?	Once	Twice	Often	
3. Was it done by one child or a group of children?		One	Group	
4. Have you seen anyone else being bullied at school this term?		Yes	No	
5. How many times?	Once	Twice	Often	
6. Was it done by one child or a group of children?		One	Group	
7. Have you bullied anyone at school this term?		Yes	No	
8. How many times?	Once	Twice	Often	
9. Where you on your own or with a group?		Own	Group	
10. How often have you been bullied by being:	Never	Sel- dom	Some- times	Often
10.1 Called hurtful names				
10.2 Teased in an unkind way				
10.3 Kicked and hit				
10.4 Pushed and shoved around				
10.5 Treated with harm				
10.6 Lied about in a malicious way				
10.7 Made to hand over money, lunch or belongings				
10.8 Excluded from taking part in activities on purpose				

11. How do you feel when you are bullied?

I am not bothered	1
I feel mostly angry	2
I feel mostly sad	3
I feel mostly ashamed	4

12. How did you feel about yourself when you were bullied?

I felt better about yourself	1
I felt the same about myself	2
I felt worse about myself	3

13. How has bullying affected you?

I stay at home	1
I get ill	2
I cannot sleep	3
I feel anxious	4
I am afraid to go to school	5
I get headaches	6
I feel stressful	7



Appendix D

Examples of a Policy on Drugs

Purpose

The purpose of this policy is to provide for the regulation of and procedures for eradicating drugs in the school.

Definitions

“Drug” shall mean any dependency-producing substance, any dangerous dependency-producing substance or any undesirable dependency-producing substance.

“Possess” shall include keeping or storing the drug, for having it in custody or under control or supervision.

“Sell” shall mean to offer, possess or expose the drug for sale.

General

The use and possession of illegal drugs, and selling drugs on school property is a criminal offence.

Disciplinary Procedures

- (1) If there are reasonable grounds to believe that a learner is in possession of drugs on or about the school or during official school activities, the learner must be reported to the principal.
- (2) The principal shall inform the learner of the allegation and provide the learner with an opportunity to respond to the allegation and to present his or her side of the story.

- (3) Depending on the circumstances and the need for haste, the principal may authorise a search to be conducted of the learner and/or his or her property, and school property.
- (4) The principal shall inform the parent (guardian) by telephone (wherever possible), confirmed by a letter, and a meeting shall be arranged with the parent/guardian to discuss the matter.
- (5) If a learner is found to be in possession of drugs a disciplinary hearing shall be arranged to hear the matter.
- (6) After due process, if a learner is found guilty of using, possession of selling drugs on or about the school or during official school activities, the learner shall be suspended for the maximum period of one week or given an appropriate alternative punishment.
- (7) If a learner is suspended for possessing, using or selling drugs on or during official school activities, the principal shall notify the parents (guardian) in writing of the suspension and its duration. A copy of the letter shall be sent to the provincial Head of Department.
- (8) Should it be necessary to suspend a learner more than twice during a school year for possessing, using or selling drugs, the principal shall inform the parents (guardian) that the matter has been referred to the provincial Head of Department who will decide whether or not to expel the learner.
- (9) Any learner who is found guilty of possessing, using or selling drugs on or about the school or during official school activities, shall be required to participate in a drug counselling and rehabilitation programme.
- (10) Detailed records shall be kept of all cases of drugs in the school showing the name of the learner concerned, the date, the date, the nature of the offence, the procedures that were followed and, in the case of a search, the manner in which a search was conducted.

Emergency Procedures

If a learner is under the influence of drugs, the following procedures must be followed:

- (1) The parent (guardian) must be informed and consulted on what action the school must take.
- (2) If time does not permit or the parent (guardian) is not available, medical assistance shall be obtained.
- (3) If a learner must be admitted to hospital:
 - an ambulance must be called
 - if an ambulance is not available, the learner shall be taken to hospital by an authorised member of staff.
- (4) A detail record of the action taken by the school shall be kept.

List of Sources

Articles and Books

- Bateman, B. 2007. *Pretoria News*, 28 May, p.1.
- Bray, W. 2005. *Human rights in education*. Pretoria: Centre for Education Law and Education Policy, Department of Education Management, University of Pretoria.
- Charles CM. 2002. *Building Classroom Discipline*, 7th Edition. Boston, USA: Allyn and Bacon.
- De Clerk, J & Rens, J. 2003. The role of values in school discipline. *Koers*, 68(4):353-371.
- De Wet, C. 2005. Educator recognition of and intervention in school bullying situations: the perspectives and experiences of Free State educators and learners. *Acta Criminologica*, 18(2) p.44 - 55.
- Department of Education. 2001. *Alternatives to corporal punishment: The Learning Experience- A practical Guide for Educators*. Pretoria: Sol Plaatje House.
- Department of Education. 2002. National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions. General Notice 3427 in *Government Gazette* 24172 of 13 December 2002.
- Dreikurs, R, Grunwald, BB & Pepper, FC. 1982. *Maintaining Sanity in the Classroom: Classroom management Techniques*, 2nd Edition. New York: Harper & Row.
- Kemerer, FR & Walsh, J. 1994. *The educator's guide to Texas school law*. Austin: University Press.

- Kight, D & Roseboro, J. 1998. *Positive Guidance and Discipline*. North Carolina: State University, Department of Family and Consumer Sciences.
- Lund, R. 1996. *A whole-school behaviour policy*. London: Kogan Page.
- Maree, JG & Cherian, L. 2004. Hitting the headlines- The veil on corporal punishment in South Africa lifted. *Acta Criminologica: South African Journal of Criminology*, 17(3), 72-85.
- Oosthuizen, IJ, Roux, JM & Van der Walt, JL. 2003. A classical approach to the restoration of discipline in South African schools. *Koers*, 68(4): 373-390.
- Porteus, K, Vally, S & Ruth, T. 2001. *Alternatives to corporal Punishment: Growing discipline and respect in our classrooms*. Heinemann Publishers (Pty) Ltd.
- Rogers, B. 1998. *You know the fair rule*. London: Pitman.
- Rosen, L. 2005. *School Discipline: Best Practices for Administrators*. 2nd Edition. California: Corwin Press.
- Snyman, CR. 1995. *Criminal law*. Durban: Butterworhts.
- South African Human Rights Commission. 2008. Report on school-based violence. http://www.sahrc.org.za/sahrc_cms/downloads/SBV%20Report.pdf. 14 March 2008

List of Statutes and Documents

- Republic of South Africa. 2005. The Children's Act. Act 38 of 2005. Pretoria: Government Printer.
- Republic of South Africa. 2001. Regulations for Safety Measures at Public Schools as amended in 2006. No. R.1128 10 November 2006. Pretoria: Government Printer.
- Department of Education. 1998. *Guidelines for the Consideration of Governing Bodies in adopting a Code of Conduct for Learners*. Government Gazette Vol 776 No 18900. (15 May 1998). Pretoria:

Government Printer.

Republic of South Africa. 1996. *The Constitution of the Republic of South Africa, 1996*. Pretoria: Government Printer.

Republic of South Africa. 1996. National Education Policy Act 27 of 1996. Pretoria: Government Printers.

Republic of South Africa. 1996. *South African Schools Act, 1996*. Act No 84 of 1996. Pretoria: Government Printer.

Republic of South Africa. 1957. *Sexual Offences Act, 1957*. Act No 23 of 1957. (12 April 1957). Pretoria: Government Printer.

South African and Foreign Case Law

Christian Education SA v Minister of the Government of the Republic of South Africa 1999 (3) SA 609 (SE).

Danielle Antonie v Governing Body, The Settlers High School and Head Western Cape Education Department (2002) (4) (SA 738).

Horton v Goose Creek Independent High School District 690 F 2d 470 (5th Cir. 1982).

K v Minister of Safety and Security 2005 (6) SA 419 (CC)

MEC for Education: Kwazulu-Natal v Pillay 2008 1 SA 474 (CC)

Michiel de Kock v HoD of the Department of Education in the Western Cape, the Governing Body of the High School Overberg and the Minister of Education (1998) (SA 12533).

Pillay v MEC for Education, KwaZulu-Natal 2006 6 SA 363 (EqC); 2006 10 BCLR 1237 (N)

Prinsloo v Van der Linde 1997 6 BCLR 759 (CC)

New Jersey v TLO 469 U.S. 325 (1985).

Richards v Thurston 424 F 2d 1281 (1st Gr. 1970).

Tinker v Des Moines Independent Community School (1969) 393 US
503, 89 S.C.T. 733.

*Western Cape Residents' Association obo Williams and Another v
Parow High School 2006 (3) SA 542 (C)*

