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COVID-19 CHALLENGES TO ACCESS TO EDUCATION FOR LEARNERS LIVING WITH SEVERE DISABILITIES: AN EDUCATION LAW PERSPECTIVE¹

ABSTRACT

Thro (2005:1) points out that the Supreme Court of the United States has recognised that “education is perhaps the most important function of state and local governments” because “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”. He adds that the Court has stressed “the importance of education in maintaining our basic institutions ...”

Thro’s summary of the American perspective on the importance of education to a person and a country is echoed in numerous national Constitutions and international treaties in which education (and access to education) is treated as a non-negotiable right of all the inhabitants of a country. Section 29(1)(a) of South Africa’s Constitution of 1996 provides that everyone (including children living with severe disabilities) has a right to a basic education, including adult basic education, Section 9(3 and 4) provide that neither the state nor any person may discriminate unfairly against anyone on the grounds of disability while Section 28(2) states unequivocally that a “child’s best interests are of paramount importance in every matter concerning the child”.

People in South Africa had every right to expect that the new political dispensation beginning in 1994 would bring with it the fulfilment of all learners’ guaranteed educational rights. However, a review of the literature reveals that South Africa has left children living with severe disabilities in the lurch and that as many as 600 000 disabled learners may never have been to school (Nappy Run, 2019). According to Yates (2020), South Africa has 1179 public and independent special needs schools but not all South African children, including those living with severe mental disabilities, have access to their fundamental human right to education (Yates, 2020).

This article has its origin into reports that came to the authors’

¹ In the court case *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and the Government of the Province of the Western Cape* 2011 (5) SA 87 (WCC) the court referred to the children with whom this article deals as “severely and profoundly intellectually disabled children”. This description of these children can be viewed as pejorative and demeaning and we will therefore refer to them as “learners living with severe disabilities” in this article.

attention of problems involving learners with severe disabilities following the return of such children to special needs education schools² after the relaxation of the COVID-19 lockdown measures. Even when following the Draft (COVID-19) Guidelines for Schools for the Learners with Intellectual Disabilities (DBE, 2020) meticulously, schools were confronted by new challenges for principals, teachers and parents to safeguard these and other learners' right to education and to prevent large-scale disruptions of school activities.

As is the case with all actions and decisions taken regarding all learners, the relevant legal rules must be obeyed. Educators and other stakeholders involved need to know these rules. In this article, we will therefore view the problem from an education law perspective and attempt to provide all stakeholders with knowledge of the pertinent legal rules to enable them to address challenges that might arise in a legally acceptable manner. We will conclude with a brief reference to possible education management responses to the challenge. Such management initiatives also need to comply with legal prescripts that are still to be investigated before one can propose these responses confidently in that they comply with legal requirements.

Keywords: Learners living with disabilities; inclusive constructive stakeholder engagement; limiting rights of learners; onus to act; best interests of the child.

1. INTRODUCTION

1.1 Statistics and their implications

One needs to have a picture of how many learners are living with severe disabilities to get an idea of the challenge of providing access to education to all learners with severe disabilities. The Department of Basic Education (2019a:1) used the General Household Survey (GHS), a survey conducted by Statistics South Africa (Stats SA), to compile this report to assess the DBE's "progress made in terms of access to schooling, as well as the quality, efficiency and equity in educational outcomes". According to this report (DBE, 2019a:1), approximately 800 000 children aged 7 to 18 years old were out of school in 2002 and in 2018 this figure "decreased to around 474,000 children in 2018".

To put this into perspective, one needs to bear in mind that there were 12 819 542 learners in South African schools in 2018 (DBE, 2019b:1). This means that, in 2018, 3.69% of South African children who should have been in school were not. The Department of Basic Education (2019a:19) provided a table giving the reasons for learners not being in school. Twenty-four and a half per cent (116 130) of 7–15-year-olds cited disability as the reason why they were not in school and 4% (18 960) of 16–18-year-olds cited disability as the reason for their not attending schools. South Africa has 1 179 special needs education schools (Yates, 2020). The above figures imply that if the out of school (7–18 years old) learners with severe disabilities were to be placed in the existing special needs education schools, each school would get 115 additional learners. Under the present circumstances, such a change could not be handled by the schools and the education system.

The above figures present a bleak picture regarding the access to school for learners living with disabilities. The problem is made more serious by the fact that these learners have a constitutional right to education that the state is not meeting. In *Moko v Acting Principal of Malusi Secondary School and Others* (2020) the Constitutional court reiterated that the right to basic education is "a right which, due to its transformative nature both for individuals and society as a whole, is of fundamental importance in this country" and the court also confirmed that the right includes Grade 12. The Department of Basic Education's figures (2019a:14-18)

2 Although the schools are known, we cannot reveal their identities.

may seem conservative and are silent about matters raised by other authors but we decided to use them as our basis seeing that they are based on work that StatsSA has been doing since 2002.

Macupe (2020) summarises the position of many children with disabilities with a disturbing picture:

Some parents must quit their jobs to look after their children because there are no schools for them. Others must uproot their families and relocate to different provinces just to access special-needs schools.

It is a travesty how children with special needs are being treated in this country. There are no more than 500³ special-needs schools in the entire country. No one is planning for children with special needs. It is as if there are no women in this country giving birth to children with special needs.

These children are treated as “by the way” and as if they are being done a favour by being provided with an education, even though it is their constitutional right.

Human Rights Watch (2019) published a critical report in collaboration with the South African Human Rights Commission called “Complicit in Exclusion” about the government’s failure to provide disabled children with education and it raised among others the following points:

- South Africa has not delivered on its promises to guarantee inclusive education for children with disabilities and to ensure that they have adequate skills for employment.
- An estimated 600 000 children with disabilities remain out of school in South Africa (*cf.* Yates, 2020). Watt (2015) quotes the above Human Rights Watch Report that puts the number of excluded children with disabilities at 500 000. Watt also refers to eight sets of government statistics in this regard between 2010 and 2015 and points out that the number of such children differs from 597 953 to 30 000 in the above sets of statistics.
- Education officials, doctors and social workers tend to refer many children to special schools automatically, disregarding the government’s policy to ensure that learners enrol in mainstream schools.

The World Health Organization (WHO) states that persons, including learners, with disabilities will be “impacted more significantly” by the pandemic (WHO, 2020:1). There may be additional barriers to people with disabilities in implementing social distancing, underlying health conditions may put them at greater risk of developing more severe cases of COVID-19 if they become infected or they may be disproportionately impacted because of serious disruptions to the services they rely on (WHO, 2020:2). The WHO also points out that this impact can only be mitigated if “appropriate actions and protective measures are taken by key stakeholders” (WHO, 2020:1). Schools are enjoined to “ensure continued education for students with [disabilities] who may be required to study from home for longer periods” (WHO, 2020:6).

South Africa cannot afford to lose more learners living with disabilities because it does not handle the pandemic through appropriate measures and activities that will ensure continued education for these learners.

3 This differs markedly from the figure presented by Yates (2020) and emphasises the lack of trustworthy statistics.

1.2 Interventions by the Department of Basic Education

After the closing of schools and hostels during the COVID-19 lockdown, parents and other caregivers have been responsible for continuing the education of learners living with severe disabilities. Many of these parents and caregivers were ill-equipped to provide suitable care and education for these children and often suffered from overload and stress (Duraku & Nagavci, 2020). Schools and non-governmental organisations (NGOs) thus had to find ways to empower parents and caregivers to continue with the education of the learners during lockdown.

Unfortunately, not all schools, parents and caregivers stepped up to ensure that learners living with severe disabilities did not regress while at home. Furthermore, not all had access to technology to benefit from the information and services provided by schools and NGOs (Courtney & Perera, 2020: 231; Inclusion Europe, 2020). They did not have access to the teaching and learning materials contemplated by the WHO (2020) and the DBE (2020b).

With the closing of the schools, the learners' well-known routines were interrupted for an extended period and caused re-adjustment problems when the schools re-opened (Nelson, 2020; Inclusion Europe, 2020). Changes tend to increase these learners' levels of anxiety and contribute to behavioural challenges and even mental health conditions. This was exacerbated by the new health protocols. These learners do not always understand the reasons for the new regulations. This created challenges for caregivers and educators who needed to protect themselves and the learners from possible infection. Many learners do not want to wear their masks and fail to maintain social distancing. Some salivate excessively and create health risks for others (Courtney & Perera, 2020: 231; DBE, 2020b; Inclusion Europe, 2020).

The Department of Basic Education sensitises schools to these challenges in the Draft Guidelines for Schools for the Learners with Intellectual Disabilities (DBE 2020a; see also DBE 2020f). In terms of these guidelines, the risk level of every child should be determined to determine appropriate measures to keep learners and other stakeholders safe. Schools are given protocols to observe regarding children that:

- frequently put their hands or other objects into their mouths;
- have language impairments that inhibit proper isolation;
- have significant difficulty to maintain distance from others; or
- who are unable to wear a mask or face shield.

and are considered high-risk learners. Guidelines and protocols are also provided for lower risk learners. In addition to the standard protocols and the provision of personal protective equipment, the guidelines propose the provision of Perspex or other barriers on tables in classrooms and therapy areas. New routines should be established as soon as possible, and children should not be pushed excessively to master the curriculum (DBE 2020a).

1.3 Principals' leading role to obviate the risk of delictual claims

Principals lead the responses to these new challenges (see S16[3] of the South African Schools Act 84 of 1996, Republic of South Africa, 1996c) and must ensure that the school and department are not exposed to delictual claims due to COVID-19-related harm. They must therefore ensure that all necessary steps are taken to ensure that civil claims will not be instituted for damages suffered by educators, learners or their relatives due to negligence

on the part of the school in the process of managing COVID-19. Such claims can arise when someone causes reasonably foreseeable harm or loss to another person through his or her negligent behaviour or omission of an action that needed to be done. Such a person could be found liable for delictual damages and be forced to compensate the person who has suffered harm or damage through his or her negligence or omission. Furthermore, the competing human rights of the different stakeholders should be managed in such a way that management decisions are not open to human rights violation challenges.

1.4 Research-related comments relating to this article

We approached the problem of providing education to learners with severe mental disabilities during the pandemic while adhering to the Guidelines of the Department of Basic Education (2020a) from an education law angle. Incidents at schools suggested that the guidelines also posed their own challenges for educators and other stakeholders.

As an education law paper deals with established and documented law, there was no need for empirical research. We relied on textual and discourse analyses of documents such as legislation and judgements from the higher courts, policies and reports to obtain data to help us answer our research question.

Our work centred on the question of whether the COVID-19 measures enforced on schools for special needs education could perhaps worsen the already invidious position of learners with disabilities and endanger their right to education. We also had to explore ways of dealing with problems caused by the COVID-19 measures in schools catering for these children.

This article may therefore be viewed as a discourse analysis and a position paper on possible solutions to a practical problem. We used the right to education and the right to access to education of learners with severe mental disabilities as our theoretical framework. We collected data that we could apply to the problem through the analysis of various documents that could lead us to suggesting legally acceptable ways of dealing with the problem.

In this paper, the legal provisions applicable to learners living with severe disabilities are discussed with reference to constitutional imperatives, national legislation, regulations, directives and guidelines provided by the Department of Basic Education (DBE, 2020a, 2020b, 2020c, 2020d, 2020e, 2020f). The role of the principal as a leader of a community of stakeholders to ensure the realisation of learners living with severe disabilities' right to education is the foremost focus of this contribution.

After examining the various features of the problems that cropped up and their legal ramifications, we considered four possible ways of alleviating stakeholders' dilemmas in handling the problems. We briefly refer to four possibilities of dealing with the challenges. These possibilities all have legal corollaries that will need to be researched thoroughly before they can be presented as firm recommendations for dealing with the challenges. Therefore, this article consists mainly of an analysis of the various legal provisions applicable to the problem and we hope to be able to draft another paper focusing on the possible solutions soon.

In the paragraphs below we discuss the problems examined through an education law lens.

2. EDUCATIONAL AND OTHER COMPETING RIGHTS OF LEARNERS LIVING WITH SEVERE DISABILITIES

Managing the competing rights of learners living with severe disabilities with the rights of other learners, other disabled learners and the rights of educators requires exceptional wisdom and appropriate management skills. Without such wisdom and skills, the abovementioned challenges that learners living with severe disabilities face during the COVID-19 pandemic and the severe consequences that the contraction of the virus pose to all vulnerable stakeholders in education could prove insoluble.

2.1 Role of the principal

Section 16(3) of the Schools Act (RSA, 1996c) provides that the principal of the school is responsible for the professional management of a public school under the authority of the Head of Department. Principals must ensure that learners attain the minimum prescribed curriculum outcomes and that assessments are done in accordance with the ministerial prescriptions.

It is important to note that the principal should ensure the safety of everyone. Most of the decisions taken by a principal constitute administrative action and should therefore comply with the provisions of the Promotion of Administrative Justice Act (RSA, 1996b). This act prescribes the legal principles to which any organ of state – in this instance the principal – should adhere to when decisions are made. All decisions must be rational and reasonable. Decision-makers should be able to justify their decisions considering the constitutional and other legal imperatives. When decisions do not comply with the reasonable and rational standards set by the act, those who are affected by the decisions can approach the courts to review those decisions and have them set aside. Most of the decisions made by the principal will impact on learners' right to a basic education and this right will therefore be discussed in what follows below.

2.2 Right to exemption from a basic education

Everyone has the right to a basic education in terms of Section 29(1)(a) of the Constitution of the Republic of South Africa (RSA, 1996a) (Constitution). Consequently, the South African Schools Act (RSA, 1996c) (SASA) obliges parents to ensure that their children of compulsory school-going age attend school, failing which could result in legal consequences for parents who could then possibly be regarded as being guilty of an offence.

However, parents or other caregivers can also apply for exemptions from this duty. The Head of Department (HOD) can consequently discharge a learner living with a severe disability from the obligation to attend school. Learners can be entirely, partially or conditionally exempted from compulsory school attendance. This opens the door to the possibility of home schooling a learner or to make other appropriate arrangements for the education of learners.

2.3 What does the right to a basic education mean?

The State's obligation to provide a basic education to all is emphasised in *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* (2011). The court held that the right to a basic education is an immediately realisable right, only subject to the provisions of the limitation provisions of Section 36 of the Constitution (1996a).

Education should be provided to all without any discrimination. In the *Western Cape Forum for Intellectual Disability (Western Cape case)* the court held that there is no justification for withholding government funding for learners living with severe disabilities and that the Western Cape Department of Education not only unlawfully discriminated against learners living with severe disabilities, but also infringed upon their rights to dignity, a basic education and not to be neglected and degraded.

One of the aims of education is to develop the full potential of every child (UNCRC, 2001). Even though the educational potential of learners living with severe disabilities is severely constrained, every effort should still be made to develop their full potential. Learners living with severe disabilities are therefore not only compelled to attend school, but they are also entitled to education, which right can only be limited under strict conditions.

Case law refined the right to a basic education and highlighted several dimensions such as the fact that the right to education presupposes the provision of textbooks for each learner (*Minister of Basic Education and Others v Basic Education for All and Others* [2016]), transport to school (*Tripartite Steering Committee and Another v Minister of Basic Education and Others* [2015]), proper infrastructure (*Equal Education and Another v Minister of Basic Education and Others* [2019]) and sanitation facilities (*Komape and Others v Minister of Basic Education and Another* [2020]). Thus, when the educational needs of learners living with severe disabilities are considered during the COVID-19 pandemic, one should keep in mind that they must have appropriate access to the school (if that is in the best interests of the child), learning material and special education equipment, therapeutic services and nutrition as is evident from recent case law. The principal with his or her management team is primarily responsible for managing all these dimensions of the right to a basic education.

Another dimension of this right was developed by the Gauteng High Court when it found in *Equal Education and Others v Minister of Basic Education and Another* (2020) (*Equal Education 2020 case*) that proper nutrition is not only essential to ensure that children develop properly and stay healthy, but it is also an integral part of the realisation of the right to a basic education. During lockdown, the National School Nutrition Programme (NSNP)⁴ was not operational and jeopardised the food security of more than nine million learners who are dependent on this programme. When the schools re-opened, the NSNP was only available to the learners who were phased in. Eventually, litigation ensured the reinstatement of the programme. The court found that the NSNP is a life-saving programme that improves learners' ability to learn among other things. The court also highlighted the fact that:

Schools are thus the critical points of contact for reaching vulnerable children with no other state service that can connect with children on such scale and with such regularity.

The court therefore found that suspending the NSNP constituted a violation of children's right to education as well as the right to nutrition. The minister was ordered to submit plans to the court to ensure the reinstatement of the NSNP to all learners, irrespective of whether they attend school on a particular day or not. The court also emphasised that the minister and Members of the Executive Committees (MECs) may not infringe on the pre-existing right to basic nutrition. Any deliberate retrogressive measures should therefore be justified with reference to the provisions of the limitation clause of the Constitution and duly considering

4 From 1994 to 2004 the programme was managed by the Department of Health. In 2004 it was transferred to the Department of Education. <https://www.education.gov.za/Portals/0/Documents/Publications-NSNP%20Documents/3.%20NSNP%20Infographic.-pdf?-ver=2018-11-09-083251-300> [Accessed 24 January 2021]

the provisions of the measures included in the United Nations Covenant on Social, Economic and Cultural rights (UN, 1966) pertaining to the “full use of the maximum available resources”.

Principals are thus obliged to consider the nutritional and medical needs of learners living with severe disabilities in addition to their educational needs when they manage the consequences of the pandemic (*Equal Education 2020* case). This holds true even if it does not seem to be in the best interests of the learners to attend school.

Although parents are primarily responsible for the care of children, the state is obliged to provide acceptable alternative care in the absence of parental or family care. The principal and educators are therefore responsible for ensuring appropriate care for learners while they are at school, in line with the *in loco parentis* principle. The state has an active duty to provide for the other socio-economic rights of children (e.g. healthcare) when parents are unable to provide access to such rights.

Special schools and full-service schools have access to several professionals such as physiotherapists, occupational therapists, nurses, social workers and psychologists. They thus provide an important service to ensure that the learners living with severe disabilities receive healthcare services while they attend school. It can be argued that the same principles applicable to the provision of nutrition are applicable to the provision of healthcare services for learners living with severe disabilities.

Managing the education of learners obviously has financial consequences that should be considered. It is evident from the *Western Cape* case that the lack of adequate resources requires the state to distribute the available resources equitably, and if needs be, to reallocate the available resources to address the educational needs of all learners. Available resources thus need to be reviewed considering the impact of COVID-19 on the realisation of every learner’s right to a basic education.

The ultimate test for decisions made regarding the education of learners living with severe disabilities is whether the decisions comply with the imperative in Section 28(2) of the Constitution (RSA, 1996a) that the best interests of the child are of paramount importance in every matter that concerns the child. Determining the best interests of the child is notoriously difficult to do and is intensified when the interests of different children⁵ should be balanced or considered.

The Constitutional court held in *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (2020) that an individualised approach should be followed, stating that “children’s rights do not apply *indifferently* to children by category. A child’s interests are not capable of legislative determination by group” (own emphasis added). Any regulatory framework should therefore make provision for an investigation that will lead to an individualised response to the needs and interests of each learner living with severe disabilities to optimise their respective best interests. This does not imply that the best interests of the child will trump all other rights, but it does mean that the best interests of the child should be considered explicitly at some point in the decision-making process. It also means that, when any decision affects the best interests of the child negatively, measures should be put in place to mitigate the impact of such decisions. Decision-makers should ensure that everyone goes the extra mile to optimise the best interests of the child (*S v M* [2007]).

5 Those with specific categories of disabilities and those without disabilities.

The COVID-19 directions published in terms of the Regulations made under the Disaster Management Act (RSA, 2000a) rightly allow parents to apply for permission to exempt learners entirely, partially or conditionally from compulsory school attendance (DBE, 2020b). Parents are, however, obliged to make reasonable efforts to facilitate learners' education in accordance with the learning material provided by the school. The principal, acting on behalf of the HOD, should facilitate the process to make learning material available to the learner and to enable the learner to access psychosocial support services when necessary (DBE, 2020c).

The directions issued by the Minister of Basic Education (DBE, 2020d; 2020e) are aligned with the best-interests-of-the-child imperatives in providing that the HOD should not only ensure reasonable availability and distribution of appropriate teaching and learning materials, but should also provide for the lending of devices aiding learners for use at home. They should also provide or make access available to therapeutic services to learners learning at home.

A different question arises about what the responsibilities of the principal are when parents send learners living with severe disabilities to school during the pandemic and their conduct creates a danger to themselves, the other learners, educators and caregivers at school. How should the competing interests of the different stakeholders be balanced and what would constitute the best possible response to the challenges posed in each case?

In *Moko v Acting Principal of Malusi Secondary School and Others* (2020), the Constitutional court reiterated that the right to education is "a right which, due to its transformative nature both for individuals and society as a whole, is of fundamental importance in this country". As an organ of state, the principal must act on behalf of the state and ensure that there are no infringements of the rights of learners and that the rights of learners are promoted and fulfilled. The court refers to the position of the Department of Basic Education and emphasises that the principals are the "key delivery agents in [the] education system" and therefore are "the most important partners in education". The principal is therefore ultimately responsible to ensure that the right to education of learners living with severe disabilities are not only protected but also promoted and fulfilled. The court also stresses that access to a school is a "necessary condition for the achievement of the right to education". However, considering the risks that the pandemic poses, attending school might not be in the best interests of all learners with severe disabilities, and other measures might be required to protect and promote these learners' right to a basic education.

It is evident from the legal principles discussed above that the addition of COVID-19 to the mixture of considerations influencing decisions taken and action steps implemented makes decision making and management of educational institutions and caring for learners infinitely more complex and difficult. The pandemic also exposes educators to more forms of legal action against them.

The next section will briefly touch on possible responses from schools to the complications of their tasks brought about by COVID-19. As has been said above, we cannot deal with the four suggestions that we are going to make in detail now as the legal upshots of the proposals still need to be investigated before submitting them to the educational and academic communities for consideration.

3. POSSIBLE RESPONSES TO THE CHALLENGE

3.1 Introduction: the nature of schools

Schools are places where the educational rights and duties of stakeholders converge and where problems about these rights and duties can originate and lead to disputes. Damage and harm, including intentional and negligent acts that might lead to delictual liability or compensation for damages caused, may also occur (Rossouw, Rossouw & Lancaster, 2012). As head of the school, the principal is the person mainly responsible for managing differences and disputes and reporting to the provincial HOD (RSA 1996 S16A; DBE, 2015; DBE, 2016). The presence of learners living with severe disabilities in conflicts over rights significantly complicates the handling of already sensitive and difficult differences of opinion where the interests of the parties must be weighed in the “light of the public interest” and where the “net of unlawfulness may now be cast wider”, because Section 7(2) of the Constitution (RSA 1996c) places “constitutional obligations on the state to respect, protect, promote and fulfil the rights in the Bill of Rights” (Neethling, Potgieter & Scott, 2007, 26–27).

3.2 Constructive stakeholder engagement

After the advent of democracy in 1994, South Africans soon got used to the expression: “There is a problem; let us sit down and discuss it”. Unfortunately, South Africans also got used to meetings that led to nothing productive. These types of meetings were just held for the sake of holding meetings and were not “constructive stakeholder engagements”.

Principals and other stakeholders who want to do justice to the competing rights and interests of learners will have to apply the principles of meaningful engagement to facilitate difficult processes to negotiate outcomes that balance the competing rights. This should be done with due regard not only to the rights but also to the obligations of all the stakeholders and considering the lawful limitation of rights, where appropriate.

The need for constructive stakeholder engagement springs from the need to find a carefully considered limitation and/or legally acceptable balancing of the rights of all stakeholders in these schools without having to approach the courts. Turning a blind eye to problems or not acting is not an option and could open the principal to accusations of negligence that could lead to delictual liability for which the state might accept vicarious liability, and that might also have monetary and other implications for principals (Treasury, 2005).

The principal or someone instructed by him/her needs to convene a meeting by timeous written or oral notice setting out the agenda. This person should also act as chairperson or facilitator of the discussions. Because there is a possibility of a violation of someone’s rights, whoever facilitates the meeting must see to it that the engagement adheres to the rules of natural justice and the rules of just administrative action, which refer to lawfulness, reasonableness and procedural fairness as set out in Section 33 of the Constitution (RSA, 1996b; see also RSA, 2000b).

Such stakeholder engagement does not equate to a hearing in a court of law and is at best a quasi-judicial event. In this regard, see the Constitutional court cases *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* (2008) (*Occupiers case*) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2010) (*Slovo case*).⁶

⁶ In this section of the paper references are examples of sources that may be consulted to trace the relevant legal principles. The references are by no means exhaustive and may be adjusted after thorough research.

Baxter (1987: 608) and Gupta (2019: Slide 9) both refer to two basic legal principles underpinning the principles of natural justice with which such engagements must comply, namely *audi alteram partem* (one should hear the other side) and *nemo iudex in causa sua* (no one should be a judge in his own cause, but be impartial) (see the *Occupiers* case).

Among the other legal principles that govern such engagements are the following, which will not be discussed in detail here pending required research:

1. Participants must look at the problem objectively and must not be biased (see the *Slovo* case).
2. The rights and duties of all stakeholders must be considered and balanced with one another (see the *Slovo* case).
3. A decision must be taken on a consensus or sufficient consensus basis; the best interests of the learners living with severe disabilities being the main focus of the deliberations together with the aim to obtain a fair determination of a dispute (Gupta, 2019: Slide 7). Participants in the meeting will be bound by such a decision.
4. A wrongful decision can expose stakeholders to a charge of delictual liability (see Rossouw *et al.*, 2012 who provide a succinct and clear exposition of what delictual liability entails).
5. Participants must be convinced that, on a balance of probabilities, the decision they are going to take is the best one under the circumstances.
6. The process of meaningful engagement does not require the parties to agree on every issue. After engaging with all the parties, a decision must be made on the way forward (see the *Slovo* case).
7. Decisions reached after all the above practical steps have been carried out and the relevant legal principles heeded will have legal power and are implementable. However, when one or more parties are aggrieved by the decision of the person implementing the decision, they can approach a competent court to review the decision of the principal (RSA 2000b).

What is set out above is not the only way of dealing with the problem. The professional discretion of the principal could be considered as a practical solution to break deadlocks and serve the child's best interests well.

3.3 Principals' professional discretion regarding learners living with severe disabilities

There is a misconception that principals only have authority delegated to them by parents and education officials. That assumption is simply not true. They can take autonomous decisions that may affect learners and parents' rights without obtaining an order or permission from someone in authority (see Van der Merwe and Olivier, 1976: 109, cited in Beckmann, 1985: 172 *et seq.*). Such autonomous decisions require principals to act in good faith with the best interests of the child and the welfare and maintenance of the institution at heart (also see Smit, 2013 and Beyers, 2020).

The discretion does not mean that principals can take away the educational rights of a child, but they may understand the circumstances in which it is better that the child does not attend school for a specific time. We believe it would be beneficial to all if education officials are reminded of the doctrine of professional discretion and its application to the access to education of learners living with severe disabilities.

The application of the professional discretion doctrine is further supported by the best-interests-of-the-child imperatives that require an individualised approach to optimise the best interests of every child (*S v M*). The COVID-19 regulations further support the possibility to negotiate measures to continue with the education of learners from, for instance, home, by explicitly affording the principal discretion to lend devices to learners and arrange therapeutic services for learners (see *Jacobs v Chairman, Governing Body, Rhodes High School and Others*).

3.4 Possible government suspension or limiting of the right to education of learners living with severe disabilities

It is a legal *dictum* that most if not all rights can be limited provided that the relevant legal provisions are applied. Section 36(1) of the Constitution (RSA, 1996b) deals with the limitation of rights. In addition to complying with Section 36, the government must remember that Section 37 of the Constitution provides that, even in states of emergency, some of the rights (including the right to a basic education) in the Bill of Rights are non-derogable and cannot be taken away or compromised under normal circumstances. An analysis of Section 36 shows that limiting any right in the Bill of Rights is not a simple and easy process and that a limitation needs to meet stringent requirements for it to be legal.

The National Education Policy Act (RSA, 1996c) provides the Minister of Basic Education with the right to determine national education policy that may include a limitation of a national policy (Section 3). Limiting a right in the Bill of Rights is a drawn-out, difficult process considering the importance of fundamental rights. The essence of all the restrictions on the limitation is the desire to protect the rights and best interests of all learners, including learners living with severe disabilities.

Limiting of rights is temporary and the right will be restored at an appropriate time. The Constitution does not guarantee the right to face-to-face education in public schools. Other modes of education are acceptable (see the Draft General Comment 25 of the United Nations Committee on the Rights of the Child [UNCRC, 2020] and the use of technology in education).

3.5 Parents deciding to keep their children at home

In terms of the *Draft Guidelines for Schools for the Learners with Intellectual Disabilities* (DBE, 2020a) parents who are concerned about their children returning to school in the context of COVID-19, may keep them at home (see par 8.1.3 of the *Guidelines*).

4. CONCLUSION

Beckmann and Prinsloo (2013) point out that “going to law” (the courts) is the last option for resolving a conflict or dispute as only the courts can settle disputes authoritatively. It is merely an option when a dispute arises and only one way of achieving the purposes of the education system. They quote Partington (1984), who can be regarded as the father of English education law, who reminds us that the law speaks only when spoken to. Disputes can be resolved amicably before approaching the courts.

Disputes are almost unavoidable in schools. There are two ways of solving them: through the courts and outside the courts. The court should not be the preferred option, as going to court can create even more anxiety in learners living with severe disabilities, their parents

or guardians as well as the educators involved, and is likely to have serious negative repercussions for these children.

The most important thing about COVID-19 and learners living with severe disabilities is probably that everything possible should be done to ensure that the right to education of these learners is not compromised and that the learners receive all the assistance they need. This can be a reality if principals engage meaningfully with all stakeholders to balance competing rights. The success of engagement processes will be increased when principals realise the inherent powers they possess in terms of the *in loco parentis* principle and by guiding stakeholders towards focusing on the best interests of learners living with severe disabilities.

Our analysis of the relevant documents suggests that we can safely say that the law, as it applies to this topic, makes it possible for schools to protect the educational rights of learners living with disabilities and having to deal with COVID-19.

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