Codes of Conduct, and Suspensions and Expulsions: BELA Act's Passes and Fails

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SUMMARY

The South African Schools Act (School Act) was amended by the Basic Education Laws Amendment Act (BELA Act), the amendments coming into force on 24 December 2024. Sections 8 and 9 of the Schools Act pertaining to a school's code of conduct, disciplinary hearings, and suspensions and expulsions, have been criticised before for failing to be adequately aligned with the best-interests-of-the-child constitutional imperative. This contribution evaluates the amendments of these two sections to determine whether the BELA Act adequately addresses the concerns previously raised. This article concludes that the amendments have codified some of the precedents set by the courts and that some additions to the legislation are valuable, but the legislature has missed some opportunities to promote the best interests of all learners in the disciplinary processes in schools.

KEYWORDS: education law, school discipline, code of conduct, suspensions and expulsions, BELA Act

1 INTRODUCTION

That a disciplined school environment is conducive to teaching and learning remains one of the key tenets of education and is crucial to the realisation of the right to education. Staff and learners should feel safe, and the environment should be calm, friendly and free from violence to optimise learning. This is unfortunately not true for a large number of South African schools, and has been the unfortunate prevailing reality for many learners for an extended period of time.

There is longstanding criticism against the provisions of the South African Schools Act[1] (Schools Act) pertaining to the regulation of school discipline.[2]

[1] 84 of 1996.

[2] Reyneke and Pretorius "Aligning School Discipline With the Best Interests of the Child: Some Deficits in the Legislative Framework" 2017 35(1) *Perspectives in Education* 112 112–128; Reyneke "Realising the Child's Best Interests: Lessons From the Child Justice Act to Improve the South African Schools Act" 2016 19 *Potchefstroom Electronic Law Review* 1 1–19.

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With the recent extensive review of the Schools Act expressed in the Basic Education Laws Amendment Act[3] (BELA Act) that came into force on 24 December 2024, the legislature had a golden opportunity to refine the legal framework, to address the criticisms and to provide better guidance on school discipline that would respect, protect, promote and fulfil the best interests of all children. Criticism of the Schools Act has included the persistent adversarial and punitive approach to discipline, which is not in the best interests of children, the lack of focus on the needs of the victims and bystanders of misconduct, the focus on serious misconduct only and lack of guidance on how to address less serious forms of misconduct, the lack of prescriptions on what should happen to learners while they are suspended, the absence of an explicit focus on teaching socially acceptable behaviour during the disciplinary process, and a very narrow focus on the right to education that creates the impression that children's right to education can be equated with teaching academic content. The general assumption is that children should only be suspended from school or class as a last resort. The criticism also targets the lack of proper guidance on what support measures and counselling should entail, and the need for it to be available to all learners, not only those involved in disciplinary proceedings.[4]

This contribution evaluates the newly adopted BELA Act to determine whether it addresses the longstanding lacunae in the Schools Act in relation to ensuring the safety and security of staff and learners, guiding schools towards an environment conducive to teaching and learning, and prescribing disciplinary measures that align with the best-interests-of-the-child standard.

2 THE BEST INTERESTS OF THE CHILD

It is a constitutional imperative that the best interests of the child should be considered in all matters that affect children.[5] Legislative measures should therefore direct those responsible for the education and discipline of learners towards respecting and promoting the best interests of all children. Yet, the pre-BELA version of the Schools Act did not include any reference to the best interests of the child. This opened the door for unconstitutional conduct where the best interests of children were not given the necessary attention. This unfortunate position is rectified in the BELA Act by the inclusion of the best-interests concept in several provisions. Section 7 of the BELA Act, amends section 8 of the Schools Act, by adding subsection 5(*c*), which provides *inter alia* that disciplinary proceedings must be conducted in the best interests of the learner.[6]

It should be noted that the Constitution refers to the best interests of the child and that a child is a person below the age of 18 years.[7] The reality is that there are learners attending school who are above this age and are, in legal terms, adults. In this regard, in the case of *Centre for Child Law v*

3 32 of 2024.

4 Reyneke and Pretorius 2017 *Perspectives in Education* 112–128; Reyneke 2016 *Potchefstroom Electronic Law Review* 1–19.

5 S 28(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

6 S 5(*c*) of the BELA Act.

7 S 28(2) and (3) of the Constitution.

Minister for Justice and Constitutional Development,[8] the Constitutional Court held that there is an explicit cut-off date and there is a distinction between adults and children – being above or below 18 years of age. It is thus important to note that owing to the amendments in the BELA Act, the Schools Act refers in some provisions to the best interests of the child,[9] while in other provisions it refers to the best interests of the learner[10] or the best interests of the school.[11]

In the context of school discipline, the term "best interests of the learner" is used in the new section 8(5)(*c*) of the Schools Act, which states that disciplinary proceedings must be conducted in the best interests of the learner (not the best interests of the child). This can be interpreted to mean that the same principles applied to children under 18 years of age must apply to those who have already attained majority status. This is not completely in line with the sentiments of the Constitutional Court – that one should make a clear distinction between adults and children – but it is understandable considering the importance of education and of the realisation of the right to education. However, it is suggested that when competing interests of learners of minority and majority status need to be balanced, the fact that some of the learners may have attained majority status can and should play a role in the outcome of the decisions. This will be even more significant when some parties are of compulsory school-going age and others are already above the age of 18.[12]

School discipline that is in the best interests of all children will respect, protect, promote and fulfil learners' rights to dignity, equality, education, personal security and the right to participate in matters that affect them. In analysing the BELA Act's compliance with advancing the best interests of children, the realisation of these rights will thus be used as a yardstick.

3 AMENDED PROVISIONS OF THE SOUTH AFRICAN SCHOOLS ACT

Since previous criticism of the Schools Act focused primarily on sections 8 and 9, which deal with the drafting of a code of conduct, disciplinary hearings, and suspensions and expulsions, this contribution focuses on the same provisions.[13]

3 1 Drafting a code of conduct

Section 8(1) of the Schools Act previously provided that the school governing body (SGB) should draft a code of conduct in consultation with the other stakeholders in the school community and explicitly include learners in this consultation process. This is in line with children's right to participate in

8 2009 (6) SA 632 (CC) par 14.
9 Ss 5(5)(*a*)(i), 6(5)(*a*), 6(8)(*a*) and 33(8)(*b*)(i) of the Schools Act.
10 Ss 4(1), 8(5)(*c*), 8A(3)(*a*)(i) and 51(2)(*a*)(i) of the Schools Act.
11 S 20(1)(*a*) of the Schools Act.
12 S 3(1) of the Schools Act.
13 Reyneke and Pretorius 2017 *Perspectives in Education* 112–128.

matters that affect them.[14] This should be done subject to any applicable provincial law.

Section 7*(a)* of the BELA Act refined this position by adding that the adoption of any code of conduct should be in line with the provisions of the Constitution, the provisions of the Schools Act and provincial legislation. This is a useful addition as it reminds all SGBs that they must draft a code of conduct in accordance with the provisions of the existing legal framework. Unfortunately, many SGBs do not really have the capacity to draft a code of conduct in line with the legal framework because they do not always have the necessary expertise or access to experts to assist them in this regard. Case law often creates important precedents and explanations of the content of constitutional rights that should be captured in codes of conduct, but most SGBs do not have the means to stay abreast of legal developments.[15] It is therefore important that legislation should be as explicit and detailed as possible to ensure the protection and realisation of the rights of all learners. Legislation should also be amended regularly to ensure that it reflects the legal position correctly when changes in the law have been effected through case law. Failure to update legislation can result in unconstitutional practices by schools. It is against this background that the Schools Act and BELA Act are criticised for failing to require SGBs to review codes of conduct frequently, and for their lack of guidance on consultation.

In practice, many, if not the vast majority of learners, complete their whole school career without being afforded an opportunity to voice their opinions on the content of the code of conduct that affects them directly. The need to make explicit provision for regular reviews, through a consultative process, is underscored by children's right to participate. Although this right is not captured in the Constitution, it is one of the supplementary rights contained in the Children's Act.[16] This increases the risk that SGBs will be unaware of their obligation to ensure that learners are afforded an opportunity to voice their opinions on the code of conduct.

Any school policy, and the school's code of conduct in particular, affect learners, and they should thus be consulted when policies and the code of conduct are reviewed; and regular reviews should be compulsory – for example, when a new SGB takes office. This would ensure that changes in the needs of learners, new developments (such as vaping or online bullying trends) and changes in the composition of the school community are timeously reflected in the school's code of conduct. Explicit provisions on reviewing the code of conduct are necessary to remind SGBs to review their codes of conduct regularly and to include learners in the review process. Failing to include a compulsory review clause constitutes a missed

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14 S 10 of the Children's Act 38 of 2005.

15 Mahlangu "Pertinent Leadership and Governance Challenges Facing Schools in South Africa" 2018 16 *Education in Modern Society* 136 137–138; Du Plessis and Mestry "Teachers for Rural Schools: A Challenge for South Africa" 2019 39(S1) *South African Journal of Education*; Karlsson "The Role of Democratic Governing Bodies in South African Schools" 2002 38(3) *Comparative Education* 327 332; Van Wyk "School Governing Bodies: The Experiences of South African Educators" 2004 24(1)*South African Journal of Education* 49 50–54.

16 S 10 of the Children's Act.

opportunity to promote and fulfil children's right to participate in decision-making on matters that affect them.

With regard to consultation or child participation, one can argue that children are represented on the SGB in high schools and that the consultation criteria are therefore met.[17] This is not true for primary school learners who have no representation on the SGB. Yet primary school learners' views on amendments to the code of conduct should be elicited and taken into consideration with due regard to their age and maturity.[18] Thus, explicit efforts should be made to elicit their views, and due weight should be given to their input. Without legislative guidance in this regard, this is unlikely to happen because adults often think that primary school learners are too young and immature to be part of this type of process. This is in sharp contrast to international law and the provisions of General Comment 12 of the Committee on the Rights of the Child, which explicitly states that a child's age should not preclude a child from participation. Dedicated efforts must be made to ensure that the child's voice is heard. The weight attached to their views will, however, play a more significant role.[19]

As far as high-school learners are concerned, questions arise regarding the opportunities afforded to learner representatives to take part in the discussions regarding amendments and whether due weight is given to their views. Some research indicates that learners' participation in SGB decision-making is often rather tokenistic, and, in some instances, learner representatives are sidelined and not even invited to meetings or are requested to leave meetings. There is also serious doubt as to whether learner representatives are properly empowered to elicit the views of their constituents or are afforded adequate opportunities to fulfil their roles as representatives satisfactorily.[20]

It is thus disappointing that the BELA Act does not include explicit provisions to ensure that learners are adequately consulted when a new code of conduct is drafted, but more importantly, that learners are not also required to be involved when a school's code of conduct is amended and that regular reviews are not explicitly required in the new legislation.

In the new political dispensation where power sharing has become more of a reality and where principles of participatory democracy should be practised more readily, this omission in the BELA Act should be regarded as a failure. Not only does it fail to promote learners' rights to be involved in decisions that affect them, but it also fails to provide an opportunity to illustrate to learners the value of participation in a healthy democracy and how it should be done in a peaceful and constructive manner through lawful processes rather than through disruption, disrespectful conduct and anarchy.

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17 S 11(1) of the Schools Act.

18 UN General Assembly *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990.

19 UN Committee on the Rights of the Child (CRC) *General Comment 12: The Right of the Child to Be Heard* CRC/C/GC/12 (20 July 2009).

20 Msweli "The Role of Representative Council of Learners in Decision Making Processes in the South African Secondary Schools" 2021 9(9) *International Journal of Education and Research* 55 56 60–62; Radebe *Representative Council for Learners' Understanding of the Learners' Code of Conduct* (master's dissertation, University of Pretoria) 2019 53–64.

An approach that promotes participation in decision-making in a respectful manner is in line with the aims of discipline – namely, to teach learners to act in a socially acceptable manner.[21] The BELA Act amendments have thus missed an opportunity to give effect to learners' right to an education and implement discipline practices that prepare them for respectful and responsible adult life.

3 2 Guidelines for the drafting of a code of conduct

The Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (Guidelines)[22] was published in 1998 and has not since been amended. A close reading of the Guidelines reveals numerous flaws, lacunae and provisions that are not in line with legal developments over the past 26 years.[23] An updated version of the Guidelines would thus be useful to guide SGBs towards drafting and amending their existing codes of conduct to reflect the latest developments regarding new and improved disciplinary measures, such as positive discipline and restorative discipline. It would also ensure that the codes of conduct of schools reflect the current legal position. This is of particular importance since the legal framework has been refined in the past 26 years so as to respect, protect and promote the constitutional rights of children. Failing to amend codes of conduct accordingly may jeopardise the realisation and promotion of children's rights in disciplinary processes. The Guidelines are therefore an important tool in promoting children's rights and meeting the expectations set by transformative constitutionalism.

One should keep in mind that the Guidelines were not drafted by the legislature. In section 8(3) of the Schools Act,[24] the legislature delegates some of its lawmaking powers to the Minister of Basic Education to draft guidelines in consultation with the Council of Education Ministers. Thus, legislative power has been delegated to the executive power to ensure the effective day-to-day implementation of the Schools Act's provisions on the drafting of a code of conduct.[25] The legislature should thus rethink the appropriateness of delegating its powers to a Minister who fails to exercise them with the necessary rigour and prudence, in that the Guidelines have not been updated since their promulgation. In this regard, the legislature can withdraw the delegation of its powers and remove existing provisions from the Schools Act that authorise the Minister to draft guidelines. The legislature can then provide the necessary guidance through a legislative process such as drafting the BELA Act or regulations.

Although the Parliamentary Portfolio Committee on Education has a general oversight role, the legislature can add an accountability measure in the existing provision and expect the Minister to review the Guidelines every

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21 Reyneke and Reyneke (eds) *Restorative School Discipline: The Law and Practice* (2020) 49.

22 GN 776 in *GG* 18900 of 1998-05-15.

23 Reyneke "Critiquing the Guidelines for Adopting a Code of Conduct for Learners: A Legal Perspective" 2019 16(5) *Africa Education Review* 158 158 172.

24 84 of 1996.

25 De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 163–167.

three or five years and report back to Parliament in this regard. One of the functions of portfolio committees is to ensure the strict observance of statutes. With such an explicit provision in the legislation, the Parliamentary Portfolio Committee on Education should ensure that the Minister reports back on this matter from time to time, and that any amendments to the Guidelines contribute to the enhancement of children's best interests as far as school discipline is concerned.[26]

The latter proposal is preferable because the legislature is not best suited to drafting detailed provisions on the implementation of legislation. The Minister of Basic Education and the Department of Education are supposed to be in a better position than the legislature to draft policies that deal with the day-to-day implementation of legislation and the realisation of human rights.[27] However, when the Minister of Basic Education fails to ensure that proper measures are in place to safeguard and promote the best interests of children, the legislature has an obligation to tighten accountability measures by, for instance, including provisions that compel the Minister to review policies on a regular basis and to account for them in Parliament. This is part of the clear and important oversight role of Parliament in addition to its responsibility to legislate on material matters.[28] Unfortunately, the legislature missed the opportunity to ensure that Parliament complies with these responsibilities in the BELA Act.

3 3 Exemptions

Section 8(4) of the Schools Act provides that there are no exemptions to the provisions of a code of conduct, thus requiring a blanket acceptance of the provisions of a code of conduct. However, in 2007, the Constitutional Court held in *MEC for Education, KwaZulu-Natal v Pillay*[29] that exemptions should be possible to cater for the diverse needs and interests of children from different backgrounds.

This ruling of the Constitutional Court is now captured in the BELA Act,[30] which amends article 8(2) of the Schools Act to state that the aim of a code of conduct is to establish a learning environment conducive to the improvement and maintenance of the quality of learning while taking cognisance of "the diverse cultural beliefs, religious observance and medical circumstances of the learners at the school".

Celebrating the diversity of learners, the BELA Act prescribes specific processes and timelines for learners to apply for exemptions from the provisions of their school's code of conduct to accommodate their cultural beliefs, needs regarding religious observances, and medical requests. The procedural prescriptions for an exemption are now captured in section 8(4)(*b*)–(*d*) of the Schools Act. A parent or learner can apply to the SGB to be exempted from any of the stipulations of a code of conduct since

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[26] De Vos and Freedman *Constitutional Law* 148.
[27] De Vos and Freedman *Constitutional Law* 163–167.
[28] *Ibid*.
[29] 2008 (1) SA 474 (CC) par 110.
[30] S 7(*b*) of the BELA Act.

exemptions are not limited to matters of cultural beliefs, religious observances and medical grounds.[31] SGBs have to make a decision on an application for exemption within 14 days of receiving the exemption application. If the SGB decides not to grant the exemption, it must provide written reasons for its decision.[32] The applicant can appeal to the Head of Department (HOD) within 14 days of receiving the outcome of the decision. The HOD is also required to make their determination within 14 days and provide the parties with written reasons.[33]

This provision in the BELA Act[34] should be commended as an effort to promote the best interests of children, since it is clearly in line with the general principles captured in the Children's Act, which guides all interaction with children. In this regard, section 6(4)(*b*) of the Children's Act stipulates that any delays in acting or making decisions where children are involved should be avoided as far as possible. The Children's Act[35] also provides that cultural sensitivity is in the best interests of children and should be considered when decisions are made regarding children. This provision also promotes the right to dignity[36] of the learner as well as the right to belong to a cultural, religious and linguistic community,[37] both of which inform the best interests of the child.

3 4 Adversarial disciplinary proceedings

Section 8(5) of the Schools Act focuses on disciplinary proceedings, stating in subsection 5(*a*) that the code of conduct must contain explicit provisions regarding due process "safeguarding the interests of the learner and any other party involved in the disciplinary proceedings". The best interests of all children should be considered in all matters that affect them.[38] Thus, the best interests of the transgressing learner, victims of misconduct and those of the bystanders of misconduct should be considered, respected and promoted. Section 8(5)(*a*) can be interpreted to mean that the interests of the victims of misconduct and of third parties to the misconduct must be safeguarded during the disciplinary proceedings. This focus was not included in the original version of the Schools Act and was only included in the legislation in 2007 by way of the Education Laws Amendment Act,[39] which came into force on 31 December of that year. This is clearly a step in the direction of acknowledging the importance of the best interests of all the learners involved in disciplinary proceedings. However, it is up to a disciplinary committee to identify the needs and interests of all the learners involved and to find appropriate measures to safeguard their interests. Considering the reality that most schools continue to follow a punitive approach to discipline, where the focus is mostly on the transgressor, rule-

31 S 4(*b*) of the Schools Act.
32 S 4(*c*) of the Schools Act.
33 S 4(*d*) of the Schools Act.
34 S 7(*b*) of the BELA Act.
35 S 7(1)(*f*) and (*h*) of the Children's Act.
36 S 10 of the Constitution.
37 S 31 of the Constitution.
38 S 28(2) of the Constitution.
39 31 of 2007.

breaking and finding a suitable punishment,[40] more explicit direction from the legislature to guide schools towards prioritising the needs and interests of the victims and bystanders of misconduct would have gone a long way to promote the best interests of all learners.

The ordinary meaning of the term "disciplinary proceedings" refers to a formal disciplinary hearing with set processes[41] and, on the face of it, excludes other approaches and processes that are not adversarial and that could be used to deal with serious misconduct, such as a restorative conference.[42] There is a growing body of research that highlights the ineffectiveness and unsatisfactory outcomes of punitive discipline. Negative traits of the punitive approach to discipline include, *inter alia*, its exclusionary and humiliating nature, its links to higher drop-out rates and poor emotional and mental well-being of learners, and the lack of change in the school culture towards self-discipline and creating a conducive environment for teaching and learning.[43]

On the other hand, research highlights the effectiveness of alternative discipline approaches to dealing with misconduct in general, as well as to instances of serious misconduct. The characteristics and advantages of these approaches include, *inter alia*, calmer and safer school environments, increased academic performance, fixing the harm caused by misconduct, addressing the root causes of misconduct, prioritising counselling, participation of learners in decision-making, and improved relationships among all stakeholders.[44] It is also linked to the realisation and promotion of several constitutional rights that have proved to be in the best interests of children and to promote social justice.[45] Considering the constitutional imperative to transform our legal framework to promote human rights,[46] the amendments to section 8 of the Schools Act can be regarded as a missed opportunity to refine the Schools Act in such a manner that it explicitly promotes alternatives to the punitive approach to discipline and to promote the best interests of children.

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40 Reyneke and Reyneke *Restorative School Discipline* 86.

41 Oosthuizen and Smit (eds) *Aspects of Education Law* (2020) 155–165; Law Insider "Disciplinary Proceeding Definition" (undated) https://www.lawinsider.com/dictionary/disciplinary-proceeding (accessed 2025-01-23).

42 Reyneke and Reyneke *Restorative School Discipline* 137, 167, 532.

43 González "Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline" 2012 41(2) *Journal of Law and Education* 281 282–284; Jean-Pierre and Parris "Alternative School Discipline Principles and Interventions: An Overview of the Literature" 2018 53(3) *McGill Journal of Education* 414 417–418; Duarte, Moses, Bown, Kajeepeta, Prince, Scott and Mujahid "Punitive School Discipline as a Mechanism of Structural Marginalization With Implication for Health Inequity: A Systematic Review of Quantitative Studies in the Health and Social Sciences Literature" 2023 1519(1) *Annals of the New York Academy of Sciences* 129 130–131, 135–139.

44 González 2012 *Journal of Law and Education* 281 285–86; Padayachee and Gcelu "Collaboration: The Key to Managing Discipline in South African Schools" 2021 42(4) *South African Journal of Education* 1 4–9; Lodi, Perrella, Lepri, Scarpa and Patrizi "Use of Restorative Justice and Restorative Practices at School: A Systemic Literature Review" 2022 19 *International Journal of Environmental Research and Public Health* 1 1–34.

45 Reyneke *The Best Interests of the Child in School Discipline in South Africa* (doctoral thesis, Tilburg University) 2010.

46 S 7 of the Constitution.

Section 8(5)(*b*) of the Schools Act makes provision for "support measures or structures for counselling a learner involved in disciplinary proceedings", which is obviously in the best interests of the learner who is involved in the disciplinary proceedings. This provision is discussed in more detail below. The BELA Act[47] adds a new subsection to the Schools Act, refining the requirements for disciplinary hearings; section 8(5)(*c*) of the Schools Act now provides:

> "Disciplinary proceedings referred to in this subsection must be age-appropriate, must be conducted in the best interests of the learner, and must adhere to the principles of natural justice, fairness and reasonableness prescribed by the Constitution."

It is prudent to note that the provision does not follow the tone set in section 8(5)(*a*) of the Schools Act, which refers explicitly also to other parties involved in disciplinary proceedings; section 8(5)*(c)* refers only to the accused learner. The reference to the age-appropriateness of disciplinary proceedings should be welcomed, and one hopes that more explicit guidance will be provided to schools in regulations on how to ensure that disciplinary hearings are in line with the age and development of children involved in the proceedings, be it as accused, victim or other witness. Individualisation is one of the key components of the best-interests-of-the-child concept, and the legislature should be lauded for highlighting it through this provision.[48]

Many disciplinary hearings are conducted in a manner akin to a criminal court hearing and not always in a child-friendly manner. The other provisions of the Schools Act[49] strengthen this idea with references to cross-examination, compulsory attendance of parents and the use of intermediaries, all measures that are applicable in a criminal court hearing. In some disciplinary hearings, legal representatives have been used to conduct the disciplinary hearing or to defend accused learners, which often exacerbates the adversarial and hostile environment created during the disciplinary hearing.

Reference to the rules of natural justice, fairness and reasonableness assists in reminding those who conduct a disciplinary hearing to remain impartial, and that no one with a stake in the matter may be involved in conducting the proceedings and that both sides of the matter should be heard.[50] What is fair and reasonable will be guided by the Promotion of Administrative Justice Act[51] (PAJA) since decisions of a disciplinary hearing constitute administrative action.[52] Furthermore, one should keep the age and best interests of the learners involved in mind. However, in terms of section 8(5)(*a*) of the Schools Act, the best interests of all the learners must be considered and properly weighed against each other. This may require

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47 S 7(*d*) of the BELA Act.

48 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC) par 47; *S v M* 2007 (2) SACR 539 (CC) par 18–36.

49 S 8(6)–(9) of the Schools Act.

50 Hoexter *Administrative Law in South Africa* 2ed (2012) 362 451; s 6(2)(*a*)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

51 S 3 of PAJA.

52 S 1 of PAJA.

the participation of more learners in the proceedings to ensure that their voices are heard.[53] With reference to *S v M*[54] (where the Constitutional Court held that, in considering sentencing a parent, their children are not a mere personal circumstance of the parent), it is argued that the victims and bystanders of misconduct in schools should not be reduced to mere witnesses in the discipline process, but their needs and interests should be considered independently of those of the accused learner. Appropriate steps should be taken by the disciplinary committee to protect their interests.[55]

Despite containing positive reminders regarding disciplinary proceedings, it should be noted that the BELA Act misses the opportunity to promote other more conducive approaches to discipline, such as positive discipline and restorative discipline. The BELA Act also misses the opportunity to give guidance on how to deal with less serious misconduct in a constitutionally compliant manner and how to prevent misconduct through positive discipline and restorative practices. It is evident that the majority of schools still employ a punitive approach to discipline, which is not in the best interests of children and does not promote human rights. Yet, the legislature has failed to guide schools and SGBs explicitly away from this approach. The legislature has an obligation not only to respect and protect rights but also to promote and fulfil rights. Failing to promote a disciplinary approach that promotes human rights fails children who are unduly subjected to the punitive approach to discipline while more child-friendly approaches are available.

3 5 Support measures or structures for counselling

There is little doubt that the provision of support measures or structures for counselling is in the best interests of children with behavioural challenges. However, to ensure that children receive adequate and appropriate support, there should be proper prescriptions to ensure that the best interests of children are promoted. It was evident in the 2011 case of *Jacobs v Chairman, Governing Body, Rhodes High School, and Others*[56] that the learner who attacked a teacher with a hammer needed intensive counselling but did not receive the necessary support, with devastating consequences for the teacher (who was seriously injured), the learner (who came into conflict with the law) and the Department of Education and the principal of the school (who were subjected to lengthy litigation and had to pay damages for the harm suffered by the teacher). The court criticised the school for failing to provide counselling to the learner and urged schools to build networks in their communities to ensure that children have access to social services to address the root causes of their challenging behaviour.

Past criticism of this provision has included the lack of clarity on who is ultimately responsible for the provision of counselling and support within a school and on what the roles of the Departments of Basic Education and the Department of Social Development are, considering the realities of no-fee schools that do not have the means to appoint social workers or other

53 S 10 of the Children's Act.

54 *S v M supra* par 18–36.

55 *Howells v S* [1999] 2 All SA 233 (C).

56 2011 (1) SA 160 (WCC).

counsellors, and on what the specific roles of educators, counsellors and social workers are, since they do not have the same expertise and training.[57] Providing adequate social services to learners at schools is a golden opportunity for the State to realise children's right to social services[58] that ultimately promote many of their other rights and are in their best interests.[59]

The BELA Act does not address any of the criticism and left the provision unchanged, but it is important to note that several policy documents[60] have been published, and it seems that the Department of Basic Education makes some effort to address the social and emotional needs of learners through psychosocial support services and dedicated programmes on a national level,[61] which is cascaded down to the school and district level.[62] Recent research indicates that these services are delivered under severe resource, knowledge, and staff constraints and that the needs of children are overwhelming.[63] These realities might require the legislature to make amendments in future to secure the well-being of all children.

3 6 Parental involvement in disciplinary hearings

Section 8(6) of the Schools Act provides that a parent or a person designated by the parent should accompany a learner to a disciplinary proceeding. The disciplinary hearing can only be continued without the parent if good cause is shown. However, it is not clear what role the parent should play during the proceedings and who should prepare the parent to fulfil this role in a constructive manner. For instance, it is not stipulated whether the parent should cross-examine witnesses on behalf of the child. This can be very problematic for illiterate parents and parents who do not have the means to appoint a legal representative. It would be in the best

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57 Reyneke and Pretorius 2017 *Perspectives in Education* 119–121.

58 S 28(1)(*c*) of the Constitution.

59 Reyneke "The Role of Social Services in Realising Children's Rights in and Through Education" 2024 28(1) *Education as Change* 1 1–23; Reyneke "The Role of School Social Workers in Giving Effect to Children's Right to Education: A Legal Perspective" 2018 43(2) *Journal for Juridical Science* 79 79–108.

60 Department of Basic Education *Policy on Screening, Identification, Assessment and Support* (2014); Department of Basic Education *A Guide for Learner Support Agents and Schools on Providing Psychosocial Support to Learners* (2020).

61 Department of Basic Education "Psychosocial Support Program" (un https://www.education.gov.za/Programmes/CareandSupport/PsychosocialSupportServices.aspx (accessed 2026-05-25).

62 Department of Basic Education "Strengthening Inclusive Education Through School- and District-Based Support Teams" (undated) https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/Strengthening-inclusive-education-through-School-0724.aspx (accessed 2025-01-25).

63 Pillay, Patel and Setlhare-Kajee "Teacher Awareness of Psychosocial Support Available as per the Integrated School Health Policy in South Africa" 2023 13(1) *South African Journal of Childhood Education* 1 1–9; Nortje and Pillay "Vulnerable Young Adults' Retrospective Perceptions of School-Based Psychological Support" 2022 42(1) *South African Journal of Education* 1 1–9; Mahwai and Ross "Life Orientation Teachers' Experiences of Providing Psychosocial Support to High School Learners in the Johannesburg West District" 2023 43(4) *South African Journal of Education* 1 1–10; Department of Basic Education "Psychosocial Support Programmes for Learner and Teacher Wellbeing" (undated) https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/Psychosocial-Support-Programmes-for-learner-and-teacher-wellbeing-1223.aspx (accessed 2025-01-25).

interests of children if they had access to skilled people who can assist them for free, or if their parents could be guided properly on what they can do to assist their children. However, the legislation is silent on this issue, and no amendments have been made in this regard.

A common research theme is the lack of parental involvement in the education and discipline of their children and its detrimental effects, resulting in calls for action to enhance the involvement of parents. There is a clear link between parental involvement in the education of children and the academic outcomes attained by children.[64] It is thus of the utmost importance that the government take steps to enhance the involvement of parents since it has an obligation to promote the children's right to education as well as their best interests.[65] In terms of international law (and specifically the Convention on the Rights of the Child), parents are primarily responsible for the upbringing and development of their children, and this responsibility must be respected and promoted by states parties.[66] Yet, South African parents are largely absent from the education and disciplining of their children, and the Schools Act has no explicit provisions to remind parents of their legal obligation and to promote such involvement. The legislature missed the opportunity to promote parental involvement in the BELA Act.

3 7 Use of intermediaries during disciplinary hearings

Section 8(7) of the Schools Act makes provision for the appointment of an intermediary in disciplinary hearings. It has been indicated in previous research that this provision is flawed and not properly aligned with the standard of the best interests of the child. The appointment of an intermediary in the criminal-justice system is a process that needs a proper understanding of the legal principles that are at play, and this is done by trained legal professionals.[67] However, in the school-discipline context, the decision to appoint or not appoint an intermediary is in the discretion of mostly lay people. This can lead to serious infringements of children's rights. Furthermore, the appointment of an intermediary in a disciplinary hearing depends on the practicability of such an appointment and on the availability of an intermediary and the necessary equipment, such as a CCTV system or availability of an appropriate venue. These prerequisites should not dictate the feasibility and appropriateness of appointing an intermediary. The only

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64 Wolhuter and Van der Walt "Indiscipline in South African Schools: The Parental/Community Perspective" 2020 85(1) *Koers – Bulletin for Christian Scholarship* 1 1–11; Munje and Mncube "The Lack of Parental Involvement as Hinderance in Selected Public Primary Schools in South Africa: The Voices of Educators" 2018 36(1) *Perspectives in Education* 80 80–93; Marongwe and Mutesasira "Harnessing Parental Involvement and Educational Equity for Sustainable Development in South African Schools" 2024 4 *Interdisciplinary Journal of Sociality Studies* 1 1–15; Şengőnűl "A Review of the Relationship Between Parental Involvement and Children's Academic Achievement and the Role of the Family Socioeconomic Status in this Relationship" 2022 12(2) *Pegem Journal of Education and Instruction* 32 32–57.

65 Ss 7, 28(2) and 29 of the Constitution.

66 UN General Assembly *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990 art 18.

67 Reyneke and Pretorius 2017 *Perspectives in Education* 122–123.

criterion for the appointment of an intermediary should be the mental state and best interests of the child witness.[68] The legislature has failed to refine the provisions regarding the appointment of an intermediary and has thus missed an opportunity to address this serious lacuna in the Schools Act.

3 8 Suspension and expulsion from school

The provisions pertaining to suspensions and expulsions from school, captured in section 9 of the Schools Act, remain largely intact except for section 9(1), which deals with the rights of an SGB to suspend a learner as a precautionary measure before the disciplinary hearing. The legislation distinguishes between instances where learners must be afforded an opportunity to make presentations, and instances where the learner must be suspended without the opportunity to make presentations. Section 9 provides:

> "(1) The governing body may, on reasonable grounds and as a precautionary measure, suspend a learner who is accused of serious misconduct from attending school, but may only enforce such suspension in the following manner:
>
> *(a)* Where a learner is accused of committing the following acts of serious misconduct–
>
> (i) physical assault of a learner, employee, or other person related to the school, with the intention to cause grievous bodily harm, or the imminent threat to commit such an act, while on school premises or during any school activity, or in any circumstance that could reasonably be connected to the school;
>
> (ii) any form of harassment, including sexual harassment of a learner, employee or other person related to the school, including via electronic and social media;
>
> (iii) repeated offences related to bullying, or the imminent threat to commit such an act;
>
> (iv) the illegal possession of a drug or liquor;
>
> (v) the repeated disruption of the school programme, or the imminent threat to commit such an act;
>
> (vi) serious transgressions relating to any test, examination or examination paper;
>
> (vii) fraud;
>
> (viii) theft or any other dishonest act to the prejudice of another person;
>
> (ix) the possession of a dangerous object while on school premises, or during any school activity, or in any circumstance that could reasonably be connected to the school;
>
> (x) the possession or distribution of pornographic material;
>
> (xi) engaging in sexual activity on school premises or committing an act of sexual assault, or the imminent threat to commit such an act; and
>
> (xii) any other serious act contemplated in Schedule 1 to the Criminal Procedure Act that prejudices the constitutional rights of learners, employees, or other persons related to the school,
>
> such learner may be suspended only after the learner has been granted a reasonable opportunity to make representations in relation to the accusation of such serious misconduct; or

[68] *Ibid*.

(b) Where a learner is accused of committing the following acts of serious misconduct–

(i) murder and attempted murder;
(ii) culpable homicide;
(iii) any sexual offence, including rape;
(iv) robbery;
(v) theft;
(vi) assault with intent to do grievous bodily harm;
(vii) breaking or entering any premises with an intent to harm a person;
(viii) any offence under any law relating to the illicit possession of any dependence-producing drugs; or
(ix) the conveyance or supply of dependence-producing drugs at school and to learners,

which occurs on a school premises or at a school activity, and the learner has been formally charged by the South African Police Service, the governing body must suspend such learner immediately without granting the learner an opportunity to make representations in relation to the accusation of such serious misconduct.

(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."

This provision clearly tries to balance the learner's right to be heard and instances where the safety of other learners takes precedence; the right to be heard is limited for the immediate situation but is afforded during a formal hearing that will follow soon. This is clearly an effort to give effect to learners' right to personal security and to protect children from potential harm.

3 9 Responsibility to find an alternative school

Section 9(5) of the Schools Act[69] provides that if a learner is expelled from a school by the HOD and the learner is of compulsory school-going age, the HOD must make alternative arrangements for placement of the learner in another school. Thus, if the child is in grade 10 or higher or is above 15 years of age, the HOD does not have an obligation to assist the expelled learner in finding another placement. It is then up to the learner and their parents to find an alternative school. Considering that overcrowding is already an issue in many schools, this might be a daunting, if not impossible, task, which could result in the eventual dropping-out of the learner. This is obviously not in the best interests of the child and limits the learner's ability to realise their right to education.

As mentioned above, the Constitutional Court held that there is a clear distinction between adults and children and emphasised that children are people under the age of 18 years. In the context of minimum sentences, the Constitutional Court held that there is no justification for treating 16- and 17-year-old children like adults in the sentencing process. By way of analogy, the same argument is made here – that there is no justification for assisting

[69] 84 of 1996.

children of compulsory school-going age to find another school, but not doing so for children above compulsory school-going age.

The legislature missed an opportunity to align the Schools Act with the precedent set by the Constitutional Court.

3 10 Interventions during suspensions and after expulsion

There is no provision in the Schools Act indicating what should happen to a child between the moment of suspension and the date of a hearing, or while the child is suspended as part of a sanction of the SGB, or while the learner awaits a decision of the HOD on a possible expulsion. A school is only compelled to provide a learner with learning material while the learner awaits a decision of the MEC when they appeal a decision of the HOD to expel them from school. The implications of this are that the child is lawfully not attending school, is falling behind on academic work, and there are no compulsory interventions to look for the root causes of the misbehaviour or to provide possible rehabilitation programmes. This constitutes infringements of the learner's right to education and, where appropriate, their right to social services, which cannot be in the best interests of the child. This does not mean that children should not be suspended or expelled from school, but their education and social and emotional well-being should be managed in a more constructive manner. This is another failure by the legislature to promote the best interests of children.

4 CONCLUSION

The legislature has codified some of the case law in the BELA Act and consequently aligned the legislation with measures to promote children's rights and their best interests. The legislature, unfortunately, did not incorporate all relevant precedents in the amendments. There are thus still lacunae in the legislation that need to be addressed to optimise the realisation of children's best interests. There are also issues that could be captured in regulations and policy documents to assist schools and SGBs in promoting the best interests of all learners – such as alternatives to the adversarial approach to discipline, a clearer focus on the needs and interests of victims and bystanders of misconduct, and measures to improve the involvement of parents and the management of learners who are on suspension or expelled from a school to ensure that they receive adequate support and rehabilitation services.