



INAUGURAL ADDRESS



**A legally strategic look at the octopus called school
(More complex below the surface than meets the eye)**

by

Prof Dr Eida de Waal

Professor (Education Law: Successful Public Schools) with the
School of Education Sciences in the Faculty of Humanities
at the
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A legally strategic look at the octopus called school

*“Public schooling in South Africa is clearly charged with the **duty** of, among others, ensuring and maintaining a **disciplined, purposeful and safe learning environment** within which all **learners** would **prepare themselves to join society as worthy and responsible citizens**”¹*

1. AN UMBRELLA BACKGROUND

Apart from the fact that the relevant available court cases and literature sources indicate evidence pointing towards the lack of successful public schooling within a legal milieu in South Africa, the importance of creating such schools is also highlighted in these cases² and sources.

While the acceptance of the 1996 Constitution³ paved the way for radical transformation in the constitutional history of South Africa,⁴ the revolutionary political changes that the country has experienced since 1994 have resulted in far-reaching effects on various areas of life, not the least being that of the education dispensation.⁵ Even the final stalemate position in trying to find the middle ground for agreeing to the Constitution was connected to education.⁶ It is therefore small wonder that the adoption of the Schools Act⁷ was marked as launching a new epoch in South African education,⁸ with its main aim being that of achieving relevant stipulations guaranteed by the modern constitutional supremacy of the country.⁹ In addition, many teachers and School Governing Bodies are struggling to come to grips with the repercussions of the new approach to education.¹⁰

¹ Oosthuizen and De Waal “Orientation to safe schools” 2008 in *Safe schools* - Oosthuizen IJ (ed) 8.

² Comments passed by judges as the verdict is deliberated. For example, in *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (T) where the judge remarked on 883 that the “greater responsibility and accountability” that are needed are still lacking at school level. Also the court report on *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) which reflects the comment that schools need to be part of “a radical break with the past” at § 50.

³ Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter Constitution).

⁴ Rautenbach, Jansen van Rensburg and Pienaar “Culture (and religion) in constitutional adjudication” 2003 *PELJ* 2.

⁵ Louw “Religie-onderwys in die brandpunt: gereedheidsvlak van Suid-Afrikaanse opvoeders vir ’n multireligieuse bedeling” 2005 *Ned Geref Teologiese Tyd* 191.

⁶ De Groof and Lauwers “Education policy and law: the politics of multiculturalism in education” 2001 *Perspectives in Ed* 50.

⁷ South African Schools Act 84 of 1996 (hereafter Schools Act).

⁸ Roos “Legal requirement for school rules and disciplinary sanctions” 2003 *Koers* 481.

⁹ S 4 of the Constitution (n 2).

¹⁰ Roos (n 8) 482.

Sadly, however, while the period of *apartheid* was criticized for striving towards a national religion within its Christian National Education system based on racial disparity and segregation,¹¹ it is becoming clear that the current education dispensation ideology has now shifted to a so-called *people's education*¹² which is seemingly focused on bringing about national unity,¹³ yet which indicates a political undertone.¹⁴

Although South Africa is known world-wide for its cultural, ethnic and religious diversity,¹⁵ multiplicity as such is an innate characteristic of our modern world.¹⁶ It was therefore to be expected that South African education authorities would be aiming, among other things, at ensuring that practices, especially at public schools, do not impede access to education¹⁷ and do not infringe on the constitutional rights of any of the learners¹⁸ either. Complying with the founding values of human dignity, equality and freedom, as guaranteed by the Constitution,¹⁹ is therefore one of the most important challenges for creating and maintaining a safe, disciplined environment where effective teaching and learning can take place.²⁰ School principals, teachers and School Governing Bodies – bearing in mind the diversity of South African communities and the vast differences between rural, township and urban schools – have to fulfil their functions as stipulated in the Schools Act.²¹

What is necessary is a structure within which schools could operate not only to guarantee equal educational opportunities,²² but also to create a positive disciplined

¹¹ Preamble of Schools Act (n 6).

¹² Snyman "Godsdiensoopvoeding op Skool – Enkele Aannames in die Konsepbeleid" 2003. *Ned Geref Teologiese Tyd* 504.

¹³ S25 of the National Policy on Religion and Education (Religion and Education Policy) Gen Not 1307 in GG 2549 of 12 September 2003.

¹⁴ Snyman "Godsdiensoopvoeding op Skool – Enkele Aannames in die Konsepbeleid" 2003. *Ned Geref Teologiese Tyd* 504 (n 10).

¹⁵ Underscored specifically by s6 of the *SA Constitution* (n 5) which guarantees the 11 official languages.

¹⁶ Coertzen "Freedom of religion and religious education in a pluralistic society" 2000 *Ned Geref Teologiese Tyd* 185.

¹⁷ Schools Act (n 6).

¹⁸ As stipulated for schools in item 2 of the National Guidelines on School Uniforms (hereafter Guidelines on Uniforms), GN 173 in GG 28538 of 23 February 2006.

¹⁹ Constitution (n 2).

²⁰ Item 1.1 of the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (hereafter Guidelines for Codes of Conduct), GN 776 in GG 18900 of 15 May 1998. Also refer to the Children's Act 38 of 2005 in sec.79(2)(a) which stipulates the safe environment for children.

²¹ Schools Act (n 6).

²² Sec.9 of the Constitution (n 2) and the Preamble and sec.5(1) of the Schools Act (n 6).

environment²³ where learners and teachers know what is expected of them and feel secure. From an educational-juridical perspective within our developing democracy, successful public schooling is in dire need of shared confidence and cooperation in *implementing* current legislation, guidelines, regulations and policy documents at school level. Such implementation of the relevant legal aspects would of necessity lead to enhanced teacher/learner fundamental rights and responsibilities, improved safety and security measures, and positive public school discipline. The surety of positive off-spins that are embedded in sound implementation of legal aspects inspired this research that focuses on creating a legal framework for successful public schooling in South Africa by identifying five themes (learners' best interests/teacher rights, classroom security, education partner accountability, religion-culture-language aspects, and public law indicators) in search of a legally strategic look at education law aspects that are relevant to improving South African public education.

Several incidences where school managers have apparently infringed on the fundamental rights of learners in respect of their schools' dress code – as one example – have not reached the South African courts,²⁴ although the media regularly report on some of these cases. The current lack of a variety of South African case law necessitates mentioning some of these newspaper reports in order to reflect on the wide-spread occurrence of such incidents.

Although the media reported on only one 13-year-old Muslim female learner attending a public school as having been asked to take off her headscarf since it was considered to contravene her school's Code of Conduct,²⁵ this incident is not to be regarded as an isolated case.²⁶ One other case of note occurred when a public school gave a male learner the ultimatum either to shave his beard that he had grown in testimony to the fact that he knew the Koran by heart or to enrol at another school. The school principal's line of defence was that it was complicated to supervise organized learner discipline within a

²³ Items 1.1, 1.2 and 1.6 of Guidelines for Codes of Conduct (n 18).

²⁴ According to Alston, Van Staden and Pretorius "The constitutional right to freedom of expression: how enforceable are school dress codes?" *SAJE* 165 at least three cases occurred: the first case where a Grade 4-learner was not allowed to attend school without shoes (which his mother could not afford); the second case was where a secondary school Xhosa male learner had to wear prescribed attire connected to his initiation for several weeks (an amicable agreement averted the possibility of serious cultural confrontation); the third case occurred at a former Model C-secondary school in KwaZulu-Natal where a Muslim father enrolled two of his daughters, with the first one simply showing up in her Muslim attire although the father had signed that he accepted the school's clearly stipulated dress code and the second daughter joining the school the year later after the father had deleted the references that were made to any dress code (the Department of Education threatened the principal with dismissal if he went on refusing to admit the girls at his school).

²⁵ Sir John Adamson High School in Johannesburg according to Rondganger and Govender 2004 *The Star* 3.

²⁶ Anonymous *The Star* 8.

multi-cultural school environment, and that one culture should not be treated differently to the other twelve cultures at the school.²⁷

Litigation pertaining to dress codes at public schools is emerging and a few strong court judgments have been recorded in the last eight years.²⁸ Based on the judgements delivered, public schools could dispute how courts interpret (1) whether limitations on the way learners dress to school are lawful rules that public school officials may implement to maintain safe and orderly learning environments, or (2) whether such limitations are purely violations of the rights learners have, such as their right to freedom of religion, culture and/ or speech and expression.

In both South Africa and in the US,²⁹ trends in learners' clothing, among other things, have repeatedly stirred up litigation as teachers have tried to gain power over learner appearance. US Courts have had to consider students'³⁰ interest in choosing their clothing in relation to local authorities' concern in preventing disturbances and advancing school objectives.³¹ South African litigation appears to result in courts currently insisting that schools follow an accommodating approach and/or be especially wary of unfair discrimination towards previously disadvantaged minority groups.³² A question that begs scrutiny is whether such an accommodating approach encourages all schools to be successful or whether such an approach in the end merely over-burdens already successful schools.

Turning more specifically to the Bill of Rights, based on section 24 of the Constitution pointing out the fundamental right to *an environment... not harmful to (one's)... well-being*, learners must be educated under safe conditions. Several authors point out that orderly and dedicated teaching conditions are indispensable facets of successful schools.³³ This is reminiscent of the proclamation that teaching involves the right to *run*

²⁷ Pretorius *Beeld* 8.

²⁸ *Antonie v Governing Body Settlers High School (Antonie)* 2002 (4) SA 738 (C); *Pillay v MEC for Education KwaZulu-Natal* 2006 (6) SA 363 (N) (Pillay Eqc); *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) (Pillay CC).

²⁹ Much cooperative research is done with Ralph Mawdsley (Cleveland, Ohio), Charlie Russo (Dayton, Ohio and Nelda Cambron-McCabe (Oxford, Ohio).

³⁰ The US refers to its school-going youth as *students*.

³¹ Thomas, Cambron-McCabe and McCarthy *Public School Law* 2009 128.

³² Examples are those of *Antonie* and *Pillay CC* (n 28).

³³ Vaughan "Geborgenheit as ordeningkriterium in die pedio-diagnostisering (*Security as criterium in pedio diagnostics*) 1975 1;; Rossouw "Learner discipline in South African public schools – a qualitative study 2003 *Koers* 68:415; Steyn, Oosthuizen and Van der Walt "Teachers, schools, and society" 2003 *Koers* 68:xi; Oosthuizen "Security as a *sine qua non* for education" 2004 in *Introduction to education law* – Oosthuizen, Rossouw and De Wet (eds) 2; Yell and Rozalski "The impact of legislation and litigation on discipline and student behaviour in the classroom" 2008 *Preventing school failure* 52:7.

schools,³⁴ fuelling the controversy that surrounds managing learner discipline as one factor that influences security at public schools.³⁵

In this regard, the researcher's own experience at public schools in the Sedibeng-West D8 and Sedibeng-East D7 areas are dotted with strongly worded arguments from teachers who talk about what the law says one can/cannot do and others who commend the application of discipline, but both suppressing the instilling thereof in maintaining school discipline.

Discipline is instilled by providing clear guidelines and limitations through consistent behaviour and performance. This is leadership from the lowest level upwards.³⁶ Yet the vital question remains: How does one exert leadership when no one appears to be held accountable for the outcomes?

When discipline is instilled, it develops a sense of personal responsibility that leads to inculcating a sense of order in learners' daily lives. Once learners have taken personal responsibility, they seek to ensure that other learners do likewise: instilled discipline thus works contagiously towards a law-abiding citizenry.³⁷ However, the weakness at South African public schools is that the level of learner discipline that is *seen* to be instilled is unacceptably low. Moreover, it appears as if the majority of the people of South Africa – including the learners – are fooled by a so-called *leaders'* display of apparent power as they see it reported in the newspapers/on television and experience it in their townships, making them unaware of teachers being leaders in themselves since they act as role models on behalf of parents/caregivers and society in general especially at public schools.

2. THREE IDENTIFIED EDUCATION CHALLENGES

Firstly, seven years ago two seasoned authors identified the most significant education challenge as that of *sustaining* secure, organized and well-disciplined education environments that are favourable for learners to become well educated.³⁸ Education partners therefore need to draw up efficient disciplinary systems, balancing the

³⁴ Dlamini "Culture, education and religion" 1994 in *Rights and constitutionalism – the new South African legal order* Van Wyk, Dugard, De Villiers and Davis (eds) 593; De Waal "Random drug-testing: the duty to act against learners who use drugs" 2007 *Acta Academic* 39(2):229; De Waal "Legal accountability for public school discipline – fact or fiction?" 2011 *South African Journal of Education* 175.

³⁵ De Waal 2007 (n 34) 229.

³⁶ Mitchell 2010 Personal communication in an E-mail (available on request from the author of this address).

³⁷ *Idem*.

³⁸ Yell and Rozalski (n 33) 7.

requisites of sustaining an organized, secure school by thwarting problematic learner behaviour³⁹ and protecting learners' right to a basic education.⁴⁰

A second challenge is the aspect of teachers being attentive to the legal parameters when they need to make decisions⁴¹ or discipline a learner.⁴² The education partners therefore need to be informed at school level of the legal parameters within which public schooling will become successful: these parameters point to the legal standards and tenets as they are included in the Constitution,⁴³ legislation,⁴⁴ regulations,⁴⁵ departmental policies,⁴⁶ Codes of Conduct for learners,⁴⁷ administrative rules and common law principles⁴⁸ as they would apply to public schools. As pointed out by before,⁴⁹ these *regulatory* mechanisms are crucial to the reliable and reasonable regulation of behaviour which aims at guaranteeing successful public schooling.

The novel third challenge that feeds this research, is informing public school teachers/school authorities, learners and their parents/caregivers of the extent to which they could be held accountable for maintaining safe/secure learning environments. This requires, among others, the parental/caregiver involvement that was pointed out decades ago already.⁵⁰ Yet more importantly this requires investigating (1) what these accountabilities comprise of,⁵¹ (2) whether the education partners are aware of their

³⁹ *Idem*.

⁴⁰ Constitution sec.29 (1)(a) (n 3).

⁴¹ Thomas, Cambron-McCabe and McCarthy (n 31) xiii

⁴² Yell and Rozalski (n 38).

⁴³ The Bill of Rights, Chapter Two, sec.7-39.

⁴⁴ Of note here would be the Schools Act (84/1996); National Education Policy Act (27/1996); South African Council for Educators Act (31/2000); and Children's Act (38/2005).

⁴⁵ Of note here are Regulations for Safety Measures at Public Schools, Regulations to Prohibit Initiation Practices in Schools and National Guidelines on School Uniforms

⁴⁶ Of note here are the following two documents: National Policy - Management of drug abuse by Learners in Public and Independent Schools and Further Education and Training Institutions; and Devices to be Used and Procedure to be Followed for Drug Testing.

⁴⁷ Specifically, as they need to be consulted and adopted according to the Guidelines for Codes of Conduct (n 18).

⁴⁸ Of note here are specifically, but not exclusively, sec.33 of the Constitution, the *in loco parentis*-position of educators and the *rules of natural justice*.

⁴⁹ Smit "Bureaucracy is constraining democracy in South African schools" 2008 *Law, Democracy & Development* 12(1) 77.

⁵⁰ Glasser *Reality therapy: a new approach in Psychiatry*1975 45.

⁵¹ The investigation would be guided by document analyses of relevant legislation, regulations and policies in order to pinpoint the various accountabilities.

specific accountabilities⁵² and (3) to what extent these accountabilities are visible in their actions at public schools.⁵³

The ultimate challenge therefore lies in making the education partners accept their personal accountability concerning creating/maintaining successful public schools so that fundamental rights/responsibilities are enhanced, safety and security measures are improved and public school discipline is maintained positively.

3. PRIORITY LINKS

The success of a multi-level research project is supported by discovering ways in which it can create links with relevant already existing priorities. Such priorities have been discovered and are indicated in the paragraphs below.

3.1 This project is linked to regional priorities

Public schools of especially the Vereeniging/Vanderbijlpark/Sasolburg/Heidelberg/Nigel area form part of the research. Perceptions of the parent-learner-teacher partners at these schools are being examined to determine the glitches with reference to creating successful public schooling within a legal milieu. Several problems that were detected have been addressed in the modules of Education Law at B.Ed. Honours level at the NWU Vaal Triangle Campus.

3.2 This project is linked to national priorities

A report by the Human Rights Council⁵⁴ on school-based-violence echoes the right to a basic education:⁵⁵

One of the aspects of a right to basic education includes the rights of learners and educators to learn and teach in a safe environment free from all forms of violence.

Having allowed various submissions on especially the forms of violence at public schools at their public hearings, the HRC came to the conclusion, among others, that the full force of school-based violence extends far beyond that of physical injuries. An increase in absenteeism, poor learning performance/success and even augmented

⁵² This would be determined, among others, through the use of survey research.

⁵³ Of special note is the use of focus group interviews in this regard.

⁵⁴ HRC 2008 5.

⁵⁵ Constitution (n 3) sec.29.

incidents of suicide among learners are some of the negative effects from past experiences and records.

On Sunday 3 April 2011, SABC 2 News reported on the Minister of Basic Education, Motshekga, who had declared the National Action Plan 2014 as aiming specifically at addressing access to education for all in South Africa. The 2014-plan was, as a matter of fact, devised in response to the evidentially lack of successful public schooling in not only rural areas and so-called townships but also in urban education.

While research to determine the *extent to which successful public schooling has already been achieved* has been conducted, the need for research *into ways through which we could support the drive towards improving/enhancing/creating successful public schools* has now become clearly eminent and serves as the main driving force behind this research on a legally strategic look at schooling.

3.3 This project is linked to international priorities

International literature⁵⁶ indicates that when solutions have to be found for deep rooted problems concerning learners' reaching the development of their full potential, the requirement of successful public schooling becomes evident.

4. CONCEPT CLARIFICATION

The following three concepts need specific clarification for the purpose of this research.

4.1 Discipline

In short, discipline implies the existence of productive, remedial, rights-based educative practices, while *punishment* is seen as retaliatory, disparaging and unproductive practices.⁵⁷ Within the school milieu the word *discipline* comprises education, paced learning, leadership and organization.⁵⁸ Moreover, parents/caregivers need to be held accountable for the discipline at home and for learners' taking part in school activities.⁵⁹

In this research project, the term *discipline* refers to rights-based practices that aim at successful public school education.

⁵⁶ Bush, 2007; Cummings, 2009; McCarthy, 2006 & 2007; Thomas, Cambron-McCabe, McCarthy and 2009.

⁵⁷ Department of Education 2009 *Alternatives to corporal punishment: the learning experience* 9.

⁵⁸ Mabeba and Prinsloo "Perceptions of discipline and creating discipline problems in secondary education" 2003 *South African Journal of Education* 20:32.

⁵⁹ Guidelines for Codes of Conduct (n 20) item 6.1, 6.1(a) and 5.5.

4.2 Instil

Public school level discipline should not merely be *applied*: it should be instilled. According to the dictionary,⁶⁰ *instil* points to introducing something little by little or *infuse[ing] [something] gradually*.

4.3 Accountability

The Constitution⁶¹ juxtaposes accountability with *responsiveness* and *openness* as three values that need to be guaranteed by the multi-party system of the South African democracy. Moreover, Davel⁶² mentions *encouraging... child[ren] to be accountable for the harm caused by [them] and public administration* – including public schooling as an organ of State⁶³ – is obliged to be accountable.⁶⁴

As part of the Values in Education Initiative, the Ministry of Education published its Manifesto on Values, Education and Democracy,⁶⁵ describing accountability as making responsibility an established custom *according to Codes of Conduct and... formal expectations*.⁶⁶

For the sake of this research project, *accountability* refers to the extent to which each education partner is held responsible for specific aspects of maintaining safe learning environments, conducive to successful teaching and learning.

Schools should be safe and protected settings that respect the fundamental rights of learners.⁶⁷ Yet schools are currently *sites of exclusion and disappointment* that fail to indicate the way forward in ensuring excellence and achievement for everyone).⁶⁸ The chairman of the Federation of School Governing Bodies believes that the involvement of learners in murder should indicate to parents that they should *start doing something at home* and that the parents need to communicate values to their offspring.⁶⁹

⁶⁰ Onions The shorter Oxford dictionary 2001 1018.

⁶¹ Constitution (n 3).

⁶² *Introduction to child law* 2000 426.

⁶³ Constitution (n 3) sec.195(2)(b).

⁶⁴ *Idem* sec.195(1)(f).

⁶⁵ Department of Education *Manifesto on values, education and democracy*

⁶⁶ *Idem* 17.

⁶⁷ De Waal "Random drug-testing: the duty to act against learners who use drugs 2007 *Acta Academica* 19 229 & 231.

⁶⁸ Bloch "Fixing education will be the work of a generation" 2008 *Cape Times* 60.

⁶⁹ Naidu "School face 'crisis of violence'" 2004 *Sunday Argus* 1.

This research project finds its gap in the fact that the present South African legal position regarding successful public schooling is comparatively novel in legal terms: with the Constitution and Schools Act turning twenty, our courts have not yet had the chance to contend with all the democratic requirements that would be relevant to public schools in various aspects,⁷⁰ the available literature that comments on legal theory and practice is scant. The aim of this research project is to gain deeper insight into how better to create successful public schooling within a legal milieu, especially within the Sedibeng-West and Sedibeng-East school districts.

5. PROJECT OBJECTIVES

The point of any law is to reflect society as it wants to be viewed. Currently South Africa has a compilation of things people believe they deserve, not what they need. This statement raises concern: Are the various public school education-related regulations just cleverly worded documents or are the education partners familiar with the contents?

Three Ministers of Education have proclaimed a variety of guidelines, regulations and policies aimed at putting practical support strategies in place especially at public school level. Such documentation may well imply a heightened success rate at managing especially school discipline and safety in theory – yet the question remains whether these documents are implemented correctly in practice.

The overall aim of the project is to create successful public schooling within a legal milieu.

Based on the identification of the background and motivation, the overall aim can be operationalized as follows for the different sub-projects:

5.1 Constitutional rights/responsibilities

1. To investigate the right to a basic education as it would influence equal access to public education.
2. To evaluate the *best interest of the child*-stipulation as it would be applicable at public schools.
3. To assess to what extent public schools are promoting the founding values – *human dignity, equality, freedom* – in their Codes of Conduct and disciplinary systems.

⁷⁰ Exceptions would be the rulings on prohibiting corporal punishment and managing learners' appearance. Of note would be the *Christian Education, Antonie* and *Pillay* cases that have in some regard set precedents.

4. To determine the fundamental human rights/responsibilities of learners at school level, by determining perceptions of education partners and/or by doing a comparative law study.
5. To determine the fundamental human rights/responsibilities of teachers at school level, by determining perceptions of education partners and/or by doing a comparative law study.

5.2 Regulatory instruments

1. To review legislation in order to pinpoint shortcomings in school documents and disciplinary systems.
2. To explore the relevant subordinate legislation documents, assessing to what extent public school education partners could be held legally responsible, among other things, for maintaining safe learning environments.
3. To identify appropriate *administrative rules* and *common law*-principles and to assess to what extent these are reflected in public schools' Codes of Conduct and disciplinary systems.

5.3 Safety and security measures

1. To scrutinize existing Codes of Conduct in order to measure their content against the expectations of the most relevant legal stipulations and guidelines.
2. To assess whether existing safety and security measures at public schools adhere to most recent legal stipulations in this regard.
3. To investigate disciplinary dilemmas such as bullying/cyber bullying; informal disciplinary hearings; punitive action; suspension/expulsion; violence/illegal and dangerous items; and invalid administrative actions.
4. To suggest a workable framework for practical safety/security measures at public school level.

5.4 Jurisprudence

1. To analyse court cases in order to demonstrate education relevant legal parameters and pitfalls. Not just at national level, but also at comparative education law level.
2. To examine precedents laid down concerning a variety of aspects that would be relevant at public school level.
3. To link the examined precedents to the topic of the study.

5.5 Education management within a legal milieu

1. To determine what is done at management level to...
 - advance the constitutional rights and responsibilities of education partners;
 - implement the regulatory instruments; and
 - promote safety and security.

6. PROJECT DESIGN/PROCEDURES/METHODS/TECHNIQUES

A combined quantitative, qualitative and comparative education law approach is utilized at Master's and Doctoral level, since multi perspectives provide better assurance that what is targeted is being captured correctly. Triangulation of a variety of data sources (interviews, questionnaires, observations) is being developed by the Master's and Doctoral students. The B.Ed. Honours students have been following a quantitative approach in their FOER/RSPR research projects.

6.1 Relevant research designs

The work of Master's and Doctoral students who have conducted and who are busy conducting research in this project is in general characterised by quantitative, qualitative and/or comparative education law research designs.

- **Quantitative designs**

1. Philosophical worldview: In general, an advocacy and participatory worldview is held. Non-experimental, descriptive research is specifically applicable to this research project.
2. Strategy of inquiry: Survey research is conducted by some of the Master's and Doctoral students, since it is, in general, their intention to determine education partners' current understanding of factors that influence successful public schooling within a legal milieu. For this purpose, they use, among other things, self-developed questionnaires to determine the perceptions of especially teachers and learners.

- **Qualitative designs**

1. Philosophical worldview: A pragmatic philosophical worldview is held.
2. Strategy of inquiry: Phenomenological research is conducted in the qualitative phase. By determining personal perspectives and opinions concerning the

cultivation of successful public schooling, the phenomenon *successful public schooling* is investigated from an interpretivist stance.

- **Comparative education law**

1. Philosophical worldview: A pragmatic philosophical worldview is held.
2. Strategy of inquiry: Document and/or policy analysis, using a secondary analysis method, is done. Existing legal guidelines are appraised and diverse questions are asked in order to make pragmatic-oriented suggestions available.

6.2 Data-collection instruments

- **Quantitative studies**

1. Questionnaires – self-developed

The Honours, Master's and Doctoral students develop structured, closed, Likert-scale question items, as informed by their individual literature studies, to determine (1) teachers' understanding of successful public schooling, (2) the extent to which the school/classroom practices that these teachers implement enhance their understanding of successful public schooling, and/or (3) learners' perceptions of how successful public schooling is cultivated.

2. Observations

Aiming at confirming and supporting the data obtained from the questionnaires, some of the Master's and Doctoral students utilize structured observations to determine the extent to which teachers' classroom practices augment, among other things, the fundamental rights/responsibilities of learners.

- **Qualitative study**

1. Interviews

Aiming at confirming and supporting the data obtained with the quantitative study, some of the Master's and Doctoral students use focus group interviews to determine teachers' understanding of successful public schooling and teacher-learner perceptions concerning the extent to which school/classroom practices augment the cultivation of successful public schooling.

- **Comparative education law**

1. Acts and constitutions

Some of the Master's and Doctoral students manage to obtain the relevant legal documents in order to analyse, appraise, contrast and ask diverse questions to facilitate acquiring insight and evaluating information by comparing and weighing the data sets that are studied.

2. Subordinate legislative documents

Some of the Master's and Doctoral students manage to obtain the relevant documents at subordinate legislation level (regulations/guidelines/policy documents) in order to analyse and appraise them, while asking diverse questions to facilitate acquiring insight by comparing and weighing the data of the documents that are studied.

3. School documents with a legal background

Some of the Master's and Doctoral students manage to obtain, among others, existing Codes of Conduct for learners in order to evaluate them against existing legal guidelines.

6.3 Research steps

- **Quantitative/qualitative**

Concurrent data collection is done.

Steps in inductive data analysis:

1. Collect comprehensive data.
2. Read text/notes carefully.
3. Code/confirm data.
4. Develop categories from codes.
5. Decrease categories – getting rid of redundancy.
6. Draw conclusions, develop programme, suggest framework/structure.

- ***Comparative education law***

1. Descriptive phase – investigating the relevant elements of each of the individual legal systems.
2. Identification phase – doing a content analysis of relevant elements from each system against the background of each individual system's legal background.
3. Explanatory phase – considering links between relevant elements; also bearing in mind the individual contexts when reflecting on differences/similarities.

7. EXPECTED RESULTS

This research is planned to contribute towards extending the knowledge base concerning creating successful public schools in the South African context, whether it be rural, urban or so-called township. In addition, it is predicted that at the end of the project it will be possible to suggest a legal framework for successful public schooling.

Potential outcomes for the research conducted by Master's/Doctoral students at school level:

Their research aims at discovering pitfalls and shortcomings related to creating successful public schools (safety/security measures; Codes of Conduct; administrative actions; fundamental rights/responsibilities; management practices). This could assist in drawing attention to the education partners (principals, teachers, learners, parents/caregivers, District Offices) where support is called for to aid public schools in becoming successful.

Peer reviewed publications in accredited journals are foreseen in which the findings of the students are reported; sole authored and co-authored peer reviewed publications in accredited journals are being published; and peer reviewed publication of a few articles in internationally accredited journals are on-going.

In the last instance, this research project aims at creating an awareness of the aspects that hamper successful public schooling through visits and reports which will document and elaborate on the findings, while highlighting the importance of supporting serious efforts that schools make to effect positive change in this regard.

8. SPECIFIC ETHICAL IMPLICATIONS OF THE PROJECT DESIGN

A research project of this nature needs to adhere to ethical principles that would be relevant to the purpose and aim of the project.

8.1 Current experiences by the research participants

1. The participants of this research project are requested to do the following: complete a questionnaire (which takes 20-25 minutes to complete); consent to being a participant in observations (which takes one school period per observation); form part of a group interview (which take an hour per interview). Their experience level comprises being teachers or learners at the schools that form part of the research samples and who hold viewpoints that would definitely add value to the gathered data.

2. To restrict discomfort, any participant is free, at any time, to withdraw from the research process and all participants are informed of this aspect. The research titles have to date not been of a nature that would per se cause discomfort. No school-time is being used for any of the data-collection strategies: learners who need to stay after school are provided with light eats, taking dietary restrictions into due consideration. In the case of tape recordings, the participants are informed beforehand – when they consent to this phase – which the proceedings need to be taped for the sake of accurate data capturing. Once the recording has been transcribed, the students validate the transcription with any of the participants who are willing to assist them in this regard. When reflected in the student’s final document, the participants appear under pseudonyms or alphabetical numbers and the tape recordings are kept securely in one office.

3. All the research participants’ privacy is carefully considered: nobody’s personal information is filled in on the questionnaires; nobody’s name is recorded. The gathered data sets are managed by only the student, the study leader/promoter and the Statistical Services consultants. The data sets are locked away securely.

9. CHOICE OF TECHNIQUES/METHODS/PROCEDURES

These aspects need to be a perfect fit for the specific research, as will be indicated below.

9.1 Chosen approaches/methods

In general, law research steers clear from quantitative methods – the argument being that one should not measure legal content, but rather advocate for its being reviewed/adapted/removed once smart academic comparative research has been done by way of especially content and document analysis, which often includes research on an international level. It is therefore apparent that the comparative research method is frequently selected and followed successfully.

However, as Education Law is only a side-stream of full law, not all postgraduates are comfortable with conducting a full-blown educational-juridical study based on getting hold of legal documents and analysing/weighing/criticising them. It is for this reason and based on the past fifteen years’ experience of study leading in the field of Education Law, that it has become obvious that there is sound reason for including survey research as part of a Master’s or Doctoral degree. Such a student develops the questionnaire him/herself, based on the specific literature study, since no standardized tests are available on the topics of interests to this research project. These survey data sets are then used to “weigh” the theory against what education partners’ perceptions

are at public school level concerning relevant aspects on a small scale. It is necessary to understand that no student's Master's and/or Doctoral degree in Education Law ever comprises only quantitative research, since that would negate the very essence of the subject.

In some instances, it is even justified to include a qualitative phase, using focus group interviews: from experience with students, education partners sometimes mislead the student when completing the self-developed questionnaire. Doing interviews is one way of trying to notice and address such deception. Once again, it is necessary to understand that no student's Master's and/or Doctoral degree in Education Law ever comprises only qualitative research, since that would negate the very essence of the subject.

International examiners were at first uncomfortable with students' inclusion of quantitative/qualitative research methods in a Master's/Doctoral study, while also having a legal chapter; recently, however, these examiners have become convinced that, doing this circumspectly, such methods could add definite value to the completed educational-judicial document with South Africa's democracy being only 22 years old.

9.2 Rigour

Quantitative phase – reliability is considered by asking the Statistical Consultant to calculate Cronbach alpha values + inter-item correlations for both the pilot and the actual Master's/Doctoral study. In consultation with the consultant, the student edits the final questionnaire according to the pilot study calculations.

Regarding **validity**, the following aspects are considered:

- Face validity. This is underpinned by the fact that the questionnaire items contain relevant content that reflect on the literature study, making sure that the questionnaires measure what they are supposed to measure. Apart from the study leader/promoter, at least one other expert in the field of research is consulted.
- Content validity. This is supported by the fact that the specific questionnaire items are constructed according to the definition of each section. Apart from the study leader/promoter, at least one other expert in the field of research is consulted.
- Construct validity. This is supported by the fact that the different sections of the questionnaires all deal with aspects that are vital in determining whether the topic being studied is addressed at public school level. Apart from the study leader/promoter, at least one other expert in the field of research is consulted.

When determining the internal validity, the student and study leader/promoter ensure that sufficient controls are available to try and determine whether the conclusions that are drawn are truly warranted.

Qualitative phase – quality criteria involve the following aspects of trustworthiness

- **Credibility.** Basic triangulation of the data sets gathered by qualitative interviews and document analyses of the selected documents assist in establishing the believability of the data, the actual analysis and eventual conclusions.
- **Applicability/transferability.** The study leader/promoter and student ensure that sufficient detailed description of the study's context is provided so that users/readers of the study are able to measure the fit with their own circumstances.
- **Dependability.** Reporting the findings truthfully and reflecting the events honestly would assist in convincing the user/reader that honest research is being done.
- **Confirmability.** A confirmability audit trail supports the answer to the question whether the findings result from the focal point of the research investigation and not from the researcher's own biases:
 - √ Verifying and validating data
 - √ Avoiding generalization
 - √ Preserving confidentiality and anonymity
 - √ Stating limitations of the study upfront
 - √ Reflecting on being the instrument of data-collection to some degree involves considering.
 - ✚ historical, social and cultural experiences;
 - ✚ personal assumptions;
 - ✚ personal ties with or connection to sites and/or participants; and
 - ✚ steps in gaining research entry.
 - √ Taking cognizance of own assumptions
 - √ Avoiding clouding of interpretation

Comparative education law phase

Document studies are conducted by way of a content analysis in each case. Primary sources are scrutinized according to the following nine steps:

- ✓ Planning the research questions.
- ✓ Keeping a research diary + creating a system of record keeping.
- ✓ Locating material resources.
- ✓ Transliterating the texts into more manageable manner.
- ✓ Reading and questioning the manuscripts over and over again.
- ✓ Devising a coding system through the constant comparison method.
- ✓ Scrutinizing the constancy/inconsistency of data and outline provisional findings.
- ✓ Verifying rigour by involving experts in the research field.
- ✓ Considering how to write up the final report.

10. LEGAL AUTHORISATION

The Gauteng Department of Education and Free State Department of Education have been granting their permission to conduct research at Master's and Doctoral level. Once this is in place, the relevant District Offices and school principals need grant their permission for the students to conduct their research at the public schools who form part of the specific sample. From experience with current Master's and Doctoral students, at least one public school in District D7 and two in District D8 are unwilling to permit research.

Goodwill permission/consent

1. Public school principals need to consent to the research being done at their schools. A general letter to this effect has been drawn up.
2. Parents/caregivers of learners younger than 18 years need to consent to learner participation. A general letter to this effect has been drawn up.

Participant information and voluntary participation

- Information made available to participants

The relevant information concerning the research project is set out in a brief document [available in Afrikaans and English]. Research is conducted at schools that have Afrikaans and/or English as Medium of Instruction. A letter for informed consent is made available to the teacher participants; a letter for informed consent for learner participation is made available to the parents/caregivers of underage learners; a letter of consent is made available to the learners: all these letters for informed consent contain assurances that the data sets are being managed confidentially and that participation occurs anonymously.

- Ensuring voluntary participation

Recruitment: once the necessary permission to conduct research has been obtained, the participants are invited to join the research project, without any form of bribery involved. At the same time, they are assured that they should not feel discomfort if they choose not to participate in the research.

Assent: parents/caregivers need to agree to underage learners' participation and care is taken, in a diplomatic way, that learners whose parents/caregivers did not assent to their participation do not form part of the research project. From experience with current Master's and Doctoral students, parents/caregivers do agree to learner participation.

Participation: it is explained to all participants that they should feel free to withdraw from the research at any point, without any reason offered.

- Obtaining consent

The study leader/promoter is doing her best to ensure that students obtain the relevant informed consent of every participant concerning their research. This includes obtaining the consent of the legally authorised persons who care for underage learners.

11. CRITERIA FOR PARTICIPANT SELECTION AND RECRUITMENT

This research project aims at including adult participants connected to public schools across genders, racial groups, ages and levels of experience. A variety of participant perceptions will enhance the results/findings of this project: no exclusion criteria would be taken into consideration.

At the same time this research project aims at including learners in Grade 6-11 as their perceptions would be relevant to each individual study. Using learners in Grade 1-5 would, for example, not benefit this research project since the little knowledge and experience they would have in general about what is being investigated – school-related matters within a legal milieu – would not justify their participation. Grade 12 learners are in their final school year, preparing for end of the year matric examination: their participation could affect the time they afford their academic studies negatively. Excluding Grade 1-5 and Grade 12 learners is thus not meant to indicate keeping out their responses, but is meant to indicate that the research project is aware of public school learners' specific characteristics and education needs.

Benefits for participants

No short-term benefits are foreseen. Yet, in the long run, the participants may benefit from changes that public schools could affect when becoming more and more aware of legal stipulations/parameters/guidelines that are already in place, aimed at enhancing South African public school education.

Participant recruitment and randomness

As different students will be conducting different topics related to creating successful public schooling, more than one sampling type is included in this research project. The sample sizes are guided by Stoker's table.

Focus group interviews

Purposeful sampling, since the participants need to mirror the target population; factors such as age, gender and racial grouping would be borne in mind.

Observations

Volunteers are recruited from the specific group of participants. This is planned for the sake of not imposing on and/or creating discomfort on any one participant.

Questionnaires

Based on the need of the specific title of the study, the student considers the most suitable sampling design. To date, probability sampling has been the general the way to go, since Education Law aims at not excluding any part of society and/or the population. Once the sampling approach, such as that of simple random sampling, has been selected, the lists of public schools – provided by the relevant district offices/s – are consulted in order to make the selection as unbiased as possible.

In some instances, such as with Wendy Batterbee, purposive sampling has had a specific purpose since it was necessary to obtain the perceptions of particular elements from the school population (such as Grade 7 learners and their teachers).

12. STUDY DESIGN/EXPERIMENTAL DESIGN

Quantitative phase

Non-experimental, descriptive research design – surveys are developed, based on the literature review, in order to get hold of quantitative data that can describe and/or explore the research topic. No manipulation of the data occurs. Two to three structured observations are normally included in the quantitative phase.

Qualitative phase

Phenomenological design – focus group interviews with participants who volunteer; six to eight participants in a group; three to four interviews per study that uses this strategy.

Legal phase

A non-interactive design is followed, since the student does document and/or policy analysis of the relevant legal documents.

13. MANAGING JUSTIFIABILITY

Minors

The principals of the public schools who fall in a sample are contacted and the letters of consent that are addressed to the parents/caregivers are shown to them, while asking them for permission to address the relevant learners in their presence. The learners are informed of the aim of the research project both orally and in a brief document which stresses the fact that they are invited to participate, without any hidden negativity attached to their unwillingness in this regard. It is made clear that their responses are valuable to the outcome of the research project. They are requested (1) to hand the letter of consent to their parents/caregivers, (2) help ensure that the letter is completed, and (3) to bring it back the next day. The study leader or student collects the letters on the designated day. No school-time is used for completing questionnaires once proxy consent has been established. Light eats are available to the learners, taking special note of dietary requirements which the principals point out. At all times the anonymity of the learners is guaranteed in that their names do not appear anywhere, although it remains a fact that their friends could perhaps notice them taking part. Confidentiality is supported by the fact that only the student, study leader and Statistical Consultants work with the data sets. The compilation of the data is made available to the learners who request this. The documents are locked away.

Students

For the past ten years, the supervisors of the B.Ed. Honours course have agreed to assist students who choose to include fellow students and they approach such students as a group, with the study leader present to confirm ethical justifiability through her clearance certificate which expires only in November 2016. Including enrolled students rather than learners at schools is suggested in the FOER/RSPR study guides.

14. LEGALLY STRATEGIC ACTION-ORIENTED SUGGESTIONS

It is an indubitable fact that if the centre of school discipline no longer holds steadfast, things will continue to fall apart. As an example of an indispensable aspect of public

school discipline, in affording religious-cultural practices legal protection, courts in South Africa are weighing the appropriate balance between the rights to freedom of religion and culture and the State's duty, as carried out by school officials, to maintain safe and orderly learning environments at public schools. The Constitutional Court, in recognising learners' protected rights to human dignity, equality and freedom, has held that learners must be permitted to apply for exemptions from school policies that interfere with their religious or cultural practices.

- Schools must make sure that policies do not include blanket prohibitions that unduly impinge on learners' rights.
- Schools must be mindful of the Constitutional Court's warning regarding efforts to make reasonable accommodations.
- Schools must go as far as it takes to avoid the slippery slope scenario of ignoring the bona fide religious-cultural practices of South Africa's school learners.
- School practices must stop infringing on the religious-cultural rights of learners so that the first step in complying with human dignity, equality and freedom as guaranteed by the Constitution can be taken.
- School officials must address the question whether the various aspects of schooling are designed to reflect primarily mainstream and historically privileged forms of schooling.
- All learner groups must feel valued so that no learner feels excluded or marginalised.
- School officials can use the factors for assessing discrimination specifically stipulated in the Equality Act to begin a dialogue with a school, the parents/caregivers and the community on possible unfair discriminatory practices. Relying on the Equality Act, an entry point for such a dialogue could be *whether the discrimination impairs or is likely to impair human dignity*.
- Based on telephonic, office-based and/or school-based support offered to learners, parents, teachers and principals over that last five years, the following document was developed and tested successfully:



NORTH-WEST UNIVERSITY
YUNIBESITI YA BOKONE-BOPHIRIMA
NOORDWES-UNIVERSITEIT
VAAL TRIANGLE CAMPUS

Office number: 016 910 3077
Cell phone: 072 480 7971
Fax: 0865076094
Webpage: <http://eldadewaal.co.za>

EDUCATION LAW SUPPORT, ADVICE AND COUNSEL

* Parent = definition of Schools Act 84 of 1996 [legal caregiver included]

NO ANONYMOUS CALLS ARE ACCEPTED

Type of complaint or question	Phone call	Meeting	First date	Last date
Parent calls about learner fault				
Learner calls about own fault				
Teacher calls about learner fault				
Principal calls about learner fault				
School Governing Body call on learner fault				
Parent calls about teacher fault				
Learner calls about teacher fault				
Teacher calls about own fault				
Principal calls about teacher fault				
School Governing Body call on teacher fault				
Parent calls about principal fault				
Learner calls about principal fault				
Teacher calls about principal fault				
Principal calls about own fault				
School Governing Body call on principal fault				
Parent call on School Governing Body fault				
Learner call on School Governing Body fault				
Teacher call on School Governing Body fault				
Principal call on School Governing Body fault				
School Governing Body call on own fault				

To be completed by the person supported, please:

Om voltooi te word deur die persoon wat ondersteun is, asseblief:

Give a brief indication of the dilemma.

Gee kortliks 'n aanduiding van die dilemma.

Signature of person supported <i>Handtekening van persoon ondersteun</i>	Date <i>Datum</i>	Pleased <i>Gelukkig</i>	Unhappy <i>Ongelukkig</i>
Extra comment / Ekstra opmerking:			
Signature of Elda de Waal <i>Elda de Waal se handtekening</i>	Date <i>Datum</i>	Solved <i>Opgelos</i>	Unsolved <i>Onopgelos</i>

14. CONCLUSION

Legal precedent undoubtedly sanctions learners who have the need to express their religious-cultural beliefs that clash with existing dress codes. The superlative example in South Africa would be that of the Constitutional Court's decision in *Pillay* that clearly

defines learners' rights under the Equality Act regarding religious-cultural practices. The challenge to schools is thus clear: treat all learners fairly, making allowances for exemptions from requirements that may infringe religious-cultural practices. School incidents, that are being reported post-*Pillay*, indicate the need for greater attention to ensuring that schools treat all learners fairly.

As pointed out before, schools need to be made aware of the Constitutional Court's ruling that school rules need to provide accommodation for dress customs that cater for the expression of specific religious-cultural groups. Even more urgent is the fact that the Department of Basic Education needs to be seen as reacting by making resolute efforts in supporting schools to develop rules that will accommodate, among others, learners' expressing religious-cultural beliefs.

The following points should be considered in framing and implementing policies that have the potential for infringing on rights related to religion/culture:

(1) Seek input from everyone willing to contribute to the debate. Their support is not only crucial in implementing policies, but also in bringing matters to the forefront that may have the potential to impinge on a particular religion and/or culture. As can be seen in the *Pillay* decision, however, consultation does not immunise the school from challenges to its policies. The Constitutional Court noted that several individual societies maintain traditionally imbalanced power relationships or traditionally distorted population groups, increasing the possibility of local resolutions infringing on the rights of destitute groups. To counter this concern, schools must attempt to involve the broad community to gain greater representation of diverse perspectives in the construction of the school's Code of Conduct.

(2) Avoid falling into the trap of developing neutral Codes of Conduct. The standards of such codes frequently put so-called middle-of-the-road and even historically privileged practices into effect. In fact, the biggest threat to such dress policies is the charge of being vague and over-broad. Phrases such as *this includes ... but is not limited to ...* would indicate a school's willingness to accept that its code cannot foresee all circumstances that may occur. In such situations, courts may then defer to teachers when dealing with otherwise well-crafted policies. As reflected in the litigation, whether in South Africa or the USA, the fact-specific nature of disputes about dress codes becomes readily apparent.

(3) Include a clear process for requesting exemptions in dress code policies. Who does the learner contact to request an exemption? On what basis will exemptions be granted? What should the learner's petition for an exemption include? How will the

centrality of a learner's religious and cultural practices be assessed? When will the school notify the learner of the decision? What is the appeal process if a school denies a request?

(4) Note that teachers can restrict practices that will be disruptive to the school process. As the US Supreme Court noted, it must be more than a fear of disruption. In the *Pillay* case, school officials argued that the nose stud posed a threat of disrupting the educational process. Yet, Sunali wore the nose stud for two years with no apparent impact on learners' education. What may be most difficult when school leaders attempt to make accommodations is to move out of the comfort of their own culture and recognise that a practice that seems different, exotic or even bizarre can be included and honoured without damaging the educational environment. As the Constitutional Court noted, "our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation."

(5) Consider the pedagogical needs and fundamental rights in classrooms. Teachers who have been participating in the research, are generally not meeting the pedagogical needs and fundamental rights of the learners in their classrooms. The strong focus on maintaining the workload efficiently, enforcing school rules, managing stress levels and adhering to practices that have been proven – as well as a strong tendency to accommodate learners who favour learning through sensing and watching – imply that the fundamental rights and pedagogical needs of learners are neglected in practice. The responses of learners who indicated their preferred learning style also confirm this. In addition to this, according to the data, the pacing of learning according to learners' different needs and using different approaches to teaching and learning appropriately are ranked lower than expected. These results sound a warning in that inclusive education might become an unrealized dream in time.

In the first place, teachers must develop an own understanding of their philosophy of teaching and learning, to compare it with other philosophies, to discard those aspects that are unhelpful and to acquire new ones. Secondly, teachers must understand philosophies of teaching and learning and their relation to classroom practice in greater detail. In the third place, the professional development of in-service teachers must deepen their understanding of the processes of teaching and learning and of the learners they teach. Lastly, teacher pre-set and in-service training must focus on the importance of recognizing and enhancing the pedagogical needs and the fundamental rights of all learners.

THE WAY FORWARD

When human dignity is threatened, learners are unlikely to grow and develop to their full potential. Human dignity is certainly a powerful lens for school officials to use when examining pluralism and learners' justifiable freedom at South African schools.

Let us celebrate and embrace diversity at school level through policy and procedure!

