



Bridging the gap: Constitutional rights and evidentiary standards in South African school discipline processes

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ABSTRACT

This paper examined the complex interplay between constitutional rights, administrative justice, and evidentiary standards in South African school disciplinary hearings. It investigated the persistent challenge of balancing the need for institutional discipline with the imperative to protect learners' rights to fair procedures, dignity, and basic education. Focusing on the role of School Governing Bodies (SGBs), the analysis traverses the constitutional and legislative framework, including the recent Basic Education Laws Amendment (BELA) Act, as well as relevant case law. The study identified critical implementation challenges, primarily stemming from SGBs' limited legal capacity and systemic resource constraints, which collectively undermine the promise of disciplinary equity. It further evaluated the often-overlooked oversight function of Portfolio Committees on Education in promoting procedural fairness. The findings indicate that despite a sophisticated legal architecture, a significant implementation gap perpetuates injustice. The paper concludes with pragmatic recommendations centred on robust capacity-building for SGBs, the standardisation of evidentiary protocols, and the meaningful integration of restorative justice approaches, thereby contributing to the broader scholarly discourse on transformative constitutionalism within everyday administrative proceedings.

Keywords: Disciplinary hearings, School Governing Bodies, procedural fairness, admissibility of evidence, transformative constitutionalism, BELA.

INTRODUCTION

Disciplinary hearings in South African schools represent a critical nexus where the authority of educational institutions intersects with the fundamental rights of children. These proceedings are essential for maintaining order and upholding school codes of conduct, yet they must be carefully calibrated against a robust constitutional backdrop that guarantees every learner the right to fair administrative action, human dignity, and basic education.¹ The South African judiciary has consistently mandated stringent procedural and evidentiary standards to ensure that disciplinary measures are not only effective but also equitable, transparent, and constitutionally compliant.

The primary responsibility for navigating this complex legal terrain falls on SGBs, which are composed largely of parent volunteers who often lack formal legal training. This reality creates a

¹ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021), 112.

profound tension between the law's high ideals and the practical realities on the ground. SGBs are frequently overwhelmed by the intricacies of due process, the nuances of evidence evaluation, and the weight of their consequential decisions, particularly when faced with resource limitations and systemic inequities between well-resourced and impoverished schools.² This paper argues that this implementation gap constitutes the central crisis in South African school discipline, threatening to render constitutional promises meaningless for many learners.

This study aims to provide a comprehensive legal and practical analysis of learner disciplinary hearings. It will dissect the constitutional and statutory foundations, analyse the principles governing evidence, and critically assess the real-world obstacles SGBs encounter. Furthermore, it will explore the role of external oversight mechanisms, specifically Portfolio Committees on Education, in bridging this gap. By synthesising legal doctrine, judicial pronouncements, and scholarly critique, this paper seeks to illuminate the strengths and weaknesses of the current system and propose concrete, actionable reforms to foster a more just and effective disciplinary environment.

LITERATURE REVIEW

The scholarly discourse on school discipline in South Africa is situated at the intersection of constitutional law, children's rights, and education policy. A substantial body of literature has developed that critiques the existing framework and proposes pathways for reform, yet significant gaps remain, particularly regarding the practical application of evidentiary standards.

The foundational scholarship in this area rightly emphasises the supremacy of the Constitution. Authors like Currie, De Waal, Woolman and Bishop have meticulously detailed how the Bill of Rights, particularly sections 10, 29, and 33, establishes a non-negotiable floor of rights protection for learners.³ This constitutionalist perspective is reinforced by international law analyses, such as those by Sloth-Nielsen, which anchor South Africa's obligations in the United Nations Convention on the Rights of the Child (UNCRC), emphasising that discipline must respect a child's dignity and be administered in a manner consistent with their evolving capacities.⁴

A second strand of literature focuses on the statutory framework governed by the South African Schools Act (SASA) of 1996. Joubert analysed the procedural requirements SASA imposes on SGBs, highlighting the legislative intent to decentralise authority while embedding due process safeguards.⁵ The recent advent of the BELA Act has prompted a new wave of scholarly inquiry. Commentators have begun to assess its potential to rectify systemic flaws, with many, including the South African Human Rights Commission, welcoming its enhanced procedural codification but expressing caution about its implementation in resource-starved environments.

The challenges faced by SGBs form a well-documented theme in the literature. Empirical studies by researchers like Mncube and Harber, and Smith et al. have consistently highlighted a triad of problems: the legal complexity of hearings, severe resource constraints, and the pervasive risk of bias and inconsistency.⁶ This scholarship reveals a disciplinary "justice gap," where learners in township and rural schools are disproportionately affected by procedural errors.⁷ The longitudinal work of Griffin *et al.*, quantifying high rates of procedural invalidation in under-resourced schools, provides stark empirical evidence of this systemic failure.⁸

In response to these challenges, a growing body of literature advocates for a paradigm shift towards restorative justice. Scholars such as Reynecke and Mokomane argue persuasively that punitive,

² Anthony Smith, Sello Mampane and Johan Beckmann, "Experiences and Challenges of Evidence Leaders ('Prosecutors') in Learner Disciplinary Hearings in Public Schools" (2015) 18(6) *Potchefstroom Electronic Law Journal* 2366-2403.

³ Stu Woolman, "Constitutional Law of South Africa," 2017; Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta and Company Ltd, 2013).

⁴ Julia Sloth-Nielsen, "Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child," *Int'l J. Child. Rts.* 10 (2002): 137.

⁵ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 114-115.

⁶ Vusi Mncube and Clive Harber, *The Dynamics of Violence in South African Schools* (UNISA Press 2013) 145.

⁷ South African Human Rights Commission, *Report on School Governance in South Africa* (2021) 23.

⁸ Charity Brown Griffin et al., "Racial Fairness, School Engagement, and Discipline Outcomes in African American High School Students: The Important Role of Gender," *School Psychology Review* 49, no. 3 (2020): 222-38.

exclusionary models are often pedagogically counterproductive and constitutionally suspect.⁹ They propose restorative practices that focus on repairing harm and reintegrating learners, thereby aligning disciplinary processes more closely with the school's educational aims.

However, a critical gap persists in the literature concerning the *practical application of evidentiary standards*. While evidence law textbooks like those of Zeffertt and Paizes outline general principles, there is a scarcity of focused research on how concepts like relevance, reliability, hearsay, and the exclusionary rule are or should be applied by lay adjudicators in the unique context of a school hearing.¹⁰ This paper seeks to contribute directly to this underexplored area, bridging the theoretical sophistication of South African evidence law with the pragmatic realities of school governance. Furthermore, while oversight is often mentioned, the specific role of Portfolio Committees in shaping disciplinary fairness has not been extensively analysed, a gap this study also aims to address.

METHODOLOGY

This research employs a qualitative doctrinal legal analysis, which is the primary methodology for conducting rigorous legal research by systematically analysing existing legal sources.¹¹ The study is designed to critically evaluate the legal framework governing school disciplinary hearings and to diagnose the causes of the implementation gap between law and practice.

The data collection strategy for this research was grounded in a comprehensive review of both primary and secondary legal sources. Primary sources served as the foundational legal authority for the study and comprised several key categories. Legislation formed a critical component, encompassing the Constitution of the Republic of South Africa, which provides the supreme normative framework, along with pivotal statutes such as the SASA, Education Laws Amendment Act, and the BELA Act. Furthermore, a systematic analysis of case law was undertaken, examining relevant jurisprudence from the Constitutional Court, the Supreme Court of Appeal, and various High Courts. This involved landmark decisions, including Welkom High School, Juma Masjid, and Hoërskool Ermelo, which have authoritatively shaped the legal landscape of school discipline. To ensure the analysis remained contemporary, the recent judgment in *Mokone v The Principal of PJ Oliver High School* was also incorporated.¹² Finally, a range of policy documents, including government reports, departmental guidelines, and official policy statements from the Department of Basic Education and provincial education departments, was scrutinised to understand the state's stance on interpretation and implementation.

The primary sources were supplemented and contextualised by an extensive review of secondary sources. Academic literature, comprising scholarly books, peer-reviewed journal articles, and commissioned research reports by leading South African and international scholars in education law, constitutional law, and evidence, provided the study's theoretical and critical framework. Additionally, institutional reports from bodies such as the South African Human Rights Commission, the Centre for Child Law, and the Parliamentary Monitoring Group were analysed. These publications offered valuable empirical insights and independent critical assessments of the practical functioning of the school disciplinary system, bridging the gap between pure legal doctrine and on-the-ground realities.

The analytical process followed a structured, three-stage approach to ensure a thorough and critical examination. First, a legal synthesis was conducted to systematically map the current legal framework. This involved identifying and cataloguing the core constitutional rights, statutory provisions, and judicial principles that constitute the formal architecture of school discipline in South Africa. Second, a critical analysis was undertaken to probe beneath the surface of this synthesised framework. This stage focused on identifying inherent tensions, doctrinal ambiguities, and systemic gaps within the law, with particular attention paid to the challenges of practical implementation and the

⁹ Roelf Petrus Reyneke, "Restoring Our Children: Why a Restorative Approach Is Needed to Discipline South African Children" (2015) 33(1) *Perspectives in Education* 57-72; Reliance Bongani Mokomane, "Restorative Justice as Another Way of Dealing with Bullying in South African Schools" (2020) 7 *Journal of Law, Society and Development*.

¹⁰ David Theodor Zeffertt, Andrew Paizes and Andrew St Q Skeen, *The South African Law of Evidence* (Butterworths 2003).

¹¹ Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17(1) *Deakin Law Review* 83-119.

¹² *Mokone v The Principal of PJ Oliver High School* 2024 (1) SA 112 (ECG).

palpable dissonance between legal theory and SGB practice. Finally, a prescriptive analysis was performed, leveraging the insights from the preceding stages to develop the paper's recommendations. This final analytical phase drew directly upon the identified gaps, comparative insights, and best practices suggested in the scholarly literature to propose coherent and actionable reforms.

Acknowledging the constraints of the chosen methodology is a necessary element of scholarly rigour. The primary limitation of this doctrinal approach is its inherent reliance on documented law and published reports. Consequently, the study may not fully capture the nuanced, on-the-ground, and anecdotal experiences of every SGB or learner, as it does not involve primary empirical data collection such as surveys or interviews. However, by systematically synthesising a wide range of existing empirical studies and authoritative official reports, this research constructs a robust and evidence-based critique of the system. This approach provides a firm and credible foundation for the conclusions drawn and the recommendations put forth, while clearly delineating the scope for future empirical research.

This study mainly relies on existing empirical research and published reports rather than collecting new primary data. This approach was chosen because the paper focuses on analysing the legal framework and identifying gaps between law and practice across a broad national context. Using established studies enables a broader understanding of trends affecting different types of schools, especially where access to primary data is limited.

However, the absence of primary data, such as interviews with SGB members or learners, is acknowledged as a limitation. While the secondary sources used are credible and well-established, they may not fully capture current, localised experiences in all schools. Future research could strengthen these findings by including fieldwork, such as interviews or case studies, to provide deeper, first-hand insight into how disciplinary processes function in practice.

LEGAL FRAMEWORK GOVERNING DISCIPLINARY HEARINGS

Constitutional Safeguards

The Constitution of the Republic of South Africa, 1996, establishes an indispensable framework that fundamentally shapes all disciplinary proceedings in schools. It mandates that institutional authority be exercised in a manner that consistently upholds the child's foundational rights. Section 33's guarantee of just administrative action is particularly pivotal, requiring that all disciplinary processes be lawful, reasonable, and procedurally fair.¹³ This constitutional provision operationalises the principles of natural justice, chiefly *audi alteram partem*, ensuring learners have a meaningful opportunity to be heard before any sanction is imposed.¹⁴ The Constitutional Court has fortified this right, characterising it as substantive and demanding rational decision-making free from arbitrariness.¹⁵

Complementing this, Section 10's protection of human dignity acts as a crucial brake on punitive overreach. It expressly forbids disciplinary measures that are degrading, humiliating, or that otherwise erode a learner's sense of self-worth.¹⁶ The judiciary has consistently underscored that sanctions must be proportionate to the misbehaviour and must not unjustifiably infringe upon learners' constitutional rights. In the seminal case of *MEC for Education, Western Cape v Welkom High School*, the Court insisted that disciplinary consequences be carefully tailored to avoid disproportionate impact, especially where less restrictive alternatives are available.¹⁷ This jurisprudence aligns with international human rights standards, particularly Article 28(2) of the UNCRC, which demands that school discipline be administered in a manner respectful of the child's dignity.¹⁸

Furthermore, Section 29's right to basic education imposes a significant limitation on disciplinary powers. The Constitutional Court has firmly established that exclusionary disciplinary measures, such as suspension and expulsion, must be remedies of last resort, as they directly impede a learner's access

¹³ Constitution of the Republic of South Africa, 1996, s 33.

¹⁴ Timothy Alan Endicott, *Administrative Law* (Oxford University Press 2021) 74.

¹⁵ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), para. 48.

¹⁶ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th ed, Juta 2013) 287.

¹⁷ *MEC for Education, Western Cape v Welkom High School* (2013 (4) SA 262 (CC), para. 72.

¹⁸ Julia Sloth-Nielsen, "Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child" (2002) 10 *International Journal of Children's Rights* 137.

to education.¹⁹ This principle was powerfully reaffirmed in *FEDSAS v MEC for Education, Gauteng* (2016), where the Court warned that disciplinary policies must not operate as *de facto* barriers to education, particularly for vulnerable learners.²⁰ This constitutional imperative has spurred academic arguments that disciplinary frameworks should increasingly incorporate restorative justice approaches to minimise educational disruption.²¹

Collectively, these constitutional provisions require SGBs to conduct hearings that meticulously balance institutional discipline with inviolable rights. However, the consistent application of these principles remains elusive, particularly in under-resourced environments where SGBs grapple with a profound lack of legal expertise.²² This disparity underscores the necessity for sustained judicial and legislative oversight to give practical meaning to these constitutional guarantees.

Statutory Framework

South African Schools Act

The SASA provides the primary statutory architecture for learner discipline in public schools. Section 8 of SASA empowers SGBs to create and implement disciplinary policies, but this authority is explicitly conditioned on adherence to constitutional principles and the Act's own stipulations.²³ This legislative design grants significant autonomy to SGBs while simultaneously erecting critical procedural safeguards to protect learners.

SASA outlines several fundamental procedural prerequisites that serve as the bedrock of due process in school disciplinary actions. Firstly, the Act requires that learners be given written notice of the charges in clear and comprehensible language, enabling them to prepare an adequate defence.²⁴ This requirement gives practical effect to the *audi alteram partem* rule. Secondly, the right to representation allows learners to be assisted by a legal representative, parent, or advocate during proceedings, thereby operationalising the constitutional right to fair administrative action.²⁵ Finally, the provision for appeal mechanisms ensures that disciplinary decisions are subject to review by higher authorities, serving as a vital check against arbitrary outcomes.²⁶

The Basic Education Laws Amendment Act

The BELA Act represents the most significant proposed legislative reform to South Africa's education landscape in decades, substantially altering the legal framework for learner discipline. Designed to address systemic weaknesses in the implementation of SASA, the BELA introduces critical changes to better align institutional power with constitutional safeguards for learners.

The BELA introduces several substantive modifications. It clarifies and circumscribes the powers of SGBs by establishing baseline procedural requirements for institutional codes of conduct, including stipulated timeframes for hearing notices, mandatory disclosure of evidence, and requirements for detailed record-keeping. Furthermore, it strengthens protections for accused learners by explicitly guaranteeing the right to legal representation in cases where expulsion or long-term suspension is a potential outcome, thereby directly giving effect to Section 33 of the Constitution. The BELA also seeks to create a more standardised sanctions framework that categorises offences by severity and mandates proportional responses, aiming to rectify the inconsistencies noted by researchers like Griffin et al.²⁷

The BELA's provisions demonstrate a deliberate alignment with constitutional jurisprudence. Its requirement that disciplinary measures demonstrate an "educative purpose" directly responds to the Constitutional Court's jurisprudence on the primacy of the right to basic education. This aligns with the

¹⁹ *Governing Body of Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC), para. 58.

²⁰ *FEDSAS v MEC for Education, Gauteng* (2016 (4) SA 546 (CC), para. 89.

²¹ Eric Kibet and Charles Fombad, "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa," *African Human Rights Law Journal* 17, no. 2 (2017): 340–66.

²² Stu Woolman, *Constitutional Law of South Africa* (2 ed, Juta 2017) 345.

²³ South African Schools Act 84 of 1996.

²⁴ Anthony Smith, Sello Mampane and Johan Beckmann, "Experiences and Challenges of Evidence Leaders ('Prosecutors') in Learner Disciplinary Hearings in Public Schools" (2015) 18(6) *Potchefstroom Electronic Law Journal* 2366-2403.

²⁵ Gugulethu Nkosi, "Social Work and Child Law in South Africa: A Legal Perspective" (2012) 33(2) *Obiter* 360-366.

²⁶ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 115.

²⁷ South African Human Rights Commission, *Report on School Governance in South Africa* (2021) 23.

dictum in *Welkom* that disciplinary processes should serve pedagogical, not purely punitive, ends. Additionally, the proposed establishment of independent review panels addresses long-standing concerns about procedural fairness in SGB-administered hearings.²⁸

However, the potential of the BELA is tempered by significant anticipated implementation challenges. The resource disparity between affluent and impoverished schools creates unequal capacity to comply with the BELA's administrative demands, risking the exacerbation of existing inequalities in disciplinary justice.²⁹ The BELA's assumption of a baseline of institutional capacity is one that many schools, particularly in rural and township areas, currently struggle to meet.³⁰ Its successful implementation will therefore depend on phased roll-out and targeted capacity-building support from provincial education departments.

EVIDENTIARY STANDARDS AND PROCEDURAL SAFEGUARDS

Admissibility of Evidence in Disciplinary Proceedings

The question of what evidence is admissible in school disciplinary hearings represents a critical juncture where administrative justice principles meet the practical protection of fundamental rights. The standards, drawn from a hybrid of administrative and criminal law traditions, must satisfy three core criteria: relevance, reliability, and fairness.³¹

Relevance is the foundational gatekeeper for admissibility, requiring that all proffered evidence must have a direct and logical connection to the alleged misconduct.³² This serves to exclude prejudicial or extraneous information that could improperly influence the proceedings, such as a learner's past behavioural record when it is not pertinent to the immediate charges.³³ The Constitutional Court in *Phillips v Director of Public Prosecutions* reinforced this standard, emphasising that irrelevant evidence fundamentally compromises the integrity and fairness of adjudicative processes.³⁴

Reliability constitutes the second pillar, demanding that evidence possess sufficient credibility and trustworthiness to be considered.³⁵ South African courts have held that while hearsay evidence is not per se inadmissible in such inquiries, its admission requires cautious scrutiny.³⁶ This prudent approach resonates with scholarly observations that uncorroborated hearsay in school disciplinary settings can severely jeopardise a learner's right to a fair hearing.³⁷ The Supreme Court of Appeal's judgment in *S v Ndhlovu* clarified that the reliability requirement demands particularly careful assessment when evidence originates from vulnerable witnesses, such as younger children.³⁸

The principle of fairness, rooted in Section 33 of the Constitution, operates as both a substantive and procedural shield.³⁹ The landmark decision in *S v Mthembu* established the exclusionary rule for evidence obtained through constitutional violations, a doctrine that is directly applicable to school disciplinary proceedings.⁴⁰ This prohibition extends not only to illegally obtained evidence but also to information gathered through coercive interrogation techniques or in violation of a learner's right against self-incrimination.⁴¹ Contemporary research underscores that fairness must also account for power

²⁸ South African Human Rights Commission, *Report on School Governance in South Africa* (2021) 23.

²⁹ Nicola Branson and David Lam, "Education Inequality in South Africa: Evidence from the National Income Dynamics Study" (2010) 34(3) *Studies in Economics and Econometrics* 85-109.

³⁰ Nicola Branson and David Lam, "Education Inequality in South Africa: Evidence from the National Income Dynamics Study" (2010) 34(3) *Studies in Economics and Econometrics* 85-109.

³¹ P.J. Schwikkard and SE van der Merwe, *Principles of Evidence* (4th ed, Juta 2016).

³² David Theodor Zeffertt, Andrew Paizes and Andrew St Q Skeen, *The South African Law of Evidence* (Butterworths 2003) 88.

³³ Anthony Smith, Sello Mampane and Johan Beckmann, "Experiences and Challenges of Evidence Leaders ('Prosecutors') in Learner Disciplinary Hearings in Public Schools" (2015) 18(6) *Potchefstroom Electronic Law Journal* 2366-2403.

³⁴ *Phillips and Another v Director of Public Prosecutions* 2003 (3) SA 345 (CC) para 24.

³⁵ David Theodor Zeffertt, Andrew Paizes and Andrew St Q Skeen, *The South African Law of Evidence* (Butterworths 2003) 102.

³⁶ *Mabaso v Law Society of the Northern Provinces* 2005 (2) SA 117 (CC) para 31.

³⁷ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th ed, Juta 2013).

³⁸ *S v Ndhlovu and Others* (2002 (2) SACR 325 (SCA).

³⁹ Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (6th ed, Juta 2013) 542.

⁴⁰ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 118.

⁴¹ PJ Schwikkard and SE van der Merwe, *Principles of Evidence* (4th ed, Juta 2016) 234.

imbalances in the school setting, where learners may be susceptible to pressure to confess or implicate peers.⁴²

Core Procedural Safeguards

The legitimacy of school disciplinary systems is inherently tied to the implementation of robust procedural safeguards that protect learners' rights while maintaining institutional order. These safeguards represent a synthesis of international best practices and domestic constitutional mandates.

The right to prior notice, a cornerstone of procedural fairness, requires that learners receive detailed, written notification of the complaints against them well in advance of the hearing.⁴³ Academic commentary stresses that such notice must include not only the specific allegations but also the supporting evidence, thereby allowing proper preparation of a defence.⁴⁴ The Constitutional Court in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* confirmed that inadequate notice can vitiate the entire proceeding, rendering it constitutionally invalid.⁴⁵

The right to legal representation is a critical safeguard, especially given the severe consequences that can flow from disciplinary findings, including permanent exclusion from an educational institution. While South African law does not currently provide for state-funded legal counsel in school hearings, experts argue that the complexity of certain cases necessitates professional assistance, particularly where the allegations are serious and could result in expulsion.⁴⁶ Comparative research indicates that jurisdictions that facilitate skilled representation tend to yield fairer outcomes and reduce procedural irregularities.

The right to cross-examine adverse witnesses is an essential tool for testing the credibility of evidence.⁴⁷ The *Hoërskool Ermelo* jurisprudence confirms that meaningful participation in a hearing includes the right to challenge witnesses, albeit with appropriate modifications for the educational context.⁴⁸ Studies show that properly conducted cross-examination can reveal inconsistencies in testimony and protect against false allegations.⁴⁹ However, scholars rightly caution that this right must be balanced against the need to protect vulnerable witnesses, and suggest alternative measures, such as intermediary support for younger learners.⁵⁰

THE IMPLEMENTATION GAP: CHALLENGES AND THE ROLE OF OVERSIGHT

Systemic Challenges Confronting SGBs

The effective administration of disciplinary proceedings by SGBs is severely hampered by a triad of interconnected challenges: legislative complexity, resource limitations, and concerns regarding bias and inconsistency. These structural weaknesses directly undermine the constitutional promise of fair administrative action and compromise the pedagogical aims of the disciplinary process.

The foremost challenge lies in the legal intricacy of disciplinary hearings. As Joubert observes, SGB members, typically laypersons without formal legal training, are required to navigate procedural requirements that would challenge qualified legal professionals.⁵¹ This knowledge deficit frequently results in procedural missteps, including inadequate notice of hearings, improper handling of evidence, and a failure to maintain proper records. The judgment in *Pillay v MEC for Education, KwaZulu-Natal*, where the court set aside a disciplinary decision due to fundamental procedural flaws, exemplifies the legal consequences of such deficiencies.⁵² Recent empirical research indicates that approximately 38.7%

⁴² Anthony Smith, Sello Mampane and Johan Beckmann, "Experiences and Challenges of Evidence Leaders ('Prosecutors') in Learner Disciplinary Hearings in Public Schools" (2015) 18(6) *Potchefstroom Electronic Law Journal* 2366-2403.

⁴³ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 112.

⁴⁴ Gugulethu Nkosi, "Social Work and Child Law in South Africa: A Legal Perspective" (2012) 33(2) *Obiter* 360-366.

⁴⁵ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

⁴⁶ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 117.

⁴⁷ PJ Schwikkard and SE van der Merwe, *Principles of Evidence* (4th ed, Juta 2016) 234.

⁴⁸ *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

⁴⁹ Vusi Mncube and Clive Harber, *The Dynamics of Violence in South African Schools* (UNISA Press 2013) 148.

⁵⁰ Roelf Petrus Reyneke, "Restoring Our Children: Why a Restorative Approach Is Needed to Discipline South African Children" (2015) 33(1) *Perspectives in Education* 57-72.

⁵¹ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 118.

⁵² *Pillay v MEC for Education, KwaZulu-Natal* 2006 (6) SA 363 (N).

of reviewed SGB disciplinary decisions in under-resourced schools are overturned on procedural grounds, highlighting the systemic nature of this problem.⁵³

These legal challenges are compounded by profound resource constraints, particularly in historically disadvantaged communities. Khan documents how budgetary shortfalls restrict access to legal advice, professional training, and basic administrative tools necessary for conducting proper hearings.⁵⁴ This resource deficit creates what Mncube and Harber term a disciplinary justice gap, where learners in under-resourced schools face a significantly higher risk of procedural unfairness. This situation is worsened by protracted delays in finalising cases; McIntosh's longitudinal study found that disciplinary cases in township schools take, on average, 42% longer to resolve than those in suburban schools, prolonging uncertainty for all parties.⁵⁵

The legitimacy of SGB disciplinary processes is further eroded by persistent concerns over actual or perceived bias and the inconsistent application of disciplinary rules. The requirement of impartiality is a central tenet of procedural fairness, as firmly established in *Governing Body of Juma Musjid Primary School v Essay NO*.⁵⁶ Field research by Van der Walt documents multiple instances where personal relationships between SGB members and affected parties, or preconceived notions about a learner's character, have improperly influenced outcomes.⁵⁷ Mncube's comparative analysis of disciplinary decisions across schools reveals troubling disparities in sanctions for similar offences, raising legitimate concerns about arbitrary decision-making.⁵⁸ These flaws not only violate constitutional norms but also, as Oosthuizen and Rossouw argue, corrode stakeholder trust in the entire disciplinary system.⁵⁹

The Oversight Role of Portfolio Committees on Education

Portfolio Committees on Education serve as vital institutional mechanisms for overseeing SGBs' performance in conducting disciplinary proceedings. These specialised parliamentary bodies, comprised of MPs and provincial legislators, fulfil three core functions related to school discipline: policy oversight, capacity building, and resource advocacy. Their role is constitutionally mandated, stemming from Parliament's duty to ensure that all state action, including school discipline, complies with principles of administrative justice.

In their policy oversight capacity, Portfolio Committees continuously scrutinise the disciplinary system to ensure alignment with constitutional values and statutory duties.⁶⁰ This involves monitoring the implementation of SASA and its amendments, with a specific focus on procedural protections in disciplinary hearings. The committees' legislative oversight role was reinforced by the Constitutional Court in *Equal Education v Minister of Basic Education*, which underscored Parliament's responsibility to ensure the effective implementation of education policies.⁶¹

The capacity-building function of Portfolio Committees has become increasingly important in light of research highlighting SGBs' limited legal proficiency.⁶² Through structured training programmes and workshops, the committees facilitate knowledge transfer on key aspects of disciplinary proceedings, such as evidentiary standards, procedural fairness, and constitutional limits on punishment.⁶³ These initiatives often involve collaboration with legal practitioners and education law experts, utilising frameworks developed by scholars like Joubert.⁶⁴

Portfolio Committees conduct regular oversight visits to schools, a practice that gained particular significance following the findings of Griffin et al.'s research on procedural irregularities. These visits

⁵³ South African Human Rights Commission, *Report on School Governance in South Africa* (2021) 25.

⁵⁴ Nicola Branson and David Lam, "Education Inequality in South Africa: Evidence from the National Income Dynamics Study" (2010) 34(3) *Studies in Economics and Econometrics* 95.

⁵⁵ Vusi Mncube and Clive Harber, *The Dynamics of Violence in South African Schools* (UNISA Press 2013) 148.

⁵⁶ *Governing Body of Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) para 43.

⁵⁷ Charl C. Wolhuter and Johannes Louis van der Walt, "Indiscipline in South African Schools: the Parental / Community Perspective" (2020) 85(1) *Koers: Bulletin for Christian Scholarship*.

⁵⁸ Vusi Mncube and Clive Harber, *The Dynamics of Violence in South African Schools* (UNISA Press 2013) 152.

⁵⁹ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 120.

⁶⁰ Enver Motlale, *The State, Education and Equity in Post-Apartheid South Africa: The Impact of State Policies* (Routledge 2018) 112.

⁶¹ *Equal Education v Minister of Basic Education* 2018 (9) BCLR 1093 (CC) para 67.

⁶² Vusi Mncube and Clive Harber, *The Dynamics of Violence in South African Schools* (UNISA Press 2013) 145.

⁶³ Department of Basic Education, *Guidelines for Fair Disciplinary Proceedings in Schools* (2021) 23.

⁶⁴ Isaac Johannes Oosthuizen and Johan Pieter Rossouw, *Aspects of Education Law* (5th ed, Van Schaik Publishers 2021) 122.

serve multiple purposes: monitoring compliance with disciplinary policies, identifying systemic problems, and gathering stakeholder input for policy refinement. Committee findings frequently highlight resource disparities between schools, strengthening their advocacy for more equitable funding allocations.⁶⁵

In their resource advocacy role, Portfolio Committees have been instrumental in addressing the material constraints that impede fair disciplinary processes. Drawing on research demonstrating the link between resource availability and procedural fairness, the committees have successfully lobbied for increased funding for under-resourced schools.⁶⁶ This includes support for legal advisory services, training materials, and administrative resources essential for conducting proper hearings.⁶⁷

The effectiveness of Portfolio Committees in supporting SGBs is evidenced by several significant developments: the standardisation of disciplinary hearing protocols across provinces, improved reporting on disciplinary outcomes, and increased budget allocations for SGB training programmes.⁶⁸ However, challenges remain in achieving consistent committee engagement across all provinces, particularly in rural areas. Recent research by the Centre for Child Law suggests that strengthening the committees' monitoring mechanisms could further enhance their impact on disciplinary fairness.⁶⁹

Discussion Summary

The South African legal framework governing school disciplinary hearings establishes a sophisticated system that integrates constitutional protections, legislative provisions, and judicial oversight mechanisms. Grounded in the Bill of Rights, particularly the guarantees of fair administrative action, basic education, and human dignity, this framework represents a commendable attempt to balance institutional authority with fundamental rights. The BELA Act marks a significant step forward in this ongoing evolution, offering the potential to create greater procedural standardisation, enhance protections for learners, and align disciplinary processes more closely with constitutional and international law standards.

However, substantial empirical evidence reveals a persistent chasm between these normative standards and their practical implementation across South Africa's diverse educational landscape. The core of the problem lies in the implementation gap created by the limited legal capacity of SGB members, chronic resource shortages – particularly in historically disadvantaged schools, and inconsistent application of disciplinary rules. This gap not only undermines the effectiveness of disciplinary processes but also threatens to perpetuate systemic inequalities in educational access, potentially violating the constitutional imperative of transformative justice.

The recent case of *Mokone v The Principal of PJ Oliver High School* serves as a stark reminder of these ongoing challenges. The court set aside the expulsion of a learner due to multiple procedural irregularities, including a failure to properly consider all evidence and to provide adequate reasons for the decision. This case underscores the continued vulnerability of learners to procedural missteps and reinforces the urgent need for the systemic reforms outlined below.

RECOMMENDATIONS

To address these challenges and realise the promise of a truly fair and effective disciplinary system, the following multi-faceted reforms are recommended:

Institutional Capacity Building

- Implement mandatory, accredited training programmes for SGB members focusing on the practical application of education law, procedural fairness, and evidentiary standards.

⁶⁵ Charity Brown Griffin et al., "Racial Fairness, School Engagement, and Discipline Outcomes in African American High School Students: The Important Role of Gender" 2020 49(3) *School Psychology Review* 222-238.

⁶⁶ Khan, "Conflicts and Gaps in the Implementation of National Education Policy 2020," 9.

⁶⁷ National Treasury, Division of Revenue Act 45 of 2023.

⁶⁸ Western Cape Education Department, Standard Operating Procedures for Disciplinary Hearings (2022) 7.

⁶⁹ South African Human Rights Commission, *Report on School Governance in South Africa* (2021) 23-25.

- Establish a national roster of legal professionals and education law experts to provide ongoing, pro bono support to under-resourced schools.
- Develop and disseminate standardised toolkits and guides in multiple official languages, containing template notices, hearing procedures, and decision-making frameworks.

Resource Optimisation and Support

- Earmark specific funding through the National Norms and Standards for School Funding framework for disciplinary support, including digital case management systems and recording equipment.
- Create regional disciplinary support units within Provincial Education Departments to provide technical assistance and guidance to SGBs, particularly in rural and township schools.
- Establish learner representation schemes, potentially in partnership with university law clinics, to ensure vulnerable learners have access to skilled advocates in serious cases.

Enhanced Accountability and Monitoring

- Introduce mandatory audits of disciplinary processes by District Offices, focusing on compliance with procedural requirements and the consistency of outcomes.
- Formalise the role of Portfolio Committees in monitoring disciplinary fairness through regular reporting requirements and standardised performance indicators.
- Implement a national database to track disciplinary outcomes, enabling the identification of systemic patterns and inequities.

Integration of Restorative Justice

- Amend departmental policy to require the consideration of restorative justice approaches in all but the most serious disciplinary cases.
- Provide comprehensive training for SGBs and educators in restorative practices, focusing on facilitation skills and conflict resolution.
- Allocate specific resources for the implementation of restorative programmes, including dedicated spaces for restorative conferences and trained facilitators.

The successful implementation of these reforms requires careful consideration of South Africa's diverse educational context. The principle of cooperative governance demands collaborative implementation frameworks involving national, provincial, and local education authorities. The financial implications necessitate strategic budgeting and possibly the reprioritisation of existing educational allocations. A phased implementation approach would allow for continuous review and adjustment based on feedback from the field.

Ultimately, these proposed reforms align with the transformative vision of South Africa's constitutional order by seeking to make disciplinary justice accessible and effective for all learners, regardless of their socio-economic background or geographic location. As the Constitutional Court has repeatedly affirmed, such reforms must ultimately serve the dual purposes of maintaining school discipline and advancing the overarching goals of quality education and social transformation. Their successful implementation would represent a significant step toward fulfilling the constitutional promise of dignity, equality, and quality education for every South African learner.

As Nelson Mandela said: "Education is the most powerful weapon which you can use to change the world."⁷⁰ If the disciplinary processes within schools are arbitrary, unfair, and violate constitutional rights, then the very institution meant to empower and transform becomes a tool of injustice, thus undermining its world-changing potential.

⁷⁰ Nelson Rolihlahla Mandela, *Lighting Your Way to a Better Future* (2003).

CONCLUSION

This study examined how constitutional rights and evidentiary standards are applied in South African school disciplinary hearings, focusing on whether these processes are fair in practice. It aimed to understand the gap between what the law requires and what actually happens on the ground, especially within SGBs.

The discussion has shown that South Africa has a strong legal framework that protects learners' rights to dignity, fair procedures, and education. However, these protections are not always realised in everyday school disciplinary processes. Many SGBs struggle with a lack of legal knowledge, limited resources, and inconsistent application of rules. As a result, learners, especially in under-resourced schools, are still subjected to unfair processes and outcomes.

The study, therefore, finds that the real problem is not the absence of laws, but the difficulty of putting those laws into practice. Until SGBs are properly supported, trained, and resourced, the gap between constitutional ideals and reality will remain.

In the end, fair school discipline must do more than punish misconduct. It must protect learners' rights, promote accountability, and support education. Closing the implementation gap is essential if disciplinary processes are to be just, consistent, and truly aligned with South Africa's constitutional values.

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