

CHAPTER 22



EDUCATION RIGHTS IN INDEPENDENT SCHOOLS

Faranaaz Veriava and Ann Skelton

This chapter is an update of an earlier version authored by Shaun Franklin.

INTRODUCTION

“Independent schools no longer only cater to the wealthy. The independent school sector is now dominated by comparatively low-fee independent schools, which educate up to 73% of the learners in this sector. This change has been driven, in large part, by the fact that the public school system is, unfortunately, ailing. As the Chief Executive Officer of the Anglican Board of Education put it, ‘there is a crisis in [South African] education. ... That is why independent schools are thriving.’ As the power and significance of the independent school sector continues to grow, so too does the need for constitutional protection. Children should not be excluded from this protection merely because parental choices or circumstances have placed them in independent schools.”

[*AB v Pridwin Preparatory School, para 13*]

According to the 2019 General Household Survey, approximately 6.5% of learners in South Africa attend independent schools. This amounts to about 950 000 learners. While this number may reflect a relatively small percentage of the country’s learners, the sector has seen steady growth over the past decade due to the growing privatisation and commercialisation of education.

This rise in enrolment at independent schools is due in large part to the growth in low- and middle-fee independent schools that market themselves as an alternative for working-class and middle-income families. These families turn to independent schools because they are concerned about the

quality of education made available to their children in what is widely recognised as the under-resourced and poorly performing public schooling sector. For example, in 2018, the Gauteng Department of Education noted that there are now 800 independent schools in Gauteng, serving 11% of the province’s learners. According to the department, this represented a doubling of independent schools in the past five years, almost all of which are low fee.

This rise in enrolment in the independent sector necessitates a strong regulatory framework to ensure minimum standards within the sector. This includes safety standards, labour rights, and – particularly relevant to this chapter –

the protection of the constitutional rights of learners in independent schools.

This chapter provides a brief overview of the independent schooling landscape in South Africa. It then discusses the constitutional and legal framework for independent schools, particularly in the context of significant jurisprudential and international legal developments that aim to protect learners’ rights in these schools, and to ensure that the state does not abdicate its role in the provision of education.

Finally, the chapter highlights the main debates in respect of independent education, particularly within the context of the steady growth of the for-profit independent education sector.

CONTEXTUAL DISCUSSION

Independent schools in South Africa are marketed to parents across the socio-economic spectrum, and vary quite dramatically in degree of quality. Thus, independent schools may range from the decades-old elite independent schools housed in perfectly preserved heritage sites providing multiple sports and other world-class facilities, to schools catering for learners from middle-income families, to low-fee schools that are run in old buildings and shopping centres.

In line with this, some independent schools charge very high fees, with some annual fees exceeding 20 times the average amount that provinces spend on each public school learner each year. These schools offer:

- Low learner-teacher ratios
- Small classroom sizes
- Broad curriculum choice, taught by teachers with high credentials
- A history of high learner achievement
- Extracurricular opportunities not available at public schools
- State-of-the-art facilities and learning and teaching materials, including technology.

In 2020, a substantial portion of the academic year was disrupted due to the COVID-19 pandemic. High- and middle-income schools were able to move to online schooling relatively smoothly, while learners in public schools lost most of the academic year.

This was because of difficulties in access to online learning, because either learners did not have electronic devices or they did not have data. When learners did return to school, rotations in attendance became necessary because of social distancing, which further impacted teaching and learning in public schools.

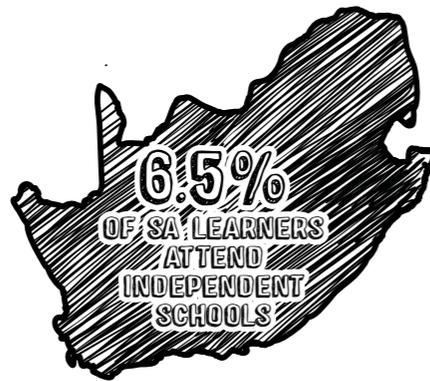
In that year, over 12 000 students wrote the Independent Examinations Board (IEB) examinations, achieving a 98.82% pass rate. This is compared to 578 468 learners in public schools who wrote the government-issued National Senior Certificate (NSC) exam, of whom 76.2% passed.

At the other end of the spectrum are independent schools that are marketed to parents as low-fee schools. These schools claim to provide a viable counterpart to public schools, which are often overcrowded and are widely reported as being dysfunctional.

COVID-19 IMPACT

In 2020, a substantial portion of the academic year was disrupted due to the COVID-19 pandemic. High- and middle-income schools were able to move to online schooling relatively smoothly, while learners in public schools lost most of the academic year. This was because of difficulties in access to online learning, because either learners did not have electronic devices or they did not have data. When learners did return to school, rotations in attendance became necessary because of social distancing, which further impacted teaching and learning in public schools.

In that year, over 12 000 students wrote the Independent Examinations Board (IEB) examinations, achieving a 98.82% pass rate. This is compared to 578 468 learners in public schools who wrote the government-issued National Senior Certificate (NSC) exam, of whom 76.2% passed.



SOME FIGURES ON THE INDEPENDENT SCHOOLING SECTOR IN SOUTH AFRICA

- According to the 2019 General Household Survey, 85.9% of individuals aged five years and older attend educational institutions, making the total learners in school around 14.6 million, of which 6.5% attend independent schools. This amounts to approximately 950 000 learners.
- A 2015 report by the Centre for Development and Enterprise (CDE) estimates that low-fee private schools charging fees below R12 000 a year are educating a quarter of a million children in disadvantaged communities. This figure does not include learners attending middle-income independent schools such as the Spark and Curro schools.
- On the high end of the spectrum, fees can cost up to R162 000 a year.

Public schools may have teachers with lower qualifications, poor content knowledge and high rates of educator absenteeism. Also, schooling infrastructure remains a problem in historically disadvantaged public schools. These schools lack essential facilities, such as adequate classroom space and stocked libraries. Many exist in a state of disrepair.

Low-fee independent schools often charge fees that are less than the average amount that provinces spend on each learner in public schools, and under certain conditions may rely on state subsidies to meet their basic operational needs.

While some independent schools function as non-profit institutions, other independent schools – particularly those marketed to poor or working-class parents – are owned and operated by for-profit, publicly traded corporations. Still, in a country with high rates of poverty and unemployment, it must be stressed that the majority of South Africans cannot afford to send their children to even low-fee independent schools, and their children attend no-fee public schools.

The huge income-based disparities in the quality of education that is provided has led to the South African basic education system being described as a ‘dual education system’.

SOME OF THE REASONS FAMILIES CHOOSE INDEPENDENT SCHOOLS

There are different reasons for parents choosing to send their children to independent schools over public schools.

- Parents desire better educational quality and opportunities for their children, and believe independent schools provide this.
- Parents want their children to be taught in an environment that conforms to their religious, philosophical or cultural beliefs and practices, or to their language preferences.
- Schools, particularly inner-city independent schools, are closer to where learners live.
- Some parents prefer single-sex schools, of which there are a greater variety in the independent schooling system.

TYPES OF SCHOOLS IN SOUTH AFRICA

Before discussing the overview of the legal framework for independent schools, it is important to note that the public-versus-private education debate is complex in the South African context. This is because state school funding policies have relied on school fees to maintain quality schools for middle-class and wealthy learners, many of whom attend public schools that were formerly reserved for white learners.

Around 60% of South African learners attending public schools attend no-fee schools. The rest go to schools that charge fees. Some of these schools charge less than R1 000 a year, while others charge as much as R60 000 per year.

School fees are used to enhance the level of education offered at schools in a number of ways. The money can be used to hire additional teachers, top up teacher salaries, offer extra-curricular arts and sports programmes, and provide a greater array of subject choices. They can also be used to improve the school’s infrastructure and sports facilities, which are often far superior to begin with – having been inherited from grossly unequal apartheid spending practices. Fees may also pay for a wide range of learning

and teaching support materials that are usually not available to learners who attend no-fee or low-fee public schools.

The state’s school-fee policy has resulted in a public education system that offers schools of vastly varying levels of quality. Under this system, schools located in wealthier areas and attended by wealthier learners are able to offer more in terms of educational resources and quality schooling than schools that either do not collect or collect very limited school fees.

South Africa’s public education system therefore features largely unequal public schools that in many ways resemble a quasi-privatised system of public education. This inequality has an impact on learners’ performance. Learners in poor, rural and township areas generally attend under-resourced and often dysfunctional public schools and produce poorer educational outcomes, while learners who attend better-resourced and high-functioning public schools tend to produce better educational outcomes.

Unlike public schools, independent schools are permitted to limit admission to learners who are able to pay fees and who may need to satisfy a number of other admission requirements, which will be discussed below.

Despite their private nature, however, some independent schools may receive state subsidies if they satisfy a number of criteria. These include charging capped fees, submitting to greater state oversight, and adhering to retention and performance standards.

Finally, recent years have seen the emergence of public-private partnership (PPP) schools on the South African educational landscape. So far, this phenomenon has been limited to a pilot project in the Western Cape, but reports suggest that PPP schools could emerge in other provinces too. The Western Cape provincial education legislation has been amended to include these partnerships as ‘collaboration schools’ and ‘donor-funded public schools’. Broadly speaking, these schools rely on public and private funding, teachers who are employed on performance-based contracts, and outside non-profit partners who control at least 50% of each school’s governing board. These public-private partnerships have been likened to charter schools that exist in other countries such as the United States, in respect of which there are conflicting views. These views are highlighted at the end of the chapter.

Table 20.1: Types of schools.

NO-FEE PUBLIC SCHOOLS	<ul style="list-style-type: none"> Schools that cater for learners within the bottom three wealth quintiles. These schools are prohibited from charging school fees, though they may solicit and accept donations.
FEE-CHARGING PUBLIC SCHOOLS	<ul style="list-style-type: none"> School governing bodies must set the school fees for the year, and must exempt learners according to a means test.
ALL PUBLIC SCHOOLS	<ul style="list-style-type: none"> All public schools are prohibited from denying admission to learners. All public schools are prohibited from discriminating against learners based on race, and from unfairly discriminating against them in any other way. Public school governing bodies are empowered to determine the school's language policy. However, this decision must take into account the interests of the learners from the surrounding school community, and not just the learners who happen to attend the school at the time. For example, if a school is an Afrikaans-only school but there are many learners in the surrounding area who speak other languages, the school may have to become a dual-medium school to accommodate these learners.
INDEPENDENT SCHOOLS	<ul style="list-style-type: none"> Set their own fees, although charging fees above a certain threshold makes them ineligible for state subsidies. Are not prohibited from administering admission tests, and may deny admission to learners who refuse to subscribe to the school's mission statement. However, independent schools are prohibited from discriminating against learners based on race. May determine their own language of instruction, and may advance particular religious and cultural beliefs and practices.
PUBLIC-PRIVATE PARTNERSHIPS	<ul style="list-style-type: none"> Are funded by a combination of public and private money Employ teachers on performance-based contracts Have non-profit partners who control at least 50% of each school's governing board.

THE ABIDJAN PRINCIPLES

In February 2019, a group of independent experts developed and adopted the 'Guiding principles on human rights obligations of states to provide education and to regulate private involvement in education' (or the 'Abidjan Principles'). Within the context of the rapid privatisation and commercialisation of education across the globe, the Abidjan Principles aim to provide a comprehensive compilation of obligations for nation states in respect of both public and private education under international and regional law. Most of the international and regional instruments on which the Abidjan Principles are based have been ratified by the South African government.

The Abidjan Principles reiterate that education is a right that must be provided by a state. Where schools are privatised, however, the Abidjan Principles require that states regulate these schools by providing minimum standards by which independent schools must abide.

There are ten overarching principles that spell out states' obligations to provide free public education of the highest possible quality, and to adopt measures to properly regulate and monitor private education.

- Principle 1:** States must respect, protect, and fulfil the right to education of everyone within their jurisdiction in accordance with the rights to equality and non-discrimination.

- Principle 2:** States must provide free public education of the highest attainable quality to everyone within their jurisdiction as effectively and expeditiously as possible, to the maximum of their available resources.
- Principle 3:** States must respect the liberty of parents or legal guardians to choose for their children an educational institution other than a public educational institution, and the liberty of individuals and bodies to establish and direct private educational institutions, subject always to the requirement that such private educational institutions conform to standards established by the state in accordance with its obligations under international human rights law.



- Principle 4:** States must take all effective measures, including particularly the adoption and enforcement of effective regulatory measures, to ensure the realisation of the right to education where private actors are involved in the provision of education.
 - Principle 5:** States must prioritise the funding and provision of free, quality public education, and may only fund eligible private instructional educational institutions, whether directly or indirectly, including through tax deductions, land concessions, international assistance and cooperation, or other forms of indirect support, if they comply with applicable human rights law and standards and strictly observe all substantive, procedural and operational requirements.
 - Principle 6:** International assistance and cooperation, where provided, must reinforce the building of free, quality public education systems, and refrain from supporting, directly or indirectly, private educational institutions in a manner that is inconsistent with human rights.
 - Principle 7:** States must put in place adequate mechanisms to ensure they are accountable for their obligations to respect, protect, and fulfil the right to education, including their obligations in the context of the involvement of private actors in education.
 - Principle 8:** States must regularly monitor compliance of public and private institutions with the right to education, and ensure all public policies and practices related to this right comply with human rights principles.
 - Principle 9:** States must ensure access to an effective remedy for violations of the right to education, and for any human rights abuses by a private actor involved in education.
 - Principle 10:** States should guarantee the effective implementation of these Guiding Principles by all appropriate means, including where necessary by adopting and enforcing the required legal and budgetary reforms.
- The case study on the right illustrates how the Abidjan Principles have influenced the law in other jurisdictions.

CASE STUDY

INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS V ATTORNEY GENERAL

In the Ugandan case of *Initiative for Social and Economic Rights v Attorney General*, in 2019, the High Court of Uganda declared the public financing of secondary education to be a violation of the rights to education and equality and freedom from discrimination in the Ugandan Constitution.

There were two types of financing models for secondary education in Uganda: government-aided schools and public-private partnerships, with the former receiving more and public-private partnership schools therefore having larger learner-teacher ratios and poorer educational outcomes.

The High Court found that the government did not implement minimum standards in respect of learner-teacher ratios at the public private partnership schools, and this affected the quality of education at these schools.

The High Court held that there was an obligation on governments – in international law, and now in the Abidjan Principles – to provide public education, and to regulate private education effectively.

LAW AND POLICY

THE CONSTITUTION

Section 29 of the South African Constitution states that:

1. Everyone has the right –
 - a. to a basic education, including adult basic education; and
 - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

Section 29 of the Constitution guarantees that all South Africans, regardless of how rich or poor they are, must be able to access a basic education.

In addition to providing for the right to access a basic education, Section 29(3) of the Constitution also provides that private parties, such as religious institutions and non-profit and for-profit organisations, have the right to establish their own educational institutions at their own expense.

The key legal considerations that have emerged in respect of independent schooling include:

- a. The impact that the right to a basic education and other rights have on the private contractual arrangements made between independent schools and the parents of the learners who attend them.
- b. The extent to which the state is mandated to promote, protect, respect and fulfil the right to a basic education for learners who attend or apply to independent schools.
- c. The rights of private individuals and associations to establish and run independent schools that advance certain pedagogical, linguistic, cultural or religious beliefs and practices.

The South African Constitution and a number of national and provincial laws, policies and regulations give rise to a framework of obligations and rights for parties who operate independent schools. This framework also protects the rights of learners who attend independent schools. This section reviews the legal and regulatory framework for independent schools.



Section 29 of the Constitution guarantees that all South Africans, regardless of how rich or poor they are, must be able to access a basic education.

THE HORIZONTAL APPLICATION OF THE RIGHT TO A BASIC EDUCATION TO INDEPENDENT SCHOOLS

Section 7 of the South African Constitution mandates that

“The state must protect, promote and fulfil the rights in the Bill of Rights”.

While this provision makes clear that the state must act in a way that advances the right to a basic education, it does not place the same responsibilities on private parties. ‘The horizontal application of the right’ refers to whether the obligations in respect of the right to basic education apply only in respect of public schools, or also to private schools.

But the right to a basic education does have an impact on independent schools through Section 8(2) of the Constitution, which states that:

“A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

The Constitutional Court touched on this issue in the *Juma Masjid* case, when it had to decide whether a private landowner could evict a public school from its property for failing to pay rent. The Court stressed that while private parties do not have the same duties as the state to advance the rights guaranteed in the Bill of Rights, the Constitution does require

private parties not to interfere with or diminish the enjoyment of the right to a basic education. In this case, this meant that once the landowner had allowed the school to be operate on its property, at most the landowner was obliged to minimise the potential impairment of the learners’ right to a basic education.

In another Constitutional Court case, *KwaZulu-Natal Joint Liaison Committee v MEC of Education, KwaZulu-Natal* (KwaZulu-Natal Joint Liaison Committee), which dealt with the withdrawal of subsidies from independent schools, the Court held that the “unqualified” right to basic education also applies to learners at independent schools.

THE SOUTH AFRICAN CONSTITUTION AND INDEPENDENT SCHOOLS

Section 29(3) of the South African Constitution provides for the right to establish and maintain independent schools. It states that:

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that:

- a. Do not discriminate on the basis of race
- b. Are registered with the state
- c. Maintain standards that are not inferior to standards at comparable public educational institutions.

Section 29(4) of the South African Constitution specifically allows for the state to subsidise independent educational institutions.

CASE STUDY

AB V PRIDWIN PREPARATORY SCHOOL

In *AB v Pridwin Preparatory School (Pridwin)*, the Constitutional Court has provided the most detailed insight thus far on the extent of the obligations of independent schools to provide a basic education in terms of Section 29(1)(a) of the Constitution.

A key issue in the case was the impact that the right to a basic education and other rights have on the private contractual arrangements made between independent schools and the parents of the learners who attend them.

In 2020, the Constitutional Court judgment in *Pridwin* confirmed the horizontal application of the Bill of Rights to agreements between private parties, and provided insight as to the role of learners' rights in the context of private education.

This case concerned two young boys, DB and EB, who in 2016 were enrolled in Pridwin Preparatory School, one of Johannesburg's elite independent all-boys private junior schools. The parents of the boys had signed a standard contract with the school which provided that either party could terminate the contract for *any reason*, with a term's notice.

The boys were well behaved, and were considered model learners. However, the parents persistently disrupted learning and recreational activities at the school, threatening sports coaches and harassing school staff members. Most of the incidents related to the boys' sporting activities, and many of these incidents took place publicly, at school sporting fixtures.

Despite an undertaking from the father to the headmaster that he would refrain from coaching, offering advice to boys, or publicly criticising umpires, and that he would abide by all refereeing and selection decisions,

he failed to do this, and further incidents arose. Relying on the termination clause in the contract with the parents, the school therefore asked the boys to leave with a term's notice.

The judgment made important pronouncements on the right of a learner at a private school to a basic education, and on a child's right to be heard in respect of any decision to terminate a contract pertaining to education.

The Constitutional Court found that when the school decided to terminate the parents' contract and exclude the boys from the school, it did not sufficiently consider the best interests of the boys as required by Section 28(2) of the Constitution. The school authorities did not give the boys an opportunity to be heard before deciding to terminate the contract – a right that must be explicitly observed; nor did it allow representations concerning their best interests.

In respect of the right to basic education, the two courts that had considered the matter before it reached the Constitutional Court (the High Court and the Supreme Court of Appeal) had found that the school and similar independent educational institutions do not provide "basic education". The SCA also distinguished this case from the *Juma Masjid* case, noting that in that case the eviction was an interference with the rights of learners, while in this case, the boys could attend any of the three public schools in the area, and therefore the obligations that ordinarily flow from the right do not apply.

The Constitutional Court disagreed. It held that while the term "basic education" refers primarily to the content of the right to education, and that while learners at

"independent schools are undoubtedly receiving and enjoying a basic education that may, at times, extend beyond what the right to basic education requires from the state, this should not preclude learners at independent schools from the protection afforded by the right."

Thus, the Court found that independent schools do provide a basic education, and thereby fulfil the right that is set out in the Constitution. The right to basic education imposes a negative obligation on the school not to impair the right to a basic education, with the effect that the school could not diminish any learner's enjoyment of this right without appropriate justification.

The Court held further that:

"The rights set out in Section 29 are not mutually exclusive; to the contrary, within the private education sphere, they are cooperative. Section 29(1)(a) speaks to the right of children to be educated, and Section 29(3) speaks to the freedom given to independent schools to provide education. In providing that education, independent schools are to fulfil their negative obligation in terms of Section 29(1)(a) and not obviate children's rights to basic education. In terms of Section 29(3), they also assume a positive obligation, upon establishment of an independent school, to maintain standards not inferior to that of comparable public schools." [para 157]

Thus, because public schools require due process prior to expulsion, the school had to afford the parents the opportunity to make representations regarding the best interests of their children, to at least the same extent that would be possible at a public school. The Court held that the school had infringed the learners' rights to a basic education without appropriate justification. The Court therefore ordered that the school's decision to cancel the contract was invalid, and set it aside.



WHY PRIDWIN MATTERS:

The judgment notes that independent schools cannot be enclaves of power immune from constitutional obligations (para 82). With the proliferation of private schools, it is important that these schools be held to human rights standards. Thus:

- Independent schools are obliged not to impair a learner's right to basic education. An independent school cannot terminate a schooling contract without following due process that requires that learners are afforded an opportunity to be heard.
- Independent schooling bodies and independent schools must revise their policies and contracts – in particular termination clauses – to ensure that learners and their parents are afforded an opportunity to make representations on the learner's behalf prior to suspension or expulsion of learner.

FREEDOM FROM CORPORAL PUNISHMENT

The Schools Act prohibits all schools, including independent schools, from inflicting corporal punishment on their learners.

CASE STUDY

CHRISTIAN EDUCATION SOUTH AFRICA V MINISTER OF EDUCATION

The Constitutional Court, in *Christian Education South Africa v Minister of Education*, held that all schools – including independent schools – are prohibited from inflicting corporal punishment on their learners. The Court further emphasised that this prohibition also applies to independent schools that claim that their religious beliefs require them to use corporal punishment as a form of discipline.

Christian Education South Africa, a voluntary association of 196 private Christian schools (representing around 14 500 learners around South Africa), challenged the Schools Act ban on corporal punishment, arguing that it violated various rights including various religious and cultural rights.

The Minister of Education argued that even at a private Christian school, and despite the fact that Christianity could be argued to support corporal punishment, allowing corporal punishment violated learners' rights to equality; dignity and freedom and security of the person.

The Constitutional Court concluded that the Schools Act's ban on corporal punishment, though limiting the right to freedom of religion of Christian parents, was reasonable and justifiable and complied with the Constitution, based on the reasons presented by the Minister of Education.

This case illustrates that firstly, parents cannot consent to violations of their children's rights in school. Secondly, an independent school may be limited in the actions that it takes, if the school's policies and activities – even when they are religiously motivated – violate the rights of children.

Section 10 of the South African Schools Act provides that:

1. No person may administer corporal punishment at a school to a learner
2. Any person who contravenes subsection (1) is guilty of an offence and is liable on conviction to a sentence which could be imposed for assault.

THE PAYMENT OF SCHOOL FEES AT INDEPENDENT SCHOOLS

The commercial relationship between independent schools and the learners who attend them raises questions about the extent to which schools may suspend, expel, or take other harmful actions against learners whose parents fall behind on school fee payments.

Many contracts that parents sign when they enrol their children in independent schools allow the school to suspend or expel the learner if fee payments are not paid on time.

Some schools even go as far as withholding learner reports if school fee payments are not made, so that learners are prevented from enrolling in a new school until the school receives the fees owed to it.

CASE STUDY

MHLONGO V JOHN WESLEY SCHOOL

In 2018, the Durban High Court provided clarity specifically on this issue, in *Mhlongo v John Wesley School (John Wesley)*. The school is a low-fee private school. The parents had signed a contract accepting the obligation to pay school fees. The contract also had a provision saying that parents agreed to comply with an Independent Schools Association of South Africa (ISASA) policy document that contained an exclusion clause. The parents' payments later fell into arrears, but they proposed to pay the arrears in instalments. The school refused, denied the 10-year-old learner access to examinations, and kept him in the art room while his classmates wrote exams. The parents sought a declaration that the exclusion clause was unconstitutional. The court held that any decision to suspend or expel a learner must satisfy rules of due process. The court held that independent schools cannot provide less than the minimum standard provided at public schools, and that the school had violated the learner's right to basic education and had not acted in the learner's best interests in terms of section 28(2) of the Constitution. It further held that the exclusion clause was invalid. The court noted:

"That ZM was allowed to write his examinations once the arrears were paid does not make the first respondent's conduct less reprehensible. In fact it continued to humiliate ZM further, as he was being treated differently. The first respondent's conduct in isolating ZM and placing him in the art room while other learners wrote examinations was degrading, humiliating and inhumane. It penalised ZM, a minor child, for his parents' conduct, for which he was not liable. The first respondent in implementing such a penalty failed to take into account ZM's interest, and conducted itself contrary to international treaties, the Act, and the Constitution." [Para 82]

WHY JOHN WESLEY MATTERS?

- It is important that in light of the recent jurisprudential developments in *Pridwin* and *John Wesley*, independent schooling bodies revise their policies and guidelines. Further, independent schools should revise their contracts with parents in accordance with the principles of due process and the best interests of the learner.
- *John Wesley* also makes clear that victimising a learner for the non-payment of school fees by withholding a report or placing a learner in another class during exams is unlawful.

ISASA, which advises its members against the withholding of learner reports, emphasises that the regulation does not prevent the school from using other means, such as legal action, to obtain fees that may be overdue in terms of the contract between the school and the parent. ISASA advises schools that they may exclude learners for non-payment provided that due process has been followed.

ADMISSIONS

One of the primary characteristics that distinguishes independent schools from public schools is the ability of independent schools to be far more selective in their admission process than public schools.

Public schools are prohibited from denying admission to learners on a number of grounds. The South African Schools Act precludes public schools

from administering tests to applicants during the admission process. The Schools Act also prohibits public schools from denying admission based on the grounds that a learner's parents are unable to pay school fees, or that the learner does not subscribe to the mission statement of the school.

Independent schools' admission processes, on the other hand, do not carry the same restrictions.

Independent schools are permitted to administer admission tests, deny admission to any learner who is unable to pay school fees, and deny admission to learners who do not subscribe to the school's mission statement or ethos.

While independent schools are able to implement far more stringent admission criteria than public schools, they are not allowed to discriminate against learners on the basis of race.

This means that independent schools may not discriminate against learners who attend or apply to the school, or teachers or other school staff, on the basis of race. This prohibition applies to both direct and indirect forms of racial discrimination. The Department of Basic Education (DBE) has further pointed out that unlawful racial discrimination covers both school policies and actions that explicitly discriminate against learners on the basis of race, as well as those that cover up a school's attempt to discriminate on the basis of race.

The DBE's position here helps to point out times when a school's policies or actions may be suspect.

One example of a suspect policy that could be judged as covering up for racial discrimination would be a school's

decision to not admit learners because they reside in certain geographic areas that are known to be demographically comprised of populations that fall within a certain race.

The prohibition against racial discrimination in independent schools extends beyond the admission process. Schools are also prohibited from treating learners differently based on their race while they are attending schools.

THE PROHIBITION OF DISCRIMINATION

In addition to race, independent schools – and indeed all schools – are prohibited from unfairly discriminating against learners, applicants and others on a number of other grounds, including gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Chapter 5 explains in detail when forms of discrimination can be found to be unfair.

Over the past few years, several high-profile independent schools nationwide have experienced protests in respect of institutional racism and exclusion. These protests have called out institutional practices at these schools by providing testimonials from current and past learners and concerned parents about their experiences of discrimination, alienation and exclusion. Independent schools are therefore increasingly being forced to confront the important questions of what it means to transform our society appropriately, and to play their role in building an equitable society rooted in justice for all.

Elite and middle-income independent schools have had to adopt specific interventions due to the groundswell of protest against institutionalised forms of discrimination at schools. These schools have had to develop transformation charters and transformation committees. Some of the issues that have been predominant in these schools include:

- Revising hair policies
- Accommodating LGBTQI learners in uniform requirements
- Accommodating religious diversity
- Increasing support for the teaching of African languages
- Increasing racial diversity at senior management level and among the staff complement
- Eradicating inconsistent punitive disciplinary measures between black and white learners
- Ensuring a wider variety and equal treatment of sports and culture.

ALIGNMENT OF OUR LAW WITH THE ABIDJAN PRINCIPLES

Many of the recent jurisprudential developments and principles discussed above – such as the protection from discrimination, ensuring due process in the suspension and expulsion of learners, the prohibition of corporal punishment and the protection of learners' rights in fee recovery processes – are in accordance with the minimum benchmarks established in the Abidjan Principles.

Paragraph 55 of the Abidjan Principles notes that the minimum standards should address the following dimensions:

CASE STUDY

CURRO HOLDINGS SCHOOL

In 2015, the Gauteng Department of Education (GED) investigated a Curro Holdings school that had been reported for a number of racially suspect practices, including segregating classrooms by race, hiring an all-white teaching staff, and not including African languages as part of the school's curriculum.

Curro Holdings is a for-profit chain of independent 'Christian values' schools that provide instruction in both English and Afrikaans. The chain of schools advertises that it offers varying levels of educational quality and classroom size depending on the fees that the parents of the school's learners are able to afford.

After the GED threatened to close this particular school for its unlawful practice of separating classrooms by race, the school admitted that its practice of segregation was wrong, and according to the GED, acted quickly to respond to the complaint by reallocating the learners of minority groups in the school throughout the school's three English classrooms.

The school initially denied that it had acted in a discriminatory way, by claiming that it had segregated the classrooms by race as a way to ensure that children were able to make friends with children of their own culture. After further investigation, however, the school admitted that it had separated the Grade R learners by race in order to prevent a repeat of the 'white flight' that had occurred two years prior, when (according to the school) white parents removed their children from the school due to the racial composition of the classrooms.



CONSTITUTIONAL AND STATUTORY RIGHTS AND RESPONSIBILITIES RELATING TO INDEPENDENT SCHOOLS

The state must:

1. Permit qualifying private parties, at their own expense, to establish and maintain independent schools;
2. Develop and implement measures to register independent schools;
3. Ensure, through regulatory and other measures, that all independent schools are fulfilling their obligation to maintain standards that are not inferior to the standards at comparable public schools;
4. Ensure that independent schools are not discriminating against learners based on race, or in other ways violating their rights, such as the right to a basic education and freedom from unfair discrimination.

Independent schools must:

1. Comply with state regulations, including compliance with registration requirements, accreditation with the Council for Quality Assurance in General and Further Education and Training (Umalusi) and the employment of educators who are registered with the South African Council for Educators (SACE);
2. Maintain standards that are not inferior to the standards at comparable public schools;
3. Minimise the negative impact that their actions or activities have on their students' right to a basic education; and
4. If the school receives state subsidies, comply with state subsidy requirements.

Independent schools may not:

1. Discriminate against learners or applicants on the basis of race or for other unfair reasons as defined under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).
2. Withhold report cards due to unpaid school fees; or
3. Administer corporal punishment against learners.

Independent schools have the right to:

Advance particular linguistic, cultural or religious values, beliefs or practices provided that they do not discriminate based on race or unfairly discriminate on other grounds. Subsidised independent schools, however, are more limited in how they may introduce religious education, practices and observances at their schools.

...
d. protection for learners against all forms of discrimination in the enjoyment of the right to education, to guarantee equality and inclusive education for all learners, including by ensuring that the conditions of enrolment, admission, and learning are not directly or indirectly discriminatory; and paying particular attention to their impacts on the rights to equality and non-discrimination of vulnerable, marginalised, or disadvantaged groups. Such protection must guarantee the existence of and re-entry into inclusive education for pregnant girls, young mothers, and married girls under 18 years of age, by enabling them to remain in or return to school without delay;

...
f. strict limitations to the suspension and expulsion of learners, ensuring due process and that any such suspension or expulsion be reasonable and proportionate;
g. discipline and the prohibition of corporal punishment;
h. the protection of learners' rights in the context of failure or delay in the payment of fees;

STATE REGULATION OF INDEPENDENT SCHOOLS

The Constitution and the Schools Act list a number of responsibilities that both the state and independent schools have towards learners applying to or attending independent schools. Taken as a whole, these responsibilities seek to ensure that all independent schools meet minimum standards, and that the rights of learners who choose to attend independent schools are protected. Accordingly, provincial and national education departments must monitor independent schools to ensure that independent schools are complying with all statutory and regulatory requirements.

REGISTRATION OF INDEPENDENT SCHOOLS

According to the Constitution, all independent schools must be registered with the province in which they are located, prior to enrolling learners.

Section 46 of the Schools Act outlines the conditions under which the state must register independent schools. The Act requires each provincial education department to develop grounds on which the registration of an independent school may be granted or withdrawn by the provincial head of department. A head of department must then register an independent school if he or she is satisfied that:

- The standards to be maintained by such school will not be inferior to the standards in comparable public schools
- The admission policy of the school does not discriminate on the grounds of race
- The school complies with the grounds for registration as defined by each provincial education department.

Section 46 of the Schools Act makes it a criminal offence to operate an independent school which has not been registered by the Provincial Head of Department. Each province has its own additional requirements for the registration and de-registration of independent schools.

It is important that parents of children attending independent schools ensure that the school is registered. Provincial education departments have warned that they will not recognise attendance that occurs at unregistered independent schools as formal education.

QUALITY ASSURANCE AND ACCREDITATION OF INDEPENDENT SCHOOLS

Umalusi (the Council for Quality Assurance in General and Further Education and Training) is the quality assurance authority for general and advanced education, as well as for the training curricula of the National Qualifications Framework (NQF). Umalusi is mandated to accredit private providers of education and training, including independent schools.

While the provincial registration process enables independent schools to operate, independent schools must be accredited by Umalusi in order to offer qualifications on the General and Further Education Training Qualification Framework, including the National Senior Certificate (NSC).

Independent schools must be accredited by Umalusi every seven years, a process which includes periodic reporting and evaluations along with site visits, used to evaluate the level of quality provided by all registered independent schools.

SOUTH AFRICAN COUNCIL FOR EDUCATORS

Teachers employed by independent schools must be registered with the South African Council for Educators (SACE). SACE also provides a code of ethics for all teachers. Teachers employed within the public sector are subject to governmental processes, as regulated by the Employment of Educators Act, and to SACE. Teachers employed at independent schools are subject to the disciplinary processes at individual schools and to SACE.

When a teacher is found to have breached the code of ethics, SACE can impose a warning or reprimand, a fine, or it can remove a teacher from the register for a specified period or indefinitely. The SACE disciplinary process is discussed in more detail in the chapter on school violence in Chapter 18.

STATE SUBSIDIES FOR INDEPENDENT SCHOOLS

Independent schools may apply to their relevant provinces to be considered for state subsidies if they satisfy a number of criteria.

Section 48 of the Schools Act empowers the Minister of Basic Education to grant subsidies to independent schools, and to determine norms and standards for the granting of subsidies. It is up to each province to allocate funds for independent schools and to grant subsidies to qualifying independent schools.

Section 48 of the Schools Act empowers provincial education departments to terminate or reduce subsidies if a condition of the subsidy is not met. Before reducing or terminating subsidies, however, the province must:

1. Furnish the school with a notice of intention to terminate or reduce the subsidy, and reasons for the termination or reduction
2. Grant an opportunity to make representations as to why the subsidy should not be reduced or terminated
3. Allow the school to appeal the termination or reduction of a subsidy.

CASE STUDY

REDUCED SUBSIDIES TO INDEPENDENT SCHOOLS IN KZN

The Constitutional Court case of *KwaZulu-Natal Joint Liaison Committee* dealt with the obligation of government to pay subsidies to independent schools. In 2008, the KwaZulu-Natal provincial education department (PED) issued a notice to independent schools in the province setting out 'approximate' funding levels for 2009. An association of independent schools, relying on this notice, proceeded to develop their budgets for the academic year.

In May 2009, after the first payment for the year became due, the provincial education department issued a circular indicating that budgetary constraints necessitated a subsidy cut. This cut was reflected in the subsidies eventually paid to the schools. The association took the PED to court, demanding the original amount.

The Court found that a "publicly promulgated promise" arose out of government's constitutional and statutory obligations in respect of the payment of subsidies to private schools. The Court held that the "unqualified" right to basic education in terms of Section 29(1)(a) of the Constitution also applies to learners at independent schools. It also noted the legislative provisions dealing with the granting and termination of subsidies. The Court therefore ordered the PED to pay schools the approximate amounts specified in the 2008 notice. The Court stated:

"So while it is correct that the state is not obliged to pay subsidies to independent schools, when it does so in terms of national and provincial legislation it is acting in accordance with its duty under the Constitution in fulfilling the right to a basic education of the learners at the schools that benefit from the subsidy. And once government promises a subsidy, the negative rights of those learners – the right not to have their right to a basic education impaired – is implicated." [Para 45]

The National Norms and Standards for School Funding (NNSF), among other things, sets standards for provinces regarding when independent schools may qualify to receive state funding, and the extent of the funding that should be made available to them.

The NNSF note that it is more cost effective to subsidise independent schools, as public subsidies to independent schools cost the state considerably less per learner than if the same learners were to be enrolled in public schools.

The NNSF gives precedence to independent schools that are well managed, provide good quality education, serve poor communities and individuals, and are not operated for profit.

HOW SUBSIDIES ARE CALCULATED, COMMUNICATED AND PAID TO INDEPENDENT SCHOOLS

Under Section 187 of the Amended NNSF, provincial education departments award subsidies to qualifying independent schools on a progressive five-point sliding scale. These amounts are payable at levels of 60, 40, 25, 15 or 0 percent of the provincial average estimate per learner expenditure (PAEPL) at public schools.

The PAEPL is calculated by dividing a province's expenditure on public ordinary schools by the number of learners attending public ordinary schools. Only independent schools that charge fees that are not greater than two and a half times the PAEPL may be eligible for subsidies.

Schools with lower fees receive greater subsidies under the sliding scale.

The NNSF require provincial education departments to communicate information to independent schools about the subsidies that they will receive for the following school year by 30 September every year.

The NNSF directs that provincial education departments must ensure that the first term's subsidy is paid to all qualifying independent schools by 1 April in each school year. Subsequent subsidy payments must be paid no later than six weeks after the beginning of each school term.

ADDITIONAL REGULATORY REQUIREMENTS FOR SUBSIDISED INDEPENDENT SCHOOLS

Independent schools that receive school subsidies are required to comply with a number of conditions. The school has to:

1. Be registered with the provincial education department
2. Have applied to the province in the prescribed way
3. Have been operating for a year
4. Be registered as a non-profit organisation
5. Be managed according to the province's management checklist
6. Agree to unannounced inspection visits by provincial officials
7. Not be in direct competition with a nearby un-crowded public school of an equivalent quality
8. Meet certain specific learner-performance targets.



LEGAL AND PHILOSOPHICAL ISSUES

Private education in South Africa and globally is a highly emotive issue, given its juxtaposition of conflicting rights.

On the one hand there is the right to parental choice, underpinned by the desire to provide the best opportunities for one's child and have them educated in accordance with parental beliefs. On the other is the notion of education as a public good that is widely entrenched as a fundamental right, and that obliges the state to provide equal access to a quality education.

In the context of a public education crisis, not only in South Africa but also in other countries in the world, proponents of a market solution argue that private education, through the provision of low-

fee schools or voucher systems or charter schools, provides choices to parents, promotes accountability, produces greater cost efficiencies and provides even better-quality education than public schools.

Increasingly, however, there is a growing number of studies that negate the premise that increasing privatisation is the solution to educational quality. Instead, there is an emergent body of evidence that suggests there are negative effects of privatisation on the right to education, educational quality, equity and teaching, and that it increases inequality in society.

There is also a concern that for-profit corporations favour the interests of shareholders rather than the rights of learners. Furthermore, there is a huge social cost to the growth of independent schooling: middle-class flight from the public sector, and with it, the professional and financial resources that accompany such flight.

It is within this context that increasingly, there are calls that the state cannot abandon its public mandate to provide education.

CONCLUSION

This chapter has highlighted the delicate balancing of the rights of independent schools to exist, and the right for parental choice, against the imperative of the state to provide equal access to quality education. Within the context of rising privatisation of education, the chapter has highlighted international developments such as the Abidjan Principles that seek to ensure greater enforcement of the right to education by clarifying the nation state's obligations and providing minimum benchmarks to guide state regulation. It further illustrates the direction of our jurisprudence in its interpretation of the right to basic education and the best interests of the learner principle, thereby providing clear direction for independent schools when it comes to learner rights.

Ann Skelton is a Professor of Law at the University of Pretoria, and holds the UNESCO Chair in Law in Africa. She is also a member of the United National Committee on the Rights of the Child.

Faranaaz Veriava is the Head of the Education Rights Programme at SECTION27. She is also a part-time lecturer in the Law Faculty at the University of Pretoria.

Ann Skelton was the Chairperson to the drafting committee on the Abidjan Principles, and **Faranaaz Veriava** served as a legal expert in the adoption of the Abidjan Principles.

CASES

AB and Another v Pridwin Preparatory School and Others (CCT294/18) [2020] ZACC 12.

Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13.

Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11.

KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others (CCT 60/12) [2013] ZACC 10.

NM v John Wesley School and Another (4594/2016) [2018] ZAKZDHC 64.

Wittmann v Deutscher Schulverein, 1998 (4) SA 423 (T).

Initiative for Social and Economic Rights v Attorney General Civil Suit No. 353 of 2016, Ugandan High Court.

LEGISLATION, POLICY AND GUIDELINES

Constitution of the Republic of South Africa, 1996.

Department of Basic Education. Amended National Norms and Standards for School Funding. Government Gazette, 31 August 2006. No. 21979.

Department of Basic Education, 'Rights and Responsibilities of Independent Schools', 2008.

Gauteng Education Department Provincial Gazette Notice No. 2919 of 2013. Notice for Registration and Subsidy of Independent Schools.

Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.

South African Schools Act 84 of 1996.

INTERNATIONAL AND REGIONAL INSTRUMENTS

Guiding Principles on human rights obligations of States to provide education and to regulate private involvement in education (Abidjan Principles), 2019.

FURTHER READING

The Centre for Development and Enterprise, 'Investing in Potential: The Financial Viability of Low-Fee Private Schools in South Africa', 2015.

BusinessTech, 'Here's how much it will cost to send your child to school in South Africa over the next 15 years', 19 January 2020.

Carol Anne Spreen, Lauren Stark and Salim Vally, 'Privatisation of Schools: Selling out the right to quality public education for all', *The Centre for Development and Enterprise*, 2014.

Joseph Oesi, 'St John's College: Forward in Faith – forward in racism?', *City Press*, 31 July 2017.

Nurina Ally and Faranaaz Veriava, 'Legal Mobilisation for Education in the Time of COVID-19', *South African Journal for Human Rights* (forthcoming).

Nurina Ally and Roné McFarlane 'Western Cape schools plan is "undemocratic"', *Mail and Guardian*, 6 July 2018.

Mila Harding and Motheo Brodie 'Abidjan Principles key to the protection of children's right to education', *Maverick Citizen*, 14 February 2021.