

CENTRE FOR CHILD LAW

SUBMISSIONS ON
ESSENTIAL SERVICES COMMITTEE'S INVESTIGATION
AS TO WHETHER
SERVICES RENDERED BY EDUCATORS & SUPPORT STAFF IN BASIC
EDUCATION INCLUDING EARLY CHILDHOOD DEVELOPMENT ARE
ESSENTIAL SERVICES

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CHILD LAW

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Centre for Child Law submissions

About the Centre

1. The Centre for Child Law (the Centre) is registered as a Law Clinic and through strategic impact litigation aims to set legal precedent to improve and strengthen laws pertaining to children. The Centre contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.

The Centre welcomes the Essential Services Committee's (the ESC) inquiry on whether educators' right to strike can constitutionally be limited by way of declaring services rendered in basic education and ECD as essential services.

Centre for Child Laws position to the inquiry.

2. The Centre's recommendations to the ESC to declare services rendered by educators in basic education and ECD as essential services is based on these main concerns:

- **Learners' unrepresented interests:** During disputes between educators and the government, learners' have distinct interests from those of educators and the government and yet they do not have formal representation because they do not have a voice in politics.¹

- **Wasted learning time and insufficient opportunities to learn:**

Currently the education system is burdened with a lot of factors that significantly reduce learning time. Educators, being the backbone in the provision of basic education should lessen the burden by exploring other political avenues in resolving disputes- avenues that do not adversely impact schooling activities.

- **Horizontal application of the Bill of Rights**

The Centre views the obligations of educators regarding the right to basic education as one of horizontal application. In terms of section 8(1) of the Constitution educators and unions have an obligation to "respect, protect, promote and fulfil" the learners' right to a basic education.

- **Educators' legal duties towards learners:** Educators owe learners a duty of care based on the common law duty of *in loco parentis*. The Centre notes with concern that some children are too young (including children with special needs) that just leaving them on their own amounts to an interruption of that duty of care thus endangering their personal safety and well-being. Educators therefore have a negative duty not to impair existing access to basic education.

- **Child & youth care centres (CYCC)**

The ESC, has in the past designated a service which is rendered to only a part of the population (children) as an essential service. Services rendered at CYCC's were declared essential services. Lessons can be drawn from this experience where workers' rights were weighed up against children's rights and the best interests principle played a key role in that determination.

- **Nutrition, health and hygiene:** Learners who suffer from chronic illnesses and have specific health requirements will benefit from staff members always being around to take care of them. School staff also

¹ Nolan, A. (2010). The child as 'democratic citizen': Challenging the 'participation gap'. Public Law (Winter), 767–782. In discussing the position of children vis-à-vis democratic processes, argues that "children are unenfranchised and as non-voters, have no opportunity to exert direct influence on the policy-making process.; See also Van der Berg, S., Spaul, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD).



have a responsibility to ensure that learners have access to clean facilities and food. The same argument holds for learners who depend on school feeding schemes.

International and regional law

3. Basic education is recognised in a number of international and regional legal instruments.

The Universal Declaration of Human Rights (UDHR), adopted in 1948, states in *Article 26*: 'Everyone has the right to education'. Since then, the right to education has been reaffirmed in various international treaties including:

- UNESCO Convention against Discrimination in Education (1960)
- International Covenant on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Economic Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention on the Rights of the Child (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their families (1990)
- Convention on the Rights of Persons with Disabilities (2006).

United Nations Convention on the Rights of the Child, 1989. (UNCRC)

4. Article 28(1)- States Parties recognise the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- a) Make primary education compulsory and available free to all;
- b) ...[M]ake [education] available and accessible to every child, and take appropriate measures....;
- c) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

5. Article 29(1)- States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

United Nations Committee on the Rights of the Child: General Comments

6. General Comment No. 7 (2005) Implementing child rights in early childhood.²

Par.28. Early childhood education. The Convention recognizes the right of the child to education, and primary education should be made compulsory and available free to all (art. 28). The Committee recognizes with appreciation that some States parties are planning to make one year of preschool education available and free of cost for all children. The Committee interprets the right to education during early childhood as beginning at birth and closely linked to young children's right to maximum development (art. 6.2). Linking education to development is elaborated in article 29.1: "States parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential". General comment No. 1 on the aims of education explains that the goal is to "empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence" and

² Particularly paragraphs 28 to 30 and 33.



that this must be achieved in ways that are child-centred, child-friendly and reflect the rights and inherent dignity of the child.

7. General Comment No. 9 (2006) The rights of children with disabilities.³

This General comment points out that the majority of children with disabilities in developing countries remain out of school and are completely illiterate. The Committee also notes that children with disabilities are still experiencing serious difficulties and facing barriers to the full enjoyment of the rights enshrined in the Convention. The Committee emphasizes that the barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives. The strategy for promoting their rights is therefore to take the necessary action to remove those barriers.

8. General Comment No. 14 (2013) The right of the child to have his or her best interests taken as a primary consideration.⁴

According to the Committee the best interests of the child is a right, a principle and a rule of procedure.⁵ The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.

The Committee underscores that the *child's best interests* is a threefold concept:

A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.

A rule of procedure: Whenever a decision is to be made that will affect children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed.

9. Nature and scope of the obligations of States parties including Essential Services Committee.⁶

The obligation of the States to duly consider the child's best interests is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children. The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education among others. Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures.

10. African Charter on Human and People's Rights, 1981.

Article 17 (1) - Every individual shall have the right to education.

³ Particularly paragraphs 62 to 69 on the right to education.

⁴ Particularly paragraph 79 on the child's right to education

⁵ Pg. 3

⁶ Refer to paragraphs 13-16



Article 25- State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

11. African Charter on the Rights and Welfare of the Child, 1990

Article 11 (1)-Every child shall have the right to an education.

11 (2). The education of the child shall be directed to: (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all people's ethnic, tribal and religious groups;

11 (3) States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:

11(3)(d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;

11(3)(e) take special measures in respect ofdisadvantaged children, to ensure equal access to education for all sections of the community;

Domestic law

12. Constitution of South Africa

Section 29 (1) Everyone has the right to a basic education.....

Section 29 (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

Section 28 (2) 'A child's best interests are of paramount importance in every matter concerning the child'

13. Horizontal application of rights of the bill of rights

Section 8 of the Constitution provides that the Bill of Rights binds all organs of state and natural and juristic persons, to the extent that the rights are applicable:

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a 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.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Educators must also take cognisance of the fact that (the application of the fundamental rights as between individuals apply to s 28 of the Constitution which protects the rights of children. Both State (public) and private



relationships are affected by this duality, as stipulated in s 8(1) and (2) of the Constitution.⁷ section 8(1) of the Constitution that places a positive obligation on the educators to “respect, protect, promote and fulfil” the learners’ right to a basic education.

14. Children’s Act 38 of 2005

Section 9-In all matters concerning the care, protection and wellbeing of a child the standard that the child’s best interest is of paramount importance, must be applied.

15. Common law duty of care

Educators in a school have a legal duty in terms of the common law principle, *in loco parentis*, to ensure the safety of learners in their care.⁸ Of importance in this matter is educators *the duty of care* -which implies looking after the physical and mental well-being of learners. It is important to note that *duty of care* is an obligation towards specific people or groups of people in the care of a specific educator.⁹ Such an educator has a duty to protect the learners from harm since the duty of care is a legal obligation.

Direction from South African courts on balancing rights

Governing Body of the Juma Musjid Primary School and Others v Ahmed Asruff Essay NO and Others 2011 8 BCLR 761 (CC)

16. In this case, the Constitutional Court (hereafter CC) had to consider if a child’s right to a basic education had been infringed upon. This required the court to balance the right to property (the school faced eviction after the Department of Basic education failed to pay rent to the Trust that owned the land that the school was on) and the rights set out in section 29 of the Constitution. The court considered the nature of section 29(1)(a) that provides a right to a basic education and its importance for the transformation of society.

17. In 2010, the Constitutional Court (CC) was approached, as the applicants contended that the common law should have been developed and that proper consideration was not given to the impact of the decision on the rights of the learners to basic education. The Centre for Child Law and the Socio-Economic Rights Institute of South Africa were admitted as amici curiae and they contended that a negative duty not to impair existing access to basic education had bound the Trust and, therefore, its decision to evict was unjustifiable.

18. In 2010 the CC provisionally set aside the eviction order, and held that the order had an impact on the learners’ right to a basic education entrenched in section 29(1) of the Constitution and the learners’ best interest under section 28 of the Constitution. The MEC had a positive obligation to provide access to schools and to respect the learners’ right to a basic education, and the Trustees had a negative obligation in terms of section 8 of the Constitution not to infringe on this right.

19. The court mentioned that the MEC had failed to fulfil her constitutional obligation in section 8(1) of the Constitution that placed a positive obligation on the MEC to “respect, protect, promote and fulfil” the learners’ right to a basic education. The court additionally made mention of section 8(2) that is binding on natural and juristic persons where that provision was applicable “taking into account the nature of the right and the nature of any duty imposed by the right”. There was not necessarily a primary positive obligation on the Trust to provide

⁷ De Waal, E., Theron, T. and Robinson, R., 2001. An education law analysis of” the learner's best interests. Perspectives in Education, 19(4), pg. 153

⁸ Prinsloo, I.J., 2005. How safe are South African schools? South African Journal of Education, 25(1), pp.5-10.

⁹ Prinsloo, I.J., 2005. How safe are South African schools? South African Journal of Education, 25(1), pp.5-10; See also Maithufi IP 1997. Children, young persons and the law. In: Robinson JA (ed.). The law of children and young persons in South Africa. Durban: Butterworths pg. 260-261



basic education to the learners, but the court held that socio-economic rights, such as the right to a basic education, could be negatively protected from improper invasion-:

“Breach of that negative obligation occurred directly when there was a failure to respect the right, or indirectly, when there was a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. The purpose of section 8(2) of the Constitution was not to obstruct private autonomy or to impose on a private party the duties of the State, but rather to require private parties not to interfere with or diminish the enjoyment of a right. The Trust had a negative constitutional obligation not to impair the learners’ right to a basic education”¹⁰

The trust was consequently entitled to seek an eviction order but they still had a constitutional obligation to minimise the impairment of the learners’ right to a basic education.

20. This case is relevant to the question of whether education services should be declared essential services, because it directly engages with the question of the obligations of third persons. The court found that although the primary duty to provide education lies on the state, the constitution operates horizontally as well. The Constitutional Court found that the trust had a constitutional obligation to minimise the impairment of the learners’ right to education. Thus the unions, which mobilise striking teachers, as well as the striking teachers themselves, may well have a constitutional duty to ensure that children’s right to education must not be impaired.

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

21. This matter concerned the prohibition by the South African Schools Act of 1996, of corporal punishment in schools. Christian Education of South Africa, representing 196 independent Christian schools, contended that the prohibition violated the right of parents to freedom of religion and that it interfered with the right to establish independent schools, the right to participate in the cultural life of their choice, the right to enjoy their culture and to practise their religion.
22. The central question in this matter was whether the law enacted by Parliament to prohibit corporal punishment in schools violated the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?
23. Justice Sachs, on behalf of a unanimous court, assumed in the appellant's favour that religious and community rights had been limited. The question then was whether such limitation was justifiable in an open and democratic society.
24. In his judgement, Justice Albie Sachs had this to say on intersecting constitutional values and interests involving children:¹¹

[Para 15] “It is clear from the above that a multiplicity of intersecting constitutional values and interests are involved in the present matter — some overlapping, some competing. The parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children. The child, who is at the centre of the enquiry, is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such freedom. Yet the same child is also an individual person who may find himself “at the other end of the stick”, and as such be entitled to the protections of sections 10, 12 and 28. Then, the broad community has an interest in reducing violence wherever possible and protecting children from harm. The overlap and tension between the different

¹⁰ Juma-case 764.

¹¹ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11, paragraph 15



clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated....”

25. This case is relevant to the question of whether education services should be declared essential services, because it directly engages with the issue of balancing constitutional rights and interests. Justice Sachs in this case firmly placed the child at the centre of the dispute and highlighted that the children, like the parents, also had rights and interests that needed to be protected. In the balancing exercise, The Court also took into consideration the importance of the child's right to dignity.

Acting Superintendent-General of Education v Ngubo 1996 3 BCLR 369 (N)

26. In this case college students staged a sit-in to demonstrate against the quality of educator training. They did not, however, act according to section 17 of the Constitution that gives everyone permission to assemble and demonstrate peacefully. The court in this case directly addressed the question of how to find the correct balance between the right to protest on the one hand and the right to education on the other. The court was also very firm about the fact that the right to assemble and demonstrate is not without limits.
27. It can thus be derived from this case that the parameters of the right to strike can be determined by the child's right to education. The court adopted the proper justification for assessing limitations on constitutional rights in the educational sector, namely the protection or restoration of the educational process.¹² The court was of the view that disruption could not be used as a lever to attract attention.¹³

Submissions

The constitutional limitation of rights

28. Constitutional rights and freedoms are not absolute.¹⁴ Constitutionally, it is important to remember that one cannot focus on the rights and concerns of one group to the exclusion of the other.¹⁵ In a democratic society, a balance needs to be struck by weighing up the relative concerns of all interest groups.¹⁶ In order to determine whether education should be designated as an essential service, the right to strike and the right to education as enshrined in the Constitution have to be balanced or weighed up against each other.
- The Centre submits that educator's right to strike is limited by learners' right to basic education as well as important social concerns such as the country's development needs and democratic values. The Constitution allows for justifiable infringement of rights and this can only take place if the infringement or limitation occurs for a reason that is justifiable in an open and democratic society based on human dignity, equality and freedom. To determine whether a limitation is reasonable and justifiable in an open and democratic society, all relevant circumstances have to be taken into account, including, but not limited to, those mentioned in section 36(1)(a)-(e) of the Constitution.
29. Section 36, provides a framework for analysis when considering the reasonableness and justifiability of a limitation. In terms of this framework, a limitation must take into account:
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

¹² Trynie Boezaart ed., 2009. Child Law in South Africa. Juta and company Ltd. Pg 437

¹³ Acting Superintendent-General of Education v Ngubo 1996 3 BCLR 369 (N) 377.

¹⁴ Currie, I. and De Waal, J., 2013. The bill of rights handbook. Juta and Company Ltd. Pg. 150

¹⁵ Spaul, N., 2015. Accountability and capacity in South African education. Education as Change, 19(3), pg. 134

¹⁶ Spaul, N., 2015. Accountability and capacity in South African education. Education as Change, 19(3), pg. 134



The nature of the right

30. Generally, employment relationships are characterised by unequal bargaining power.¹⁷ Therefore, section 23(2) of the Constitution empowers every worker with the right to form and join a trade union, to participate in the activities and programs of a trade union and to strike. The fact that workers can safeguard core constitutional values such as dignity and equality by exercising the right to strike is of great importance.¹⁸ Strike action in schools affects a number of stakeholders including educators who do not want to participate in the strike; the union who represents the employees; the Department of Basic Education as employer, parents and the learners.¹⁹ The Constitution protects both teachers' right to strike, and the best interests of our nation's children. Strike actions by nature diminishes the quality and duration of learners' classroom education, or when educators strike just before or during an examination.²⁰

The importance of the purpose of the limitation

31. Limiting educators' right to strike protects the right to basic education which plays a central role in addressing inequality and dignity when viewed against the background of the history of unequal levels of education in South Africa. In addition, education reform has been a priority in South Africa since 1994 and has played a key role in redressing the injustices of Apartheid. The Centre submits that learners are disadvantaged by certain protest-related action in that they are consequentially physically barred or intimidated from attending school.

The nature and extent of the limitation

32. If services rendered by educators in basic education and early childhood development (ECD) are declared "essential services" there could be a total or partial limitation of the right to strike.

The relation between the limitation and its purpose

33. Limiting teacher's right to strike safeguards basic education and early childhood development by making sure that learners are not disadvantaged through protest-related actions. Declaring basic education and ECD as essential services will also ensure that learning time is not lost due to teacher absenteeism.

34. Less restrictive means to achieve the purpose.

The lack of meaningful engagement between government and educators results in educators resorting to disruption of schooling activities to draw attention to their plight thus undermining learners' right to a basic education. Unfortunately, for learners whose rights are implicated by protest action, they cannot partake in democratic processes and vindicate their rights. Teachers are politically empowered and they can engage with the polity in various ways and get their demands met, but learners whose rights are directly implicated and infringed in all this have no voice. Therefore, the Centre submits that declaring education an essential service will go a long way in vindicating the rights of learners who are unenfranchised. Learners cannot vote and there is no other more effective way to vindicate their right to basic education in this case.

35. In the alternative, if the committee ultimately decides that the declaration of an essential services is too restrictive, a less restrictive means might be found through placing limits on the right to strike, rather than outlawing it altogether. To sum up, the Centre for Child Law acknowledges that the declaration of education services as

¹⁷ Achmat, W (2016). The right to strike and its limitations. LLM thesis. University of Pretoria.

¹⁸ Calitz, K. and Conradie, R., 2013. Should teachers have the right to strike? The expedience of declaring the education sector an essential service. *Stellenbosch Law Review = Stellenbosch Regstydskrif*, 24(1), pp.124-145. Pg. 140

¹⁹ Deacon, H.J., 2014. The balancing act between the constitutional right to strike and the constitutional right to education. *South African Journal of Education*, 34(2). Pg. 3

²⁰ Horsten D & Le Grange C 2012. The limitation of the educator's right to strike by the child's right to basic education. *Southern African Public Law*, 27(2):509-538.



essential services is a limitation of teachers right to strike. However, it is submitted that such right is reasonable and justifiable, when weighed against the right to education and children's best interests, according to the considerations for the limitation of rights set out in section 36 of the Bill of Rights in the Constitution.

The right to basic education & ECD in South Africa

Apartheid legacy

36. During the apartheid era, access to education was purposely skewed, with the least funds being invested in the education of black children.²¹ To date, basic education for many South African learners is characterised by inadequate infrastructure,²² unqualified educators²³ and huge pupil: educator ratios. During this period, bureaucratic control over teachers generated considerable teacher resistance which persists today.²⁴ In this era, teacher strikes ran deeper than pay checks, teacher unions played an important role in fighting for positive transformation in the education system. However, the impact of teacher strikes in contemporary South Africa's education landscape is questionable.²⁵
37. As the site of great historical injustice, the country's schools are seen as central pillars in righting the wrongs of apartheid.²⁶ The right to basic education was seen as so important to policy-makers at the transition that it was protected in the strongest terms in our constitution.²⁷ That is to say that it has been declared 'immediately realisable' and must be prioritised regardless of the State's other commitments.²⁸
38. Against this backdrop, the Centre's submissions are anchored on learners' constitutional rights as well as on learners' unique position in the social and political space. Unlike educators, learners cannot vote or partake in any other democratic processes to vindicate their rights. With this in mind, the Centre submits that much still needs to be done, in society and the education sector in terms of shifting attitudes and ensuring learners' particular vulnerabilities during strike action are addressed.

Disruption of schooling activities

39. Logically it follows that if students are not in school or being taught by teachers, formal learning cannot take place. The adverse impact of educator strikes in South Africa are obvious in terms of school closures, disruptions to teaching programmes and exam timetables. These strikes are also occasionally characterised by riots and

²¹ Graeme Bloch The toxic mix: What's wrong with South Africa's schools and how to fix it (2009).

²² Mud to bricks: A review of school infrastructure spending and delivery.

< http://www.centreforchildlaw.co.za/images/stories/Budgets_Bricks_FINAL.pdf >. This study, amongst other things, makes the concerning finding that South Africa still has a long way to go in addressing problems such as infrastructure in the education system.

²³ South African schools have 5,139 teachers who are unqualified or under-qualified. <<https://www.timeslive.co.za/news/south-africa/2017-06-06-south-african-schools-have-5139-teachers-who-are-unqualified-or-under-qualified/>>; See also Shortage keeps poorly qualified teachers in place- <https://www.businesslive.co.za/bd/national/education/2017-08-08-shortage-keeps-poorly-qualified-teachers-in-place/>; See also DBE and DHET (2011). *Integrated Strategic Planning Framework for Teacher Education and Development in South Africa, 2011–2025*. Technical report pgs. 11 & 30. The following remarks were made in the technical report:

'.... It is generally accepted – and can be confirmed here – that there is both an absolute shortage of teachers, and a relative shortage of teachers qualified and competent enough to teach specific subjects or learning areas (primarily mathematics, the sciences, technology and languages, but also arts and culture and economic and management sciences), in specific phases (especially but not only the Foundation Phase), in specific languages (African languages in particular, and also sign language and Braille), in Special Needs schools, in ECD, and in rural and remote schools.' pg. 11

²⁴ Wills, G., 2014. The effects of teacher strike activity on student learning in South African primary schools. Economic Research Southern Africa Working paper. Pg. 4

²⁵ Wills, G., 2014. The effects of teacher strike activity on student learning in South African primary schools. Economic Research Southern Africa Working paper. Pg. 4

²⁶ Van der Berg, S., Spaull, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD). pg. 10

²⁷ Van der Berg, S., Spaull, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD). pg. 14

²⁸ Skelton, A. 2014. Leveraging funds for school infrastructure. International Journal of Educational Development. Vol 39: Pp59 – 63



outbreaks of violent protest with unionized teachers intimidating schools that remain open or those teachers that resist calls to down tools.²⁹

Binding Constraints

- 40.** A binding constraint is one where, if you do not address it first, trying to address other constraints has almost no impact. In the South African context, there is a cause of concern that the influence exerted by trade unions, is interfering with the ability of the system to act in the best interests of children.³⁰ The central focus being on the binding constraints that limit learning in South African schools, specifically learning to read in the Foundation Phase (grades 1 – 3). The argument is that once learners lose³¹ out on learning opportunities when they are much younger, catching up in later grades is a challenge and this often results in learners not benefiting much from education and are subsequently doomed for life.
- 41.** The consequences of these constraints and their influences on other constraints in the education system are extremely weak educational outcomes. The most alarming of these weak outcomes is the failure of most children to learn to read fluently and with comprehension in the home language in the Foundation Phase. At all other levels and for all subjects, this failure then becomes an additional binding constraint that ruins the life chances of millions of children. For that reason, the Centre submits that educators’ services in basic education must be declared essential services.

Wasted Learning Time and Insufficient Opportunity to Learn

- 42.** A number of South African studies measuring opportunities to learn found that less than half of the official curriculum is being covered in the year and fewer than half of the officially scheduled lessons are actually taught.³² For instance, a 2007–2009 study showed that most grade 5 children write in their books only once per week or less. Only 3% of grade 5 students across South Africa wrote in their books every day.³³ In grade 4 and grade 5 exercise books, about half of all exercises in the year were single word exercises. As one of the researchers notes:

“of greatest concern is how little extended writing there is in the books... learners write one paragraph every month and a half of school.”

- 43.** A shocking 44% of grade 4 students had not written any paragraphs during the entire school year. The Centre notes with concern that there is evidence that more marginalised students, both in terms of socio-economic status and academic performance, are affected most negatively by strike action.³⁴ In the bottom three quartiles of schools where participation in the strike was widespread, militant and typically long in duration, strike activity appears to be detrimental to learning. Furthermore, these larger strikes adversely affect students attending rural

²⁹Wills, G., 2014. The effects of teacher strike activity on student learning in South African primary schools. Economic Research Southern Africa Working paper. Pg. 8

³⁰ Van der Berg, S., Spaul, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD). pg. 7

³¹ Interrupted learning for younger learners has potentially detrimental effects to the learning outcomes, see Wills, G., 2014. The effects of teacher strike activity on student learning in South African primary schools. *Economic Research Southern Africa Working paper*; See also Van der Berg, S., Spaul, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD)

³² Van der Berg, S., Spaul, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD). pg. 10

³³ Spaul, N., 2015. Accountability and capacity in South African education. *Education as Change*, 19(3), pp.113-142.

³⁴ Wills, G., 2014. The effects of teacher strike activity on student learning in South African primary schools. Economic Research Southern Africa Working paper. Pg. 2



as compared to urban schools. This implies that unionization and industrial action pose a real risk of augmenting existing inequalities in the provision of basic education in South Africa.³⁵

44. The Centre's notes with concern how the disruption of school activities interacts with other issues such as educators' lack of capacity to teach; educator shortages; educator absenteeism; service delivery protests disrupting schooling activities; the fact that less than half of the official curriculum is being covered in the year and fewer than half of the officially scheduled lessons are actually taught.³⁶ Collectively, these factors have an adverse impact on basic education which results in wasted learning time and insufficient opportunities to learn.

Political power and divergent interests.³⁷

45. Almost all teachers in South Africa belong to organised and politically powerful teacher unions, enabling them to speak with one voice and command considerable political influence. As it stands educators are politically empowered. The Centre submits that given the reality of politically organised and empowered teacher unions and politically disorganised and disempowered learners, any situation where there is a conflict of interests between learners and teachers as is the case, should be carefully considered. Children do not have direct political representation (as teachers do), but, rather, are 'spoken for' by parents or care-givers (where these exist). This is especially important to remember when one considers that there are roughly 12 million children of school-going age and only around 400 000 educators in South Africa. The Centre cautions against prioritising the concerns of a politically organised minority over those of a politically atomised majority.

46. Teacher capture

A considerable body of evidence documents the capture of service delivery systems by key actors in the service delivery chain.³⁸ Capture gains at the expense of the intended beneficiaries, as is the case with educator strikes, is untenable. "Capture" refers to a situation in which key actors are able to alter the rules, such as the conditions of service or the allocation of expenditure in the sector, to their advantage and to the detriment of service beneficiaries and the society at large.³⁹ In the case of the education system, teachers are a key group of actors that have exerted considerable influence over both the allocation of resources within the system, but more importantly, the rules that define their conditions of service. Much of this power is exercised as a result of the influence wielded by teacher unions or through the direct involvement of current or retired teachers in local and national politics.

Duty of care

47. Schools are plagued by safety issues be it bullying, learners fighting or simply accidents occurring in a playground. A key element in this debate is the issue of learner safety in schools. When educators strike and are thus absent⁴⁰ from school, who takes responsibility for these learners.⁴¹

³⁵ Wills, G., 2014. The effects of teacher strike activity on student learning in South African primary schools. Economic Research Southern Africa Working paper. Pg. 34

³⁶ Van der Berg, S., Spaul, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD). pg. 10

³⁷ Van der Berg, S., Spaul, N., Wills, G., Gustafsson, M. and Kotzé, J., 2017. Identifying binding constraints in education. Synthesis report for the programme to support Pro-poor Policy Development (PSPPD).

³⁸ Arbache, J.S., Habyarimana, J.P. and Molini, V., 2010. *Silent and Lethal: How quiet corruption undermines Africa's development efforts*. World Bank. Pg. 6

³⁹ Arbache, J.S., Habyarimana, J.P. and Molini, V., 2010. *Silent and Lethal: How quiet corruption undermines Africa's development efforts*. World Bank. pg 6

⁴⁰<https://sowetourban.co.za/41879/sadtu-schools-closed-teachers-march-pretoria/>; see also <https://westside-eldos.co.za/41822/students-want-teachers-back/>

⁴¹ <https://www.iol.co.za/dailynews/kzn-grade-r-teachers-picket-over-outstanding-pay-14216510>



“I arrived at school at 7.30 am and sat outside till 1 pm. This is unacceptable. How are we supposed to prepare for exams when teachers aren’t available?”

All the classes were locked and learners were left stranded. Brian says the teachers’ union should avoid protests at a time when learners are about to sit for their end of year exams.⁴²

48. During strike action by educators and ECD practitioners the safety and care of learners are important issues that need to be considered.⁴³ In South African common law, the legal duty to protect a learner from danger arises from the delegation of such legal duty by the parent to the educator (or the school). Parents have a statutory duty⁴⁴ to send their children to schools and in turn educators act in the place of the parent- a principle known as *in loco parentis*.⁴⁵ In schools educators therefore act *in loco parentis* based on original⁴⁶ and delegated authority over learners.

The Centre notes with concern that some children are too young (including children with disabilities) and leaving them on their own amounts to an interruption of the duty of care thus endangering learners’ personal safety.⁴⁷ There is therefore a higher duty of care and aligns with ILO’s definition of what qualifies as an essential service ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population’.

The National School Nutrition Programme

49. School feeding programmes foster better quality education by: enhancing children’s active learning capacity; alleviating short-term hunger; providing an incentive for children to attend school regularly and punctually; addressing certain micro-nutrient deficiencies in children.⁴⁸ When educators strike there is a real danger that learners from poor households will most likely go without food.⁴⁹ In 2014/15, the programme fed an estimated 9,2 million learners in 19 800 schools across the country.

50. Child & youth care centres (CYCC)

Services rendered at CYCC’s were declared essential services in 2005.⁵⁰ This was the first time South Africa designated a service which is rendered to only a part of the population (children) as an essential service. It was argued that if personnel working with vulnerable children could be allowed to go on strike this could be pose a serious threat to the safety of children in their care. In this case children’s constitutional rights were central to the argument against striking of personnel. In particular the best interests of the child as found in section 28(2) was used in the balancing exercise –weighing children’s rights against rights of workers.

Centrality of educators

51. The Centre accepts that there are many problems with the education system at many levels. The quality of much teaching is poor. Teacher accountability is insufficient and teacher training requires improvement. Education

⁴² <https://westside-eldos.co.za/41822/students-want-teachers-back/> a Grade 12 learner, says ‘today’s protest by affected many learners’

⁴³ Joubert, H.J. and Prinsloo, I.J., 2009. The law of education in South Africa. Van Schaik Publishers.pg 153

⁴⁴ Section 3 of the South African Schools Act 84 of 1996. Compulsory school attendance.

⁴⁵ Joubert, H.J. and Prinsloo, I.J., 2009. The law of education in South Africa. Van Schaik Publishers. Pg 164; See also http://dspace.nwu.ac.za/bitstream/handle/10394/8616/De_Waal_E_Chapter_4.pdf?sequence=5

⁴⁶ According to Joubert & Prinsloo- the original authority emanates from the educator’s profession.

⁴⁷ Oosthuizen, I.J., 1992. The in loco parentis role of the teacher: A relationship perspective. Koers-Bulletin for Christian Scholarship, 57(1), pg. 131; see also De Waal, E., Theron, T. and Robinson, R., 2001. An education law analysis of" the learner's best interests. Perspectives in Education, 19(4), pg.158

⁴⁸ Pg 61. <https://www.education.gov.za/Programmes/NationalSchoolNutritionProgramme.aspx>

⁴⁹ <https://www.health24.com/Diet-and-nutrition/Food-security/The-state-of-hunger-in-South-Africa-20151009>

⁵⁰ <http://www.centreforchildlaw.co.za/images/files/Government%20Gazettes/2004%20GG%20Essential%20Services.pdf>; See also Skelton A & Ramadi L (2005). Services provided by children’s homes and places of care declared an essential service. *Child & youth care* Vol 23. No 4



management systems are inadequate. By shifting focus to children’s best interests the Centre is not saying educators should be seen as “shock absorbers” for problems plaguing the education system. By preferring and supporting the declaration of basic education and ECD as essential services the ESC, will broadly be helping South Africa develop practical ways of responding to complex challenges in the education sector.

Aligning State efforts

52. The Centre, submits that the ESC build up to efforts by other State actors that seek to protect basic education from protest action. The Centre draws the ESC’s attention to the South African Human Rights Commission’s *National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa*. The Commission, amongst others, found that the right to a basic education is affected by protest-related action arising from causes that in most cases may be unrelated to the provision of basic education. The Commission recommended government departments, to better engage with communities on important matters. And the Commission encouraged people to find new ways of expressing their concerns so that their actions do not result in a negative impact on other rights, such as the right to a basic education.

53. Oral submissions

The Centre for Child Law would be willing to make oral submissions if called up to do so by the Committee.

List any specific recommendations that you wish the committee to consider.

54. The right of educators to strike should be limited by declaring basic education an essential service, this could be done in terms of an amendment of the definition of essential services in section 213 of the Labour Relations Act, or a wider interpretation of the current definition to include the education sector. Such an amendment or interpretation will satisfy the requirement of a law of general application.⁵¹ This limitation is reasonable and justifiable because learners cannot vindicate their rights and the right to basic education is protected from disruptions.

55. Alternatively, if basic education cannot be declared an essential service, the Centre proposes that the ESC sets time frames allowing strikes only during non-teaching or non-examination times. This recommendation allows for learners to enjoy their right to basic education and allows teachers to engage with employers without the disruption of schooling activities.

56. The Centre would like to see an alignment of the recommendations of this Committee upon conclusion of its inquiry with the recommendations of the SAHRC in *National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa*. The alignment will ensure the creation of synergies that could positively impact basic education.

⁵¹ Calitz, K. and Conradie, R., 2013. Should teachers have the right to strike? The expedience of declaring the education sector an essential service. *Stellenbosch Law Review= Stellenbosch Regstydskrif*, 24(1), pp.124-145. Pg. 139

